

U.S. Customs and Border Protection



REVOCATION OF THREE RULING LETTERS, MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF FIRE PITS

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

ACTION: Notice of revocation of three ruling letters, modification of one ruling letter and revocation of treatment relating to the tariff classification of fire pits.

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 three ruling letters and modifying one ruling letter concerning the tariff classification of fire pits 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. 55, No. 19, on May 19, 2021. A letter was received in response to that notice that declined to comment on the proposed revocation.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 26, 2021.

FOR FURTHER INFORMATION CONTACT: Karen S. Greene, Chemicals, Petroleum, Metals & Miscellaneous Branch, Regulations and Rulings, Office of Trade, at Karen.S.Greene@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obli-

gation 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 revoking three ruling letters and modifying one ruling letter pertaining to the tariff classification of fire pits. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) N053402, dated March 16, 2009 (Attachment A), NY N301170, dated November 1, 2018 (Attachment B), NY N264651, dated June 3, 2015, (Attachment C), and NY N301060, dated October 13, 2018 (Attachment D), 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 have advised CBP during the comment period.

CBP classified certain fire pits in heading 9403, HTSUS, based on their constituent material. Accordingly, the fire pits in NY N301060 and in NY N053402 were classified in subheading 9403.20, HTSUS, as metal furniture and the fire pits in NY N301170 and in NY N264651 were classified in subheading 9403.89, HTSUS, as other furniture. CBP has reviewed NY N053402, NY N301170, NY N264651 and NY N301060 and has determined the ruling letters are in error.

It is now CBP's position that these fire pits are properly classified according to their constituent material of their outer body. The fire pits that are the subject of NY N053402 and NY N301060 are classified in subheading 7321.81.50, HTSUS. The fire pits that are the subject of NY N264651 is classified in subheading 6810.99.00, HTSUS. The fire pit that is the subject of NY N301170 is classified based on its constituent material.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N053402, NY N301170 and NY N301060, and modifying NY N264651 and revoking or modifying any other ruling not specifically identified to

reflect the analysis contained in HQ H306789, 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: July 12, 2021

ALLYSON MATTANAH
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachment

HQ H306789

July 12, 2021

OT:RR:CTF:CPMM H306789 KSG

CATEGORY: Classification

TARIFF NO.: 7321.81.50

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JOY SEMENUK
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MOORESVILLE, NC 28115

RE: Revocation of NY N053402, NY N301170 and NY N301060; proposed modification of NY N264651; tariff classification of fire pits

DEAR MS. SCAPICCHIO, MS. SEMENUK AND MR. BONE:

This letter is in reference to New York Ruling Letters (NY) N053402, dated March 16, 2009, NY N301170, dated November 1, 2018, NY N264651, dated June 3, 2015, and NY N301060, dated October 13, 2018, regarding the tariff classification of certain fire pits under the Harmonized Tariff Schedule of the United States (HTSUS).

In NY N053402 and NY N301060, the fire pits were classified in subheading 9403.20.0050, HTSUS, as metal furniture. In NY N301170 and in NY N264651, the fire pits were classified in subheading 9403.89.6015 as furniture of other materials.

We have reviewed NY N053402, NY N301170, NY N264651, and NY N301060; and determined that the reasoning is in error. Accordingly, for the reasons set forth below, CBP is revoking NY N053402, NY N301170, and NY N301060 and modifying NY N264651.

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, notice proposing to revoke NY N304224, NY N301170, and NY N301060 and modify NY N264651 was published on May 19, 2021, in Volume 55, Number 19 of the Customs Bulletin. A letter was received in response to this notice that declined to comment on the proposed revocation.

FACTS:

The 44 inch in diameter round fire pit the subject of NYN053402 is primarily constructed of steel. It includes 4 steel benches. It has a six-inch rim and includes a cover for the fire pit and a poker tool.

The 34.65 inch by 34.65-inch gas-powered fire pit the subject of NY N301170 is made of glass fiber reinforced concrete and has an 11-inch rim. It has a fire burner center insert that contains lava rocks and a space to conceal a 20 lb. propane tank.

There are three fire pits that are the subject of NY N264651: a faux stone fire pit, a square fire pit and a faux stump fire pit. We are not addressing the classification of the faux stump fire pit.¹ The faux stone fire pit is 29 inches by 29 inches and has a five-inch rim. The base is made of natural stone powder mixture of marble, quartz, and silica with a cement binder containing fiberglass. Lastly, the square fire pit measures 32 inches by 32 inches and has a six-inch rim composed of a natural stone powder mixture.

The 36 inch in diameter wood-burning fire pit the subject of NY N301060 is composed of aluminum and steel. The surface has a six-inch ceramic tiled surface rim surrounding the wood-burning fire pit. It also includes a cover for the fire pit, a steel grate, and a poker tool.

ISSUE:

Whether the fire pits described above are properly classified according to their constituent material or as furniture in heading 9403, 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. If 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.

GRI 6 provides 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 the above Rules, 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.

The HTSUS headings under consideration are the following:

7321 Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating), barbecues, braziers, gas rings, plate warmers and similar nonelectric domestic appliances, and parts thereof, of iron or steel: Other appliances

9403 Other furniture and parts thereof:

The articles classified in heading 9403, HTSUS, in NY N053402 include 4 steel benches, a poker tool and cover along with a firepit. The Explanatory Notes (ENs) to the HTSUS constitute the official interpretation of the tariff at the international level. EN X to General Rule of Interpretation (GRI) 3(b) provides: “for the purposes of this Rule, the term “goods put up in sets for

¹ We note that the faux stump fire pit was described as having a two-inch rim which CBP determined was not usable to place glassware and therefore, it was classified in heading 6810, HTSUS, based on the component materials which are identical to the faux stone fire pit.

retail sale” shall be taken to mean goods which: (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings; (b) consist of products or articles put together to meet a particular need or carry out a specific activity; and (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).” Sets are classified according to the component, or components taken together, which can be regarded as conferring on the set its essential character.

The firepit, steel benches, poker tool and cover consist of multiple items classifiable under separate headings and the components carry out a specific activity, that of sitting in warmth. They are imported and packaged together for retail sale. Therefore, the components of the firepit, steel benches, poker tool and cover meet the definition of the term “goods put up in sets for retail sale.”

NY N053402, NY N301060, NY N264651 and NY 301170 involve the classification of fire pits that are a source of heat and have a rim of between 5 inches and 11 inches around the outer area. The presence of the rim of at least 5 inches was the basis of the determination that these fire pits were furniture. While the rim could be used to place a drinking glass and possibly small dinnerware, the utilitarian and primary purpose of these articles is to provide a heat source, not to be used as a table. We note that all the fire pits are made of heat resistant materials. One would not sit down and use these fire pits as a place to put a glass or plate if there was no desire for the heat source. These fire pits, as described above, are not interchangeable with a table and are not primarily designed to function as a table to place dinner plates and comfortably dine. Therefore, they are distinguishable from outdoor dining furniture.

In contrast to the above cases, in NY N301062, dated October 30, 2018, CBP classified an outdoor 8-piece dining set (includes 6 aluminum chairs) with a lava rock insert in heading 9403, HTSUS, as furniture. The tabletop surface provided between 14.8” and 16.57” area in which to place dinnerware and had a lava rock insert in the center. The lava rock insert provided visual appeal to outdoor dining. The primary function of the article was to provide a dining surface and a place to sit while dining. This article was properly classified in heading 9403, HTSUS, because it was a dining set with an accessory feature of the lava rock insert. It would be functional as an outdoor dining table without the lava rock heat source, which was a secondary feature of the article.

The outdoor dining set the subject of NY N301062 is distinguishable from the four cases that are the subject of this ruling letter (NY N053402, NY N301170, NY N264651 and NY N301060), because these four cases involve fire pits whose primary function is as a heat source; they merely have a rim of between five and 11 inches which can be used to place small items. The mere presence of a rim does not transform the fire pits in those four NY rulings into tables. Accordingly, the fire pits described in NY N053402, NY N301170, NY N264651 and NY N301060 are not properly classified in heading 9403, HTSUS, as furniture. Pursuant to GRI 1, the fire pits are classified according to the constituent material of their outer body.

Accordingly, the fire pits in NY N053402 and NY N301060 are classified in subheading 7321.81.50, HTSUS as a heat source of iron or steel. The faux stone fire pit, and square fire pit in NY N264651 and the concrete fiberglass reinforced fire pit in NY N301170 are classified with the faux stump fire pit in subheading 6810.99.00, HTSUS.

HOLDING:

By application of GRI's 1 and 6, the fire pits in NY N053402 and NY N301060 are classified in subheading 7321.81.50, HTSUS as a heat source of iron or steel. The faux stone fire pit and square fire pit in NY N264651 are classified in subheading 6810.99.00, HTSUS. The column one, general rate of duty for the fire pits in NY N053402 and NY N301060 is Free.

The fire pits in NY N264651 and NY N301170 are classified in heading 6810 and specifically subheading 6810.99.00, HTSUS. 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 for at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY N053402, NY N301170, and NY N301060 are revoked and NY N264651 is modified.

Sincerely,

ALLYSON MATTANAH

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

REVOCAION OF SIX RULING LETTERS AND REVOCAION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF MENORAHS

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

ACTION: Notice of revocation of six ruling letters and revocation of treatment relating to the tariff classification of menorahs.

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 six ruling letters concerning the tariff classification of menorahs 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*, in Volume 55, Number 13, on April 14, 2021. No comments were received in response to this notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 26, 2021.

FOR FURTHER INFORMATION CONTACT: Karen S. Greene, Chemicals, Petroleum, Metals & Miscellaneous Branch, Regulations and Rulings, Office of Trade, at (202) 325–0041.

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 revoking six ruling letters pertaining to the tariff classification of a menorah. Although in this notice, CBP is specifically referring to New York Ruling Letter (NY) J82947, dated April 7, 2003 (Attachment A), NY I84339, dated July 22, 2002 (Attachment B), NY E80531, dated April 27, 1999 (Attachment C), NY D86109, dated January 4, 1999 (Attachment D), NY D86108 (Attachment E), dated January 14, 1999, and NY D85910, dated January 5, 1999 (Attachment F), 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 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 the final decision on this notice.

In NY J82947, NY I84339, NY E80531, NY D86109, NY D86108, and NY D85910, CBP classified a menorah in subheading 9505.90.60, HTSUS. Subheading 9505.90.60, HTSUS provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other."

CBP has reviewed NY J82947, NY I84339, NY E80531, NY D86109, NY D86108, and NY D85910 and has determined the ruling letters are in error.

It is now CBP's position that a menorah that holds candles is properly classified in heading 9405, HTSUS, specifically in subheading 9405.50.40, HTSUS, which provides for "Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included: Non-electrical lamps and lighting fittings: Other."

An electric plastic menorah (NY D86109) is classified in subheading 9405.40.84, HTSUS, which provides for "Lamps and lighting fittings

including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included: Other electric lamps and lighting fittings: Other.”

Both the menorah that holds candles and the electric menorah are eligible for duty free treatment pursuant to subheading 9817.95.01, HTSUS, which provides for “Articles classifiable in subheadings 3924.10, 3926.90, 6307.90, 6911.10, 6912.00, 7013.22, 7013.28, 7013.41, 7013.49, 9405.20, 9405.40 or 9405.50, the foregoing meeting the descriptions set forth below: Utilitarian articles of a kind used in the home in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions, such as Seder plates, blessing cups, menorahs or kinaras.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY J82947, NY I84339, NY E80531, NY D86109, NY D86108, and NY D85910, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H310688, 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: July 13, 2021

ALLYSON MATTANAH
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

HQ H310688

July 13, 2021

OT:RR:CTF:CPMM H310688 KSG

CATEGORY: Classification

TARIFF NO.: 9405.50, 9405.40; 9817.95.01

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MR. PAUL A. BARKAN AND MR. ASHER RUBINSTEIN
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RE: Revocation of NY J82947, NY I84339, NY E80531, NY D86109, NY D86108, and NY D85910; tariff classification of menorah

DEAR MS. WILSON, MS. DAVENPORT, MR. BARKAN AND MR. RUBINSTEIN:

This letter is in reference to New York Ruling Letter (NY) J82947, NY I84339, NY E80531, NY D86109, NY D86108, and NY D85910, regarding the classification of a menorah in the Harmonized Tariff Schedule of the United States (HTSUS).

In NY J82947, NY I84339, NY E80531, NY D86108, NY D85910, and NY D86109, U.S. Customs & Border Protection (CBP) classified a menorah in subheading 9505.90.60, HTSUS, which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other."

We have reviewed NY J82947, NY I84339, NY E80531, NY D86109, NY D86108, and NY D85910, and determined that the rulings are in error. Accordingly, for the reasons set forth below, CBP is revoking NY J82947, NY I84339, NY E80531, NY D86109, NY D86108, and NY D85910.

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, notice proposing to revoke NY J82947, NY I84339, NY E80531, NY D86109, NY D86108, and NY D85910 was published on April 14, 2021, in Volume 55, Number 13 of the Customs Bulletin. No comments were received in response to this notice.

FACTS:

All the cases except NY D86109 involve a menorah that holds nine candles and is used in the home in celebration of Hanukkah.

NY D86109 involves a plastic electrical menorah that has nine light bulbs (instead of the traditional candles) that would be used in the home in celebration of Hanukkah.

ISSUE:

Whether the menorahs are properly classified in heading 9505 as a festive article or in heading 9405 as lamps or lighting fittings with a secondary classification in subheading 9817.95.01.

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. If 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.

GRI 6 provides 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 the above Rules, 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.

The HTSUS subheadings under consideration are the following:

9405	Lamps and lighting fittings including searchlights and spot-lights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included:
9405.40	Other electric lamps and lighting fittings:
9405.40.84	Other:
	Other
9405.50	Non-electrical lamps and lighting fittings:
9405.50.40	Other
9505	Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof:
9505.90	Other:
9505.90.60	Other
9817.95	Articles classifiable in subheadings 3924.10, 3926.90, 6307.90, 6911.10, 6912.00, 7013.22, 7013.28, 7013.41, 7013.49, 9405.20, 9405.40 or 9405.50, the foregoing meeting the descriptions set forth below:
9817.95.01	Utilitarian articles of a kind used in the home in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions, such as Seder plates, blessing cups, menorahs, or kinaras

Chapter Note 1(w), Chapter 95, HTSUS, excludes “Tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material)” from Chapter 95.

Presidential Proclamation No. 8097, 72 Fed. Reg. 453 (Jan. 4, 2007), added Note 1(v) to Chapter 95 (Now Note 1(w)) to Chapter 95). The addition of Note 1(w) in 2007 precludes certain utilitarian articles from classification under heading 9505, HTSUS.

Menorahs are utilitarian articles used in the celebration of a holiday that would be excluded from Chapter 95 by Chapter Note 1(w). For instance, CBP classified Hanukkah candles in subheading 9817.95.01, HTSUS, in Headquarters Ruling Letter (HQ) H269230, dated November 24, 2015, rather than in heading 9505. Since Chapter Note 1(w) was added to Chapter 95 in 2007, NY J82947, NY I84339, NY E80531, NY D86109, NY D86108, and NY D85910 are now incorrect and void by operation of law.

Traditional menorahs that hold candles would be classified in subheading 9405.50.40, HTSUS, because they are non-electrical. The plastic electrical menorah would be classified in subheading 9405.40.84, HTSUS.

Both the traditional and electrical menorahs would be eligible for duty-free treatment in accordance with subheading 9817.95.01, HTSUS as articles primarily classified in subheadings 9405.40 or 9405.50, HTSUS, and are utilitarian articles of a kind used in the home in the performance of Hanukkah, a religious holiday. Menorahs are listed in subheading 9817.95.01, HTSUS, as an example of an article included within the subheading.

HOLDING:

Pursuant to GRI's 1 and 6, the traditional menorahs are classified in subheading 9405.50.40, HTSUS. The plastic electrical menorah is classified in subheading 9405.40.84, HTSUS. Both the traditional and electrical menorahs are eligible for duty-free treatment in accordance with subheading 9817.95.01, HTSUS. The column one, general rate of duty for all the menorahs 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 for at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY J82947, NY I84339, NY E80531, NY D86109, NY D86108, and NY D85910 are revoked.

Sincerely,

ALLYSON MATTANAH

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

cc: NIS Sandra Carlson, and NIS Michael Chen, NCSD

**PROPOSED REVOCATION OF ONE RULING LETTER AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF PRESS SLEEVES**

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

ACTION: Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of press sleeves.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of frozen soybeans or edamame 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 August 27, 2021.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

FOR FURTHER INFORMATION CONTACT: Michael J. Dearden, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0101.

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 one ruling letter pertaining to the tariff classification of press sleeves. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N312791, dated July 21, 2020 (Attachment 1), 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 N312791, CBP classified press sleeves in heading 5911, HTSUS, specifically in subheading 5911.32.0080, HTSUSA, which provides for "Textile products and articles, for technical uses, specified in note 7 to this chapter: Textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement): Weighing 650 g/m²

or more: Other.” CBP has reviewed NY N312791 and has determined the ruling letter to be in error. It is now CBP’s position that press sleeves are properly classified, in heading 3926, HTSUS, specifically in subheading 3926.90.9985, HTSUSA, which provides for “Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N312791 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H315231, set forth as Attachment 2 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.

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachments

N312791

July 21, 2020

CLA-2-59:OT:RR:NC:N3:350

CATEGORY: Classification

TARIFF NO.: 5911.32.0080

MR. DAVID L. MCKNIGHT
VOITH US INC.
760 EAST BERLIN ROAD
YORK, PA 17408

RE: The tariff classification of press sleeves from Germany

DEAR MR. MCKNIGHT:

In your letter dated June 25, 2020, you requested a tariff classification ruling. Samples were not provided, however, technical literature representing the items in question, QualiFlex Press Sleeves, were supplied. Five styles are identified in the aforementioned literature by the following names: QualiFlex S, QualiFlex G, Qualiflex GS, QualiFlex B, QualiFlex BG.

In your original submission, you indicate the products are intended to be used in the papermaking process for the dewatering performance of a shoe press. In subsequent correspondence, you state the product is a polyurethane sleeve with 100 percent polyester threading embedded into the sleeve for stability purposes. You state that the goods will be imported as a finished product and not further worked. The technical literature provides information regarding what type of machine uses each style of sleeve. The materials for each product are stated to weigh 23,427 g/m².

You believe that the applicable subheading for the items is 5910.00.1090, Harmonized Tariff Schedule of the United States (HTSUS) which provides for "Transmission or conveyor belts or belting, of textile material, whether or not impregnated, coated, covered or laminated with plastics, or reinforced with metal or other material: Of man-made fibers: Other."

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, the official interpretation of the tariff at the international level, offer some guidance in this matter. The EN for heading 5910 state in relevant part:

These transmission or conveyor belts or belting are used for the transmission of power or the conveyance of goods.

The items in question are not used for power transmission or goods conveyance. In your response to our request for additional information, you assert that "the product is not belting." Thus, the items do not meet the requirements to be classified as belts or belting under heading 5910.

The applicable subheading for all five products will be 5911.32.0080, HTSUS, which provides for Textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines: Weighing 650 g/m² 5911.32.00 or more: Other." The rate of duty will be 3.8 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 the 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).

This ruling is being issued under the assumption that the subject goods, in their condition as imported into the United States, conform to the facts and the description as set forth both in the ruling request and in this ruling. In the event that the facts or merchandise are modified in any way, you should bring this to the attention of Customs and you should resubmit for a new ruling in accordance with 19 CFR 177.2. You should also be aware that the material facts described in the foregoing ruling may be subject to periodic verification by Customs.

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 Michael Capanna at michael.s.capanna@cbp.dhs.gov.

Sincerely,

STEVEN A. MACK

Director

National Commodity Specialist Division

HQ H315231
OT:RR:CTF:FTM H315231 MD
CATEGORY: Classification
TARIFF NO.: 3926.90.9985

MR. DAVID MCKNIGHT
VOITH U.S. INC.
760 EAST BERLIN ROAD
YORK, PENNSYLVANIA 17408

RE: Revocation of NY N312791; Tariff Classification of Press Sleeves from Germany

DEAR MR. MCKNIGHT:

On July 21, 2020, U.S. Customs and Border Protection (“CBP”) issued New York Ruling Letter (“NY”) N312791 to you. The ruling letter pertained to the tariff classification of press sleeves from Germany under the Harmonized Tariff Schedule of the United States (“HTSUS”).¹ Specifically, CBP classified the products at issue under subheading 5911.32.0080, HTSUSA, which provides for “Textile products and articles, for technical uses, specified in note 7 to this chapter: Textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement): Weighing 650 g/m² or more: Other.” The general duty rate was 3.8% ad valorem.

On October 9, 2020, you submitted a request for reconsideration of NY N312791. In light of your request, we have reviewed NY N312791 and have found it to be in error with respect to the classification of the merchandise. Accordingly, NY N312791 is revoked.

FACTS:

As described within NY N312791, the press sleeves are “polyurethane sleeve[s] with 100 percent polyester threading embedded into the sleeve for stability purposes.” Your original submission, discussed within the New York ruling, indicates that “the products are intended to be used in the papermaking process for the dewatering performance of a shoe press... that the goods will be imported as [] finished product[s]... [and] are stated to weigh 23,427 g/m².” On the basis of this information, CBP classified the product at issue under subheading 5911.32.0080, HTSUSA, which provides for “Textile products and articles, for technical uses, specified in note 7 to this chapter: Textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for example, for pulp or asbestos-cement): Weighing 650 g/m² or more: Other.” The general duty rate was 3.8% ad valorem. In doing so, CBP rejected your initial contention that the press sleeves were classified under subheading 5910.00.1090, HTSUSA, which provides for “Transmission or conveyor belts or belting, of textile material, whether or not impregnated, coated, covered or laminated with plastics, or reinforced with metal or other material: Of man-made fibers.”

On October 9, 2020, you submitted a reconsideration request, in which you clarified the description of the product as well as its purpose. Within your request, you suggested that the press sleeves “do[] not belong in Chapter 59

¹ Technical literature identifies the five press sleeves as members of the “QualiFlex Press Sleeve” line of products; namely, the “QualiFlex S, QualiFlex G, QualiFlex GS, QualiFlex B, [and] QualiFlex BG.”

and [are] more akin to commodities of Chapter 84.” In support of your assertion, you describe the press sleeves are “a sheath in the form of a cylindrical elastic body (polyurethane) with embedded non-woven thread for reinforcement and specific surface structure.” You note that “[t]he main purpose of a press-sleeve is to move the paper-web and press-felt through the nip-gap or a shoe-press.” Further, you provide that a second function of the press sleeves is “to offer an additional void volume for higher and more equal dewatering in the shoe-press for getting higher dryness into the paper-web within the press section.”

ISSUE:

What is the proper classification under the HTSUS for the press sleeves from Germany?

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) is made in accordance with the General Rules of Interpretation (“GRI”). 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 may then be applied.

The 2021 HTSUS provisions under consideration are as follows:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.90	Other:
3926.90.99	Other:
3926.90.9985	Other.
	* * *
5910	Transmission or conveyor belts or belting, of textile material, whether or not impregnated, coated, covered or laminated with plastics, or reinforced with metal or metal material:
5910.00.10	Of man-made fibers:
5910.00.1090	Other:
	* * *
5911	Textile products and articles, for technical uses, specified in note 7 to this chapter: Textile fabrics and felts, endless or fitted with linking devices, of a kind used in papermaking or similar machines (for examples, for pulp or asbestos-cement):
5911.32.00	Weighing 650 g/m ² or more:
5911.32.0080	Other:
	* * *
8420	Calendering or other rolling machines, other than for metals or glass, and cylinders therefor; parts thereof:
	Parts:
8420.99	Other:
8420.99.20	Of machines for making paper pulp, paper or paperboard

* * *

Note 1 to Chapter 59, HTSUS, states, in relevant part:

Except where the context otherwise requires, for the purposes of this Chapter, the expression “textile fabrics” applies only to woven fabrics of Chapters 50 to 55 and headings 58.03 and 58.06, the braids and ornamental trimmings in the piece of heading 58.08 and the knitted or crocheted fabrics of headings 60.02 to 6006.

Note 7 to Chapter 59, HTSUS, states, in relevant part:

(b) Textile articles (other than those of headings 59.08 to 59.10) of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in paper-making or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).

* * *

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the “official interpretation of the Harmonized System” at the international level. *See* 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989). 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 id.*

In relevant part, the ENs for Heading 3926 are as follows:

This heading covers articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of headings 39.01 to 39.14.

* * *

The ENs for Heading 5910 read, in relevant part:

These transmission or conveyor belts or belting are used for the transmission of power or the conveyance of goods. They are usually woven or plaited from yarns of wool, cotton, man-made fibers, etc. They are in various widths and may be in the form of two or more plies of such material woven or bonded together; sometimes they are woven with a short looped pile surface or with corded edges. They may be impregnated with linseed oil, Stockholm tar, etc., and may be coated with varnish, red lead, etc., to counter deterioration cause by atmospheric conditions, acid fumes, etc.

This heading also includes belts and belting made from woven synthetic fibres, in particular polyamides, coated, covered or laminated with plastics.

* * *

Further, the ENs for Heading 5911 provide, in relevant part:

(B) TEXTILE ARTICLES OF A KIND USED FOR TECHNICAL PURPOSES

All textile articles of a kind used for technical purposes (**other than** those of **headings 59.08 to 59.10**) are classified in this heading and **not** elsewhere in Section XI (see Note 7 (b) to the Chapter); for example:

(2) Textile fabrics and felts, endless or fitted with linking devices, of a kind used in paper-making or similar machines (for example, for pulp or asbestos-cement) (**excluding** machinery belts of **heading 59.10**).

* * *

Lastly, the ENs for Heading 8420 state, in relevant part:

PARTS

Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), parts of machines of this heading are classified here. These include **cylinders** clearly identifiable as for use with calendaring or rolling machines of this heading. These cylinders may be made of metal, wood, or other suitable material (e.g. compressed paper). They may be of various lengths and diameters, may be solid or hollow and, depending on the particular purpose for which they are required, their surface may be polished, corrugated, grained, or may bear engraved patterns. They may also be covered with other materials (e.g. leather, textile fabrics or rubber). Metal cylinders are usually so designed so that they can be heated internally by means of steam, gas, etc. Sets of cylinders for a particular calendaring machine may comprise cylinders of different composition.

* * *

There are four competing headings under the HTSUS which must be considered for the classification of the merchandise at-issue: heading 3926, which specifically provides for “Other articles of plastics and articles of other materials of headings 3901 to 3914;” heading 5910, which specifically provides for “Transmission or conveyor belts or belting, of textile material, whether or not impregnated, coated, covered or laminated with plastics, or reinforced with metal or other material;” heading 5911, which specifically provides for “Textile products and articles, for technical uses;” and heading 8420, which specifically provides for “Calendaring or other rolling machines, other than for metals or glass, and cylinders therefor; parts thereof.” In your request for reconsideration, you posit that the press sleeves are not classifiable in Chapter 59, HTSUS. Specifically, you cite to Note 1 to Chapter 59, HTSUS, asserting that the press sleeves are neither “textile fabrics” nor “textile articles” and are thus precluded from classification in Chapter 59, HTSUS. We agree.

Note 1 to Chapter 59, HTSUS, states that “[e]xcept where the context otherwise requires, for the purposes of this chapter the expression ‘textile fabrics’ applies only to the woven fabrics of Chapters 50 to 55 and headings 58.03 and 58.06, the braids and ornamental trimmings in the piece of heading 58.08 and the knitted or crocheted fabrics of headings 60.02 to 60.06.” Information provided clearly establishes that the press sleeves consist of a polyurethane body, containing embedded polyester yarns which are arranged parallel and perpendicular to one another and are neither adhesively nor thermally bonded at the intersections. The yarns are held in place by the plastic material surrounding them. Although the polyester yarns are made from a man-made textile fiber, the yarns do not meet the classification criteria set forth for “textile fabrics” in Note 1 to Chapter 59, HTSUS. Moreover, there is no provision in Chapter 59 that would otherwise allow for these products to be classified there.

While this precludes the press sleeves from classification within Chapter 59, specifically in either heading 5910 or 5911, the ENs for both of these headings solidify this understanding, as none of the ENs describe products that would be similar to the press sleeves at issue. The ENs for heading 5910 outlines two types of products, both containing “textile fabrics” as defined within Note 1 to Chapter 59, HTSUS. The first is a “textile fabric” which is coated in some way, shape, or form as a means of protecting the fabric itself and to allow its continued operation as a transmission or conveyor belt. The second is a transmission or conveyor belt, made of *woven* synthetic fibers, which is covered in some way with plastics. Although the press sleeves here resemble the latter of the transmission or conveyor belts described in the heading 5910 ENs, in that they consist of synthetic fibers (polyester) which are covered by plastics (polyurethane), they do not meet the requirements specified in the ENs.

Similarly, the ENs for heading 5911 enumerate that “textile fabrics” and “textile articles” are classified therein, so long as they do not meet the character of products in the preceding headings. While the definition of “textile fabrics” is shared with Note 1 to Chapter 59, Note 7 to Chapter 59 and the ENs for heading 5911 elaborate on what a “textile article” is. In the exemplars, a “textile article” is defined as “of a kind used for technical purposes (for example, textile fabrics and felts, endless or fitted with linking devices, of a kind used in paper-making or similar machines (for example, for pulp or asbestos-cement), gaskets, washers, polishing discs and other machinery parts).” Of interest is the notion that “textile articles,” in relevant part here, are the “textile fabrics” of Note 1 to Chapter 59, as the press sleeves would be “of a kind used in paper-making or similar machines.” However, as the press sleeves do not contain the “textile fabrics” required within the Chapter Notes and the respective heading ENs, they are precluded from classification from Chapter 59 generally and headings 5910 and 5911 specifically.

Provided within the request for reconsideration was an alternative classification for the press sleeves somewhere within Chapter 84, which provides for “Nuclear Reactors, Boilers, Machinery and Mechanical Appliances; Parts Thereof.” With this suggestion, we find that the most accurate place to classify the press sleeves would be within subheading 8420.99.2000, HTSUSA, which provides for “Calendering or other rolling machines, other than for metals or glass, and cylinders therefor; parts thereof: Parts: Other: Of machines for making paper pulp, paper or paperboard.” However, in identifying the closest classification within Chapter 84 for the press sleeves, we have reached the conclusion that such a classification is improper.

The press sleeves are described as “a sheath in the form on a cylindrical elastic body... for sheathing of a press roller in the shoe press of a paper machine.” From this description, and supplemental information provided, it is evident that the press sleeves *are added* to a type of machine classifiable under Chapter 84, HTSUS, but are not in and of themselves such a machine or a part of such a machine. Further evidence of this is available in diagrams displaying the location of the press sleeves in use. One such diagram displays the two, parallel cylindrical rollers of a paper machine; the upper cylinder – the “shoe press” – is fitted with the press sleeve, whereas the lower cylinder – the “counter roll” – is not. Whereas the paper machine, which consists of “two or more parallel cylinders or rollers revolving with their surfaces in more or less close contact,” the press sleeve merely covers one of the cylinders

to assist with the process. Thus, while the paper machine itself may be classifiable under Chapter 84, HTSUS, the press sleeves, as optional components designed to merely increase the efficiency of such a machine, are not.

While the ENs to heading 8420 make clear that “parts of machines of this heading are [also] classified here,” additional evidence supports the conclusion that the press sleeves are not “parts” of paper machines. As discussed above, the description of the press sleeves and their intended purpose convey an understanding that they are merely *attached* to paper machines in order to aid in the efficiency of the paper-making process. Additional information, provided alongside the request for reconsideration, suggests that the press sleeves can be used in conjunction with single cylinder tissue machines – “Yankee Cylinders” – as well as within the aforementioned position within a traditional paper machine. While it is noted that *most* of these tissue machines have some form of shoe press, it is important to underscore that Yankee Cylinders have been classified in headings other than heading 8420,² meaning that the press sleeves themselves are versatile enough to be utilized for the same functionality across different products and are thus not an integral “part” of any such machine for classification purposes.

Having exhausted the classifications discussed within NY N312791 and the proposed classification within the request for reconsideration, we classify the press sleeves under subheading 3926.90.9985, HTSUSA, which specifically provides for “Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other: Other.”

The ENs for Heading 3926 read as follows:

This heading covers articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of headings 39.01 to 39.14.

We note that within heading 3926, HTSUS, is subheading 3926.90.5900, HTSUSA, which provides for “Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Belting and belts, for machinery, containing textile fibers: Other: Other.” As our removal of the press sleeves from heading 5910, HTSUS, was due to their construction, rather discussing whether or not they were “[t]ransmission or conveyor belts,” a brief discussion into the matter is warranted.

In Headquarters Ruling Letter (“HQ”) 963619, dated July 12, 2002, CBP defined the definitions of “belt” and “belting” as applied to paper manufacturing industry. Notable within HQ 963619 is a consultation with National Import Specialists (“NIS”) on the matter, whose extensive research and analysis of the industry yielded the following definitions:

Belt: Can be constructed or any material or combinations of materials to a predetermined length. It may be formed by a closed loop (i.e., a continuous length with no end) or may be formed by stitching or seaming the ends. Alternatively, the predetermined length may be fitted with linking devices that when joined will effectively form a “closed loop.”

Belting: Can be constructed of any material or combination of material which is in the piece (i.e. long lengths) that will be further processed or manufactured by cutting to a specific length or sitting to a specific width. The ends of the material are then joined to form a “belt” of a desired dimension for a specific machine application.

² See HQ 951001 (dated March 12, 1992); HQ 085354 (dated June 7, 1990); HQ 083183 (dated July 11, 1989).

Although HQ 963619 ultimately classified the product at-issue within Chapter 59, its conclusion that belts *eo nomine* “provide one of two functions – either transferring power, i.e., motion from one shaft to another, or the conveyance goods, i.e., moving goods from one place to another” is applicable here.

Provided schematics clearly show that the press sleeves are placed *around* a roller within a paper machine. It is this roller, rather than the press sleeves themselves, which “move the paper-web and press-felt through the nip-gap or a shoe-press.” While the press sleeves “offer an additional void volume for higher and more equal dewatering in the shoe-press for getting higher dryness into the paper-web within the press section,” they neither transfer power nor convey goods. As such, while the press sleeves are properly classified within heading 3926, HTSUS, subheading 3926.90.5900, HTSUSA, specifically, is precluded.

Support for classification within heading 3926, HTSUS, comes from the composition of the press sleeves. As noted, the press sleeves consist of polyester yarns *embedded* within polyurethane. These yarns are neither adhesively nor thermally bonded at the intersection and are referred to within the request for reconsideration as “reinforcement.” In contrast, the polyurethane of the press sleeve is markedly important – the five varieties of press sleeves at-issue here differ not in their polyester yarn count, but the manufactured variety of their polyurethane exteriors and the impact this has on the conveyance of paper.

As a result, we see the press sleeves as a Chapter 39 plastic (polyurethanes are specifically provided within heading 3909, HTSUS) which contains textile fibers (polyester is repeatedly provided throughout Chapter 59 as a man-made textile fiber). As such, their proper classification would be the above-noted subheading 3926.90.9985, HTSUSA. Support for this classification from previous rulings comes in the form of general analyses of classifying similar goods in either Chapter 39 or Chapter 59. In HQ 084682, dated August 25, 1989, subject merchandise from South Africa were discussed to determine their proper classification. Although they were ultimately classified under heading 5910, HTSUS, CBP posited their classification under heading 3926, HTSUS. Specifically, CBP noted that the merchandise was classifiable under *both* headings 3926 and 5910 by an application of GRI 1, as they were constructed of a solid *woven* fabric of polyester which had been coated in PVC. Thus, as a textile fiber embedded within a Chapter 39 plastic, the subject merchandise met the requirements for classification under either heading. Similarly, the press sleeves here consist of a textile fiber (polyester yarns) embedded within a Chapter 39 plastic (polyurethane); however, crucially, as indicated above, the press sleeves are excluded from Chapter 59. As a result, we can apply the same understanding as was demonstrated within HQ 084682, but without the conflict at-hand – with the press sleeves only meeting one such classification, it is classified as such, under heading 3926, HTSUS.

In HQ 957620, dated February 28, 1996, CBP used similar methodology to classify the product at-issue within Chapter 39. Specifically, the product consisted of a woven textile fabric – embedded within PVC, so that from an external examination the belting appeared to be made entirely of plastics. Although CBP found that the predominance of the plastics, and the use of the embedded textiles as a form of reinforcement, supported classification in Chapter 39, it ultimately classified the conveyor belting under heading 3921,

HTSUS; however, this was done on the basis that the belting was imported “in lengths up to 1200 feet” and better fit the description of plastic sheets. CBP also noted the ENs for heading 3921, which state that further worked plastic sheets would belong in alternative headings, such as heading 3926. In this case, the construction of the press sleeves, for the basis of Chapter 39 classification, remains similar – the press sleeves consist of textile fibers embedded within a Chapter 39 plastic. However, this plastic is further worked; provided information shows that the press sleeves have grooves carved into them, and each press sleeve is of finite dimensions to properly attach to paper machines. As a result, because of the predominance of a Chapter 39 plastic and its effect on the subject merchandise, as well as the notion that the textile fibers within it are a mere form of reinforcement, the press sleeves are properly classified under heading 3926, HTSUS, as other articles of plastic.

HOLDING:

Under the authority of GRIs 1 and 6, the QualiFlex press sleeves are classified under heading 3926, HTSUS, and specifically in subheading 3926.90.9985, HTSUSA, which provides for “Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other: Other.”³ The 2021 column one, general rate of duty is 5.3 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 the internet at www.usitc.gov/tata/hts/.

EFFECT ON OTHER RULINGS:

NY N312791, dated July 21, 2020, is 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,
For

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

³ The Court of International Trade’s (“CIT”) decision in *Semperit Industrial Products, Inc. v. United States*, 855 F. Supp. 1292 (CIT 1994), which involved the classification of industrial conveyor belts of vulcanized rubber and textile material, held that the term “predominate” requires the presence of at least two elements. As the textile component in the press sleeves consists of only one man-made fiber, the press sleeves are classified as though no textile component predominates.

U.S. Court of Appeals for the Federal Circuit

TR INTERNATIONAL TRADING COMPANY, INC., Plaintiff-Appellant v. UNITED STATES, UNITED STATES DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, GINA M. RAIMONDO, SECRETARY OF COMMERCE, TROY MILLER, IN HIS OFFICIAL CAPACITY AS SENIOR OFFICIAL PERFORMING THE DUTIES OF THE COMMISSIONER FOR UNITED STATES CUSTOMS AND BORDER PROTECTION, UNITED STATES CUSTOMS AND BORDER PROTECTION, Defendants-Appellees

Appeal No. 2020–1830

Appeal from the United States Court of International Trade in No. 1:19-cv-00022-MAB, Judge Mark A. Barnett.

Decided: July 14, 2021

JOHN MICHAEL PETERSON, Neville Peterson LLP, New York, NY, argued for plaintiff-appellant. Also represented by LAWRENCE JOSEPH BOGARD, MICHAEL KONRAD TOMENGA, Washington, DC.

JOSHUA E. KURLAND, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendants-appellees. Also represented by JEFFREY B. CLARK, JEANNE DAVIDSON, LOREN MISHA PREHEIM.

WILLIAM MITCHELL PURDY, Office the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, Washington, DC, for defendants-appellees United States Department of Commerce, International Trade Administration, Gina M. Raimondo.

PAULA S. SMITH, Office of the Assistant Chief Counsel, United States Bureau of Customs and Border Protection, United States Department of Homeland Security, New York, NY, for defendant-appellee United States Customs and Border Protection.

Before PROST*, CHEN, and HUGHES, *Circuit Judges*.

HUGHES, *Circuit Judge*.

After duties were assessed on its import of citric acid, Appellant TR International Trading Company, Inc. filed suit in the Court of International Trade, asserting jurisdiction under 28 U.S.C. § 1581(i). Because § 1581(i) is a residual grant of jurisdiction and because TRI had other adequate avenues for its claims, we affirm the Court of International Trade’s dismissal for lack of jurisdiction.

I

In 2017, TR International Trading Company, Inc. (TRI) filed 17 entries of citric acid with various U.S. ports. The entries identified

* Sharon Prost vacated the position of Chief Judge on May 21, 2021.

India as the country of origin, and TRI listed Posy Pharmachem PVT. LTD. (Posy) as the manufacturer. Claiming India as the country of origin allowed TRI to file the subject entries as type 01 “consumption” entries, which are not subject to duties, rather than type 03 “consumption—antidumping (AD)/countervailing duty (CVD)” entries. *TR Int’l Trading Co. v. United States*, 433 F. Supp. 3d 1329, 1334 (Ct. Int’l Trade 2020) (*Decision*).

On February 1, 2018, U.S. Customs and Border Protection (Customs) requested information from TRI regarding the 17 entries. On March 19, 2018, TRI responded with documentation of Posy’s purchase and receipt of citric acid monohydrate from suppliers in India and Posy’s processing of the citric acid monohydrate into citric acid anhydrous. TRI argued that “[t]he processing of the citric acid monohydrate into citric acid anhydrous performed by Posy satisfies the new and different product test for a substantial transformation thereby establishing India as the country of origin of the citric acid anhydrous it supplied to TRI.” *Decision*, 433 F. Supp. at 1334 (quoting Def.’s Mot. to Dismiss, Attach. B, No. 1:19-cv-22 (Ct. Int’l Trade 2019), ECF No. 17) (alteration in original). However, TRI admits that the origin of the citric acid monohydrate is unknown. *Id.* at 1334 n.2. Customs extended liquidation of the 17 entries on May 16, 2018. *Id.* at 1334; *see also* 19 U.S.C. § 1504(b)(1) (permitting extension of the time period for liquidation when Customs requires additional information “for the proper appraisalment or classification of the imported or withdrawn merchandise”).

On October 3, 2018, Customs informed TRI via email that its review of TRI’s entries had been transferred to Customs’ Pharmaceuticals, Health & Chemicals Center for Excellence and Expertise (PCEE). *Decision*, 433 F. Supp. at 1334. In the email, PCEE stated that it had not received TRI’s response to Customs’ February 1, 2018 request for information and, thus, on September 6, 2018, Customs had issued a Notice of Action to TRI setting the entries for liquidation. *Id.* The Notice stated:

As of today, this office has not received a response to the CBP-28 originally sent on 2/1/18 requesting information to support the use of India as the country of origin for the Citric acid on these entries. *We believe the Citric Acid is of Chinese origin and subject to antidumping and countervailing duties.* The proposed change includes changing the entry to type 03 and adding antidumping case A570–937–000/156.87% and countervailing case C570–938–000/8.14%. If this office does not receive documents to support your use of [India] as country of origin within 20 days of this notice, the entries will be changed as proposed.

Id. at 1334–35 (citation omitted) (alterations in original). TRI provided evidence of its March 2018 responses and PCEE responded that the Customs’ Office of Laboratory and Scientific Services (Customs’ Lab) would consider Posy’s processing of the citric acid in India. *Id.* at 1335.

The lab report stated: “The process described is that of drying citric acid to remove solvate water. . . . [T]he name and CAS registry number are changed as a result of this process. However, the character of the product as citric acid is not altered. . . . [B]oth materials are largely suited for the same purposes.” J.A. 84. Based on these findings, Customs determined that the product was not substantially transformed.

On October 24, 2018, Customs sent an email to TRI, advising TRI that the citric acid was not substantially transformed and therefore not a product of India. *Decision*, 433 F. Supp. at 1335. Customs also stated that the entries “would be liquidated with the applicable consumption, antidumping and countervailing duties.” *Id.* (citation omitted).

On October 31, 2018, TRI requested that Customs extend liquidation to permit TRI time to challenge the conclusion as to country of origin. *Id.*

On November 13, 2018, a Customs National Import Specialist agreed with the Customs’ Lab conclusion that the processing did not transform the citric acid. *Id.* at 1336. The official suggested TRI obtain a scope ruling from the U.S. Department of Commerce (Commerce) if it disagreed. *Id.*

On December 7, 2018, Customs liquidated the entries, and on December 12, 2018, Customs issued a Notice of Action to TRI stating that the entries had been liquidated according to the *Citric Acid Orders*,¹ which set forth the relevant duties. *Id.*

TRI filed suit in the Court of International Trade (Trade Court) on February 7, 2019, asserting § 1581(i)’s residual grant of jurisdiction. *Id.* Separately, TRI also protested Customs’ liquidation of its entries. *Id.* One protest covered a single entry, while another covered the remaining 16 entries. TRI requested accelerated disposition of the first protest, and that protest was deemed denied by operation of law 30 days after the date of mailing. *Id.* Customs suspended action on

¹ *Citric Acid and Certain Citrate Salts from Canada and the People’s Republic of China*, 74 Fed. Reg. 25,703 (Dep’t Commerce May 29, 2009) (antidumping duty orders); *Citric Acid and Certain Citrate Salts from the People’s Republic of China*, 74 Fed. Reg. 25,705 (Dep’t Commerce May 29, 2009) (notice of countervailing duty order).

the larger set of protests in light of this litigation. *Id.* The Trade Court dismissed this suit for lack of jurisdiction because jurisdiction was available under other subsections of § 1581, thereby prohibiting use of residual jurisdiction. *Decision*, 433 F. Supp. at 1337–46.

II

We review de novo the Trade Court’s decisions to grant the government’s motion to dismiss for lack of subject matter jurisdiction. *Hutchison Quality Furniture, Inc. v. United States*, 827 F.3d 1355, 1359 (Fed. Cir. 2016) (citing *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345 (Fed. Cir. 1995)). The party invoking the Trade Court’s jurisdiction, here the plaintiff, bears the burden of establishing subject matter jurisdiction. *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006).

Section 1581(i) is a residual grant of jurisdiction for the Trade Court. Where a plaintiff asserts § 1581(i) jurisdiction, it “bears the burden of showing that another subsection is either unavailable or manifestly inadequate.” *Erwin Hymer Grp. N. Am., Inc. v. United States*, 930 F.3d 1370, 1375 (Fed. Cir. 2019) (citation omitted); *see also Sunprime Inc. v. United States (Sunprime I)*, 892 F.3d 1186, 1191 (Fed. Cir. 2018) (“Section 1581(i) embodies a ‘residual’ grant of jurisdiction[] and may not be invoked when jurisdiction under another subsection of [section] 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.” (citation omitted)). Otherwise, plaintiffs would be able to circumvent the method that Congress intended for them to bring certain types of claims. *Erwin Hymer*, 930 F.3d at 1374.

Commerce is charged with interpreting the scope of an order, but Customs applies and enforces the order through the assessment and collection of antidumping and countervailing duties. *See Sunprime I*, 892 F.3d at 1188; *Sunprime Inc. v. United States (Sunprime III)*, 946 F.3d 1300, 1317 (Fed. Cir. 2020). Relevant here, § 1581(a) grants the Trade Court jurisdiction to review a denied protest of a Customs decision. 28 U.S.C. § 1581(a); 19 U.S.C. § 1515. Section 1581(c) grants the Trade Court jurisdiction to review Commerce’s scope determinations. 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a(a)(2)(B)(vi). TRI bears the burden of proving that these avenues were either unavailable or manifestly inadequate to address its claims. TRI has not met that burden.

A

To the extent that TRI challenges Customs’ factual determination that the citric acid originated in China, we agree with the Trade Court that TRI “failed to establish that its claims challenging [Cus-

toms'] application of the *Citric Acid Orders* . . . may not properly be subject of a Customs protest and judicial review pursuant to 28 U.S.C. § 1581(a)." *Decision*, 433 F. Supp. 3d at 1341.

Protests are the typical avenue for addressing factual or procedural issues in Customs determinations. *See* 19 U.S.C. § 1514(a) (noting that "any clerical error, mistake of fact, or other inadvertence" in a "liquidation" or decision regarding "rate and amount of duties chargeable" "shall be final . . . unless a protest is filed" or judicial review is obtained); *Xerox Corp. v. United States*, 289 F.3d 792, 794 (Fed. Cir. 2002) (noting that "findings of Customs as to the classification and rate and amount of duties chargeable are protestable to Customs under 19 U.S.C. § 1514(a)(2)" and that "[d]enial of protests are reviewable by the Court of International Trade [under] 28 U.S.C. § 1581(a)" (quotation marks omitted)).

At root, TRI contests the factual determination that the citric acid originated in China. TRI argues that there is no evidence regarding the citric acid's origin, and that Customs therefore erred in determining the acid to be from China. *See, e.g., Decision*, 433 F. Supp. 3d at 1339 ("TRI asserts [that] Customs maintained an 'unsupported belief' as to country of origin.") (citation omitted); Appellant's Br. 34–35. This argument should be made through a Customs protest. "[W]here the scope of a duty order is unambiguous and undisputed, and the goods clearly do not fall within the scope of the order, Customs' misapplication of the duty order is a protestable decision reviewable by the [Trade Court] under § 1581(a)." *Sunprime I*, 892 F.3d at 1192 (citation omitted); *see also* Appellant's Br. 3 (noting that one of the issues before the Trade Court was Customs' assessment of duties on TRI's entries of citric acid pursuant to "unambiguous" orders) (emphasis in original).

TRI also argues that a protest of Customs' factual determinations was unavailable or inadequate because TRI did not have notice that Customs made any factual findings regarding country of origin. This argument is untenable considering Customs' October 3, 2018 email, which stated that Customs "believe[s] the Citric Acid is of Chinese origin and subject to antidumping and countervailing duties," *Decision*, 433 F. Supp. at 1334–35 (citation omitted), and Customs' October 24, 2018, email informing TRI that the citric acid was not substantially transformed, *id.* at 1335. Customs made a factual determination that the hydrous citric acid originated in China and notified TRI accordingly.

TRI "offers no persuasive rationale as to why a protest proceeding is unavailable—indeed, it cannot, given its lodging of two Customs

protests.” *Id.* at 1342. We agree that the Trade Court does not have residual jurisdiction under § 1581(i) to address these factual and procedural arguments.

B

To the extent that TRI challenges Customs’ use of the substantial transformation test, we agree with the Trade Court that “TRI has also failed to establish that it could not have challenged Customs’ country of origin [determination] by requesting a scope ruling from Commerce and, if necessary, judicial review pursuant to 28 U.S.C. § 1581(c).” *Id.* at 1343.

TRI claims that Customs’ application of the substantial transformation test interpreted the scope of the origin term “from the People’s Republic of China” in the *Citric Acid Orders* to include TRI’s citric acid entries, Reply Br. 18; J.A. 56–57, and TRI seeks relief reversing this determination, *see* J.A. 59–60 (requesting that the entries be liquidated “without antidumping and countervailing duties on TRI’s citric acid from India”). “[T]he proper remedy [for such arguments] is for the importer to seek a scope inquiry from Commerce, the result of which may subsequently be challenged before the [Trade Court].” *Sunpreme I*, 892 F.3d at 1193; *see also Bell Supply Co. v. United States*, 888 F.3d 1222, 1229 (Fed. Cir. 2018) (holding that application of the substantial transformation test is an appropriate part of scope determinations).

Attempting to recast its arguments as directed to something other than the scope of the *Citric Acid Orders*, TRI contends that Customs acted outside its authority by determining that TRI’s imports were subject to the Orders. *See* J.A. 54–57. But we held in *Sunpreme I* that recasting a scope dispute as a challenge to an alleged ultra vires action does not create § 1581(i) jurisdiction. *See Sunpreme I*, 892 F.3d at 1193 (“Sunpreme’s characterization of its appeal as challenging Customs’ allegedly ultra vires action is unavailing. ‘[A] party may not expand a court’s jurisdiction by creative pleading.’ . . . Instead, ‘we look to the true nature of the action in the district court in determining jurisdiction of the appeal.’”) (*quoting Norsk*, 472 F.3d at 1355 (Fed. Cir. 2006)). Here, TRI contests the application of the *Citric Acid Orders* to its entries and seeks a determination that its entries should be liquidated as not within the scope of the orders. *See* J.A. 59–60. This is “the very relief associated with a scope ruling,” so “[t]he appropriate remedy for this type of claim is to request a scope ruling from Commerce.” *Sunpreme I*, 892 F.3d at 1193.

Moreover, we held in *Sunpreme III* that Customs does have authority to determine in the first instance whether imports are covered by

such orders. *See Sunpreme III*, 946 F.3d at 1317 (“Customs has a statutory responsibility to fix the amount of duty owed on imported goods. *See* 19 U.S.C. § 1500(c). As part of that responsibility, Customs is both empowered and obligated to determine in the first instance whether goods are subject to existing antidumping or countervailing duty orders.”). In other words, under the *Sunpreme* framework, Customs makes initial determinations regarding whether goods are subject to an order, even if there is some ambiguity involved in the order’s application. *Id.* at 1317–18. If an importer disagrees with Customs’ determination, “the proper remedy is for the importer to seek a scope inquiry from Commerce, the result of which may subsequently be challenged before the [Trade Court].” *Sunpreme I*, 892 F.3d at 1193.

The *Sunpreme* line of cases is applicable here—indeed, the Trade Court stayed this case awaiting our holding in *Sunpreme III*—but TRI makes a couple of unavailing attempts to distinguish the *Sunpreme* cases. For example, TRI argues that here it is contesting Customs’ *anticircumvention* analysis rather than *scope* analysis. But Customs’ determination centered on the substantial transformation test, *Decision*, 433 F. Supp. at 1335; J.A. 84, which indicates a scope determination rather than an *anticircumvention* analysis, *see Bell Supply*, 888 F.3d at 1229 (noting that the “substantial transformation analysis to determine country of origin” comes “before resorting to the circumvention inquiry.”).

TRI also argues that seeking a scope ruling would have been futile here because there would not have been time for Commerce to conduct that analysis before liquidation. But this argument makes many assumptions, including that Customs would not have suspended liquidation and that Commerce would not have promptly initiated a scope proceeding. The burden is on TRI to demonstrate that § 1581(c) jurisdiction is unavailable or manifestly inadequate, and hypotheticals are not enough to carry that burden. *See Chemsol, LLC v. United States*, 755 F.3d 1345, 1355 (Fed. Cir. 2014) (noting that mere belief that a plaintiff has no adequate remedy under another subsection of § 1581 is not enough to allow use of residual jurisdiction under § 1581(i)).

TRI has not carried its burden of proving that a scope determination was unavailable or manifestly inadequate, so we agree that the Trade Court does not have residual jurisdiction under § 1581(i) to address TRI’s arguments.

III

We have considered TRI’s other arguments and find them unpersuasive. Because TRI has not demonstrated that another subsection

of § 1581 was unavailable or manifestly inadequate, TRI cannot bring its claims under § 1581(i) residual jurisdiction. We therefore affirm the Trade Court's dismissal for lack of jurisdiction.

AFFIRMED

TRANSPACIFIC STEEL LLC, BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., BORUSAN MANNESMANN PIPE U.S. INC., THE JORDAN INTERNATIONAL COMPANY, Plaintiffs-Appellees v. UNITED STATES, JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, TROY MILLER, IN HIS OFFICIAL CAPACITY AS SENIOR OFFICIAL PERFORMING THE DUTIES OF THE COMMISSIONER FOR UNITED STATES CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF COMMERCE, GINA RAIMONDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE, Defendants-Appellants

Appeal No. 2020–2157

Appeal from the United States Court of International Trade in No. 1:19-cv-00009-CRK-GSK-JAR, Senior Judge Jane A. Restani, Judge Claire R. Kelly, Judge Gary S. Katzmann.

Decided: July 13, 2021

MATTHEW MOSHER NOLAN, Arent Fox, LLP, Washington, DC, argued for all plaintiffs-appellees. Plaintiff-appellee Transpacific Steel LLC also represented by DIANA DIMITRIUC QUAAIA, NANCY NOONAN, LEAH N. SCARPELLI, RUSSELL ANDREW SEMMEL.

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

Opinion for the court filed by *Circuit Judge* TARANTO.

Dissenting opinion filed by *Circuit Judge* REYNA.

TARANTO, *Circuit Judge*.

In section 232 of the Trade Expansion Act of 1962, Pub. L. No. 87–794, 76 Stat. 872, 877, codified as amended at 19 U.S.C. § 1862, Congress provided that if the President receives, and agrees with, a finding by a specified executive officer (now the Secretary of Commerce) that imports of an article threaten to impair national security, the President shall take action that the President deems necessary to alleviate the threat from those imports. *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) (addressing then-current version of § 1862 and holding that permitted action includes requiring licenses for imports and that provision raised no substantial issue

of improper delegation of legislative power); *American Inst. for Int'l Steel, Inc. v. United States*, 806 F. App'x 982 (Fed. Cir. 2020) (rejecting nondelegation challenge to the current version of the statute). In its present form, the statute includes provisions, added in 1988, that set forth process and timing standards applicable to the Secretary's making of the predicate finding of threat, § 1862(b), and set forth certain timing standards applicable to the President's follow-on decisions if the Secretary finds such a threat, § 1862(c). Of central importance here is § 1862(c)(1). It specifies one period within which the President is to concur or disagree with the Secretary's finding and to determine the necessary action if the President concurs in the finding and another period within which the President is thereafter to implement the chosen action. § 1862(c)(1). This case involves a challenge to certain presidential action as taken too late under § 1862(c)(1).

In January 2018, the Secretary, in compliance with the process and timing requirements of § 1862(b), found that imports of steel threatened to impair national security because the imports caused domestic steel-production capacity to be used less than the level of utilization needed for operation of the plants to be profitably sustained over time. In March 2018, within the periods prescribed for presidential action, the President agreed with the Secretary's finding, determined the needed plan of action, and announced the plan in a proclamation that imposed some tariffs immediately, announced negotiations with specified nations in lieu of immediate tariffs, invited negotiations more broadly, and stated that the immediate measures might be adjusted as necessary. Proclamation 9705, 83 Fed. Reg. 11,625 (Mar. 15, 2018). Within a few months, as certain negotiations produced agreements or adequately progressed, the President determined that imports were still too high to allow domestic plant utilization to meet the Secretary's identified target, and the President raised the tariff on steel from Turkey, one of the largest producers and exporters of steel imported into the United States. Proclamation 9772, 83 Fed. Reg. 40,429 (Aug. 15, 2018). Proclamation 9772's raising of the tariff on Turkish steel imports is challenged here.

Transpacific Steel LLC, Borusan Mannesmann Boru Sanayi Ve Ticaret A.S., Borusan Mannesmann Pipe U.S. Inc., and the Jordan International Company (together, Transpacific)—importers of Turkish steel (in some cases also producers or exporters)—sued in the Court of International Trade (Trade Court), alleging that the President's issuance of Proclamation 9772 was unlawful. The Trade Court held the action unlawful on two grounds. First, the court held that Proclamation 9772 was unauthorized because, unlike the initial Proclamation 9705, it was issued outside the time periods set out in §

1862(c)(1) for presidential action after the Secretary's finding (in which the President concurred) of a national-security threat from steel imports. To take this action in August 2018, the court ruled, the President had to secure a new report with a new threat finding from the Secretary. Second, the court held that singling out steel from Turkey for the increased tariff violated the equal-protection guarantee of the Fifth Amendment to the Constitution.

We reverse. The President did not violate § 1862 in issuing Proclamation 9772. The President did not depart from the Secretary's finding of a national-security threat; indeed, the President specifically adhered to the Secretary's underlying finding of the target capacity-utilization level that was the rationale for the predicate threat finding. Moreover, the President made the determination that further import restrictions were needed to achieve that level in a short period after the Secretary's finding and after the initial presidential action. And that initial presidential action (in March 2018) itself announced a continuing course of action that could include adjustments as time passed. In these circumstances, we conclude that the increase in the tariff on steel from Turkey by Proclamation 9772 did not violate § 1862. We do not address other circumstances that would present other issues about presidential authority to adjust initially taken actions without securing a new report with a new threat finding from the Secretary.

Nor did the President violate Transpacific's equal-protection rights in issuing Proclamation 9772. The most demanding standard that could apply here is the undemanding rational-basis standard. The President's decision to take one of a number of possible steps to achieve the goal of increasing utilization of domestic steel plants' capacity to try to improve their sustainability for national-security reasons meets that standard.

I

A

Section 1862 empowers and directs the President to act to alleviate threats to national security from imports. It does so by modifying and adding to other presidential authority granted by Congress.

Subsection (a). The first subsection of § 1862 refers to two of the preexisting, continuing statutory grants of presidential authority and forbids relaxation of import restrictions under those grants if national security would be threatened. Specifically, subsection (a) addresses 19 U.S.C. §§ 1821 and 1351, which grant the President certain discretionary authority regarding tariffs on goods from foreign nations with which the President might enter into executive agree-

ments. Section 1821(a), which dates to at least 1962, *see* Trade Expansion Act of 1962, § 201, 76 Stat. at 872, states that the President “may,” for any of the broad trade-related purposes identified in 19 U.S.C. § 1801, enter into trade agreements and, among other things, raise or lower duties (within limits) to carry out such agreements. § 1821. Section 1351, which traces back to 1934, *see* Tariff Act of 1934, ch. 474, 48 Stat. 943, confers similar authority. § 1351. Subsection (a) of § 1862 forbids the President, when acting under those provisions, “to decrease or eliminate the duty or other import restrictions on any article if the President determines that such reduction or elimination would threaten to impair the national security.” § 1862(a).¹

Subsection (b). The next subsection sets forth the agency-level processes required for exercise of § 1862’s own grant of presidential authority to take action against imports that threaten to impair national security. In particular, subsection (b) prescribes process and timing standards for the Secretary of Commerce to make the finding that is a precondition for the President to take such action under this statute.

If the Secretary receives a request from an agency or department head or an “application of an interested party,” or on the Secretary’s “own motion,” the Secretary must “immediately initiate an appropriate investigation to determine the effects on the national security of imports of the [relevant] article.” § 1862(b)(1)(A). During the investigation, the Secretary must consult with and seek information and advice from certain officers—most notably, the Secretary of Defense—and, if appropriate, “hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation.” § 1862(b)(2)(A). Within “270 days” of the investigation’s start, “the Secretary shall submit to the President a report on the findings of” the investigation. § 1862(b)(3)(A). Based on those findings, the Secretary must include his “recommendations . . . for action or inaction.” *Id.* “If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report.” *Id.*

Subsection (c). The next subsection lays out the President’s authority and obligation to act under § 1862. As paragraph (1) makes clear, that authority and obligation exist only if the President receives a report “in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances

¹ In *American Institute for International Steel*, we noted other congressional authorizations of presidential action, and the use of executive agreements, to restrict imports. 806 F. App’x at 983–84, 984 n.1; *see also American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414–15 (2003) (noting longstanding use and approval of executive agreements).

as to threaten to impair the national security.” § 1862(c)(1)(A). In that event, the President “shall,” within 90 days of receiving such a report, “determine whether the President concurs with the finding of the Secretary,” *i.e.*, the Secretary’s finding of a threat (not the Secretary’s recommendation of action or inaction). § 1862(c)(1)(A)(i). “[I]f the President concurs” in that finding, then the President “shall,” within the same 90 days, “determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.” § 1862(c)(1)(A)(ii). Finally, “[i]f the President determines . . . to take action to adjust imports of an article and its derivatives, the President shall implement that action” within 15 days of the action determination. § 1862(c)(1)(B).implement that action” within 15 days of the action determination. § 1862(c)(1)(B).implement that action” within 15 days of the action determination. § 1862(c)(1)(B).²

In paragraph (3), subsection (c) specifically addresses the circumstance in which one of the actions that the President initially chooses is not a unilateral imposition on certain imports but, instead, bilateral or multilateral in character, *i.e.*, negotiation of an agreement that “limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security.” § 1862(c)(3)(A)(i). To prevent that presidential choice from turning into inaction or inadequate action, paragraph (3) provides for unilateral action if either no agreement is reached within 180 days, *id.*, or an agreement is reached but it “is not being carried out or is ineffective in eliminating the threat to the national security posed by imports of such article,” § 1862(c)(3)(A)(ii) (emphasis added). When either of those conditions is met, “the President shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security.” § 1862(c)(3)(A). The President must publish in the Federal Register notice of such “additional actions” or of a determination not to take “additional actions.” § 1862(c)(3)(A), (B).

Subsection (d). Congress included what amounts to a definitional provision for § 1862. Subsection (d) states a number of “relevant

² Paragraph (2) requires the President to inform Congress about the paragraph (1) determinations. § 1862(c)(2). This is one of several provisions that insist on public disclosure of the choices made under § 1862. Another is the provision requiring the Secretary to submit to Congress and publish in the Federal Register a report on dispositions under subsection (b). *See* § 1862(e) (though labeled as a second subsection (d), the U.S. Code states that it probably should be designated (e)). In addition, if the President has chosen to pursue bilateral or multilateral agreements initially, but that choice does not bear out in the statutorily specified ways, the President must publish notice of determinations of what if any alternative actions to take. § 1862(c)(3)(A), (B).

factors” to which the Secretary and the President must “give consideration” in making their determinations regarding “national security.” § 1862(d). Among the factors are the “domestic production needed for projected national defense requirements,” the “capacity of domestic industries to meet such requirements,” the “requirements of growth of such [domestic] industries,” “the impact of foreign competition on the economic welfare of individual domestic industries,” and whether the “weakening of our internal economy may impair the national security.” *Id.* The statute enumerates other considerations as well, and the entire enumeration is set forth “without excluding other relevant factors.” *Id.*³

B

1

On April 19, 2017, the Secretary of Commerce started “an investigation to determine the effects on the national security of imports of steel.” Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19,205, 19,205 (Apr. 26, 2017). After following the processes, and within the time, prescribed by § 1862(a), the Secretary, on January 11, 2018, sent his report to the President. Publication of a Report on the Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended, 85 Fed. Reg. 40,202 (July 6, 2020) (January 2018 report).

The Secretary found that “the present quantities and circumstance of steel imports are weakening our internal economy and threaten to impair the national security as defined in Section 232.” *Id.* at 40,204 (internal quotation marks omitted). Underlying that finding, the Secretary explained, were “[n]umerous U.S. steel mill closures, a substantial decline in employment, lost domestic sales and market share, and marginal annual net income for U.S.-based steel companies.” *Id.* Because the “declining steel capacity utilization rate is not economically sustainable,” the Secretary reported that “the only effective means of removing the threat of impairment is to reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80 percent or more of their rated production capacity.” *Id.*

³ Subsection (f) is the final subsection of § 1862. It narrowly addresses presidential action “to adjust imports of petroleum or petroleum products” and, for that subject, specifies that such action “shall cease to have force and effect upon the enactment of a disapproval resolution,” defined as “a joint resolution of either House of Congress.” § 1862(f).

Based on the finding of a need for 80% average capacity utilization for the sustainable industry required to remove the national-security threat, the Secretary made several recommendations about how to adjust imports that were leaving domestic plants underutilized. The first option was a “global quota or tariff.” *Id.* at 40,205. For the global quota, the Secretary recommended a quota limiting steel imports to 63% of 2017 import levels; for the global tariff, the Secretary recommended a 24% tariff on all steel imports. *Id.* The second option was “tariffs on a subset of countries.” *Id.* Under that approach, the Secretary recommended a 53% tariff on all steel imports from “Brazil, South Korea, Russia, Turkey, India, Vietnam, China, Thailand, South Africa, Egypt, Malaysia and Costa Rica.” *Id.* For every option, the Secretary noted that “the President could determine that specific countries should be exempted from the proposed” quota or tariff. *Id.* But if the President determined that certain countries should be exempt, the “Secretary recommend[ed] that any such determination should be made at the outset and a corresponding adjustment be made to the final quota or tariff imposed on the remaining countries.” *Id.* at 40,205–06.

The Secretary further recommended “an appeal process by which affected U.S. parties could seek an exclusion from the tariff or quota imposed.” *Id.* at 40,206. Under that process, the “Secretary would grant exclusions based on a demonstrated: (1) lack of sufficient U.S. production capacity of comparable products; or (2) specific national security based considerations.” *Id.* If an exclusion was granted, the Secretary would also “consider at the time whether the quota or tariff for the remaining products needs to be adjusted to increase U.S. steel capacity utilization to a financially viable target of 80 percent.” *Id.*

2

After receiving the Secretary’s January 11, 2018 report, with its finding that imports of steel articles threatened to impair national security because they were preventing 80% domestic capacity utilization, the President issued several proclamations relevant here.

Proclamation 9705. On March 8, 2018, well within the prescribed 90 days of receiving the report, the President issued Proclamation 9705. 83 Fed. Reg. 11,625 (Mar. 15, 2018). The President stated that he “concur[red] in the Secretary’s finding” on steel articles and had “considered [the Secretary’s] recommendations.” *Id.* at 11,626, ¶ 5. The President “decided to adjust the imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles . . . imported

from all countries except Canada and Mexico.” *Id.* at 11,626, ¶ 8. The tariffs would take effect on March 23, 2018, and “continue in effect, unless such actions are expressly reduced, modified, or terminated.” *Id.* at 11,627–28, § 5(a).

On the exception, the President explained that “Canada and Mexico present a special case” because of the countries’ “close relation” with and “physical proximity” to the United States and because the President sought “to continue ongoing discussions with these countries.” *Id.* at 11,626, ¶ 10. The President also stated his willingness to negotiate with “[a]ny country” that has “a security relationship” with the United States in order to discuss “alternative ways to address the threatened impairment of the national security caused by imports from that country.” *Id.* at 11,626, ¶ 9. The President highlighted, though, that if the negotiations led to an agreement with a country with “a satisfactory alternative means to address” the national-security threat, he “may remove or modify the restriction on steel articles imports from that country *and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require.*” *Id.* (emphasis added). In other words, a negotiated deal with one country, if it was generous regarding steel imports from that country, might require lowering imports from other countries by raising the initial tariff imposed on them, so that the 80% capacity-utilization level could be reached.

To facilitate the planned course of action, the President ordered the Secretary to “continue to monitor imports of steel articles,” to consult “from time to time” with various officials “as the Secretary deems appropriate,” and to “review the status of such imports with respect to the national security.” *Id.* at 11,628, § 5(b). He also ordered the Secretary to “inform the President of any circumstances that in the Secretary’s opinion might indicate the need for further action by the President” or if “the increase in duty rate provided for in this proclamation is no longer necessary.” *Id.*

Proclamations 9711, 9740, and 9759. Thereafter, the President negotiated with many countries, made agreements with some, and adjusted tariffs on countries that did not negotiate or reach an agreement with the United States. For example, two weeks after Proclamation 9705, the President issued Proclamation 9711. 83 Fed. Reg. 13,361 (Mar. 22, 2018). In that proclamation, the President highlighted that several countries reached out to discuss “satisfactory alternative means to address the threatened impairment to the national security” and noted that he “determined that the necessary and appropriate means to address the threat to the national security posed by imports of steel articles from these countries is to continue

ongoing discussions and to increase strategic partnership.” *Id.* at 13,361, ¶ 4 and 13,362, ¶ 10. The President concluded: “[D]iscussions regarding measures to reduce excess steel production and excess steel capacity, measures that will increase domestic capacity utilization, and other satisfactory alternative means will be most productive if the tariff proclaimed in Proclamation 9705 on steel articles imports from these countries is removed at this time.” *Id.* at 13,362, ¶ 10. Still, the President declared, the exemption would expire on May 1, 2018, if no agreement was reached. *Id.* at 13,362, ¶ 11. And if an agreement was reached, the President said (as he did in Proclamation 9705), “corresponding adjustments to the tariff” previously set for other countries would be considered. *Id.*

About five weeks later, on April 30, 2018, the President issued Proclamation 9740 announcing agreements and further negotiations. 83 Fed. Reg. 20,683 (May 7, 2018). The President announced that negotiations with South Korea had succeeded, producing an agreement “on a range of measures, . . . including a quota that restricts the quantity of steel articles imported into the United States from South Korea.” *Id.* at 20,683, ¶ 4. The President also reported that the “United States has agreed in principle with Argentina, Australia, and Brazil on satisfactory alternative means” and temporarily exempted those countries from the 25% ad valorem tariff “to finalize the details” of the agreements. *Id.* at 20,684, ¶ 5. And he noted that the United States was “continuing discussions with Canada, Mexico and the [European Union].” *Id.* at 20,684, ¶ 6.

Later, on May 31, 2018, the President, in Proclamation 9759, announced that the United States had reached agreements with Argentina, Australia, and Brazil. 83 Fed. Reg. 25,857, 25,857–58 (June 5, 2018).

Proclamations 9772 and 9886. On August 10, 2018, just over five months after the President issued the first proclamation (Proclamation 9705), he issued the proclamation challenged here by Transpacific, *i.e.*, Proclamation 9772. 83 Fed. Reg. 40,429 (Aug. 15, 2018). The President explained that the Secretary had monitored imports of steel articles (as directed in Proclamation 9705) and, based on that monitoring, the Secretary had “informed [the President] that while capacity utilization in the domestic steel industry has improved, it is still below the target capacity utilization level” identified in the January 2018 report and imports were “still several percentage points greater than the level of imports that would allow domestic capacity utilization to reach the target level.” *Id.* at 40,429, ¶¶ 3–4. The President added that in the “January 2018 report, the Secretary

recommended . . . applying a higher tariff to a list of specific countries” if the President “determine[d] that all countries should not be subject to the same tariff.” *Id.* at 40,429, ¶ 6. The President also noted that the Secretary’s report had Turkey on the list and that the report explained that “Turkey is among the major exporters of steel to the United States for domestic consumption.” *Id.* Then the President declared: “To further reduce imports of steel articles and increase domestic capacity utilization, I have determined that it is necessary and appropriate to impose a 50 percent ad valorem tariff on steel articles imported from Turkey, beginning on August 13, 2018.” *Id.* The President also highlighted that the Secretary had advised him that the adjustment on steel imports from Turkey “will be a significant step toward ensuring the viability of the domestic steel industry.” *Id.*

The 50% ad valorem tariff on Turkish steel remained in place for just under nine months—until May 21, 2019—when it returned to 25%. *See* Proclamation 9886 of May 16, 2019, 84 Fed. Reg. 23,421 (May 21, 2019). In the proclamation announcing the return to the 25% level, the President stated that the Secretary had advised him “that, since the implementation of the higher tariff under Proclamation 9772, . . . the domestic industry’s capacity utilization ha[d] improved . . . to approximately the target level recommended in the Secretary’s report.” *Id.* at 23,421–22, ¶ 6. The President determined that “[t]his target level, if maintained for an appropriate period, will improve the financial viability of the domestic steel industry over the long term.” *Id.* at 23,422, ¶ 6. “Given these improvements,” the President “determined that it [wa]s necessary and appropriate to remove the higher tariff on steel imports from Turkey imposed by Proclamation 9772, and to instead impose a 25 percent ad valorem tariff on steel imports from Turkey.” *Id.* at 23,422, ¶ 7. The President also determined that “[m]aintaining the existing 25 percent ad valorem tariff on most countries [wa]s necessary and appropriate at this time to address the threatened impairment of the national security that the Secretary found in the January 2018 report.” *Id.*

C

On January 17, 2019, while the 50% tariff was in effect, Transpacific sued the United States, two agencies of the United States (the Department of Commerce and U.S. Customs and Border Protection), the President, and the heads of the two agencies, invoking the Trade Court’s jurisdiction under 28 U.S.C. § 1581(i)(2), (4). *See Transpacific Steel LLC v. United States*, No. 1:19-cv-00009, ECF No. 6 (Ct. Int’l Trade Jan. 17, 2019) (Complaint). Transpacific amended its complaint on April 2, 2019, naming the same defendants. J.A. 95. Like the

original complaint, the amended complaint alleged that Proclamation 9772 was unlawful because the President exceeded his authority under 19 U.S.C. § 1862 and violated the Fifth Amendment's guarantees of equal protection and of procedural due process. J.A. 95–559.

On April 3, 2019, the government moved to dismiss the suit for failure to state a claim, and on November 15, 2019, the Trade Court denied the motion. *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267, 1269 (Ct. Int'l Trade 2019) (*Transpacific I*). The Trade Court held that Transpacific stated a claim that the timing provisions of § 1862(c) foreclosed the President from doing what he did here, namely, announce and put into effect a plan of action within the statutory time periods (as the President did in Proclamation 9705), and then raise tariffs pursuant to the implemented plan after those deadlines passed (as the President did in Proclamation 9772) without obtaining a new report from the Secretary produced through the statutorily specified procedure. *Id.* at 1274–76. The Trade Court also determined that Transpacific stated a claim that Proclamation 9772 violated the Fifth Amendment's equal-protection guarantee because it alleged that there was “no set of facts that justify identifying importers of steel from Turkey as a class of one.” *Id.* at 1272. As for the procedural-due-process claim, the Trade Court did not reach it because the court determined that the President violated the procedural constraints of § 1862. *Id.* at 1276.

Shortly thereafter, the other appellees were permitted to intervene as co-plaintiffs. *See* J.A. 64–65. On January 21, 2020, the parties jointly moved for a judgment on the agency record. J.A. 65. About six months later, on July 14, 2020, the Trade Court issued an opinion and entered judgment for Transpacific. *Transpacific Steel LLC v. United States*, 466 F. Supp. 3d 1246, 1249 (Ct. Int'l Trade 2020) (*Transpacific II*); J.A. 1–2 (Judgment). The Trade Court concluded that Proclamation 9772 was unlawful because the President violated a statutory timing constraint of § 1862 and because singling out importers of Turkish steel products denied them the constitutionally guaranteed equal protection of the laws.

As to § 1862, the court maintained its view that “there is nothing in the statute to support the continuing authority to modify Proclamations outside of the stated timelines.” *Transpacific II*, 466 F. Supp. 3d at 1253. Although the Trade Court recognized that § 1862 before the 1988 amendments let the President “modify previous Proclamations as a form of continuing authority,” the court explained that “the statutory scheme has since been altered, and the court must give

meaning to those alterations.” *Id.* “The 1988 amendments prescribed time limits,” the court noted, “but also deleted language that could be read to give the President the power to continually modify Proclamations.” *Id.* And the court repeated that nondelegation concerns reinforced its reading. *Id.* The Trade Court therefore held that “modifications’ of existing Proclamations under the current statutory scheme, without following the procedures in the statute, are not permitted.” *Id.*

As to equal protection, the Trade Court concluded that the government flunked the rational-basis standard. “Singling out steel products from Turkey,” reasoned the court, “is not a rational means of addressing” the government’s national-security concern. *Id.* at 1258. According to the court, the “status quo under normal trade relations is equal tariff treatment of similar products irrespective of country of origin. Although deviation from this general principle is allowable, such deviation cannot be arbitrarily and irrationally enforced in a way that treats similarly situated classes differently without permissible justification.” *Id.* (citation omitted). The court, seeing no permissible justification, concluded: “Proclamation 9772 denies [Transpacific] the equal protection of the law.” *Id.*

The court then addressed Transpacific’s procedural-due-process argument. It stated: “[T]he process [Transpacific] request[s] is simply that the government be made to comply with the procedures laid out in the statute. Because we hold that [Transpacific is] entitled to that process under the statute, we need not also answer whether any constitutional guarantees of Due Process were violated.” *Id.* at 1259. The court added: “Whatever constitutional minimum process might be owed, it is satisfied by requiring that the President abide by the statute’s procedures.” *Id.*

The same day, the Trade Court entered final judgment. J.A. 1. The court ordered that Proclamation 9772 “is declared unlawful and void” and ordered that the “United States Customs and Border Protection refund [Transpacific] the difference between any tariffs collected on its imports of steel products” under Proclamation 9772 “and the 25% ad valorem tariff that would otherwise apply on these imports together with such costs and interest as provided by law.” J.A. 1–2.⁴

⁴ The government moved to stay enforcement of the judgment’s refund order pending appeal. The Trade Court denied the stay, *Transpacific Steel LLC v. United States*, 474 F. Supp. 3d 1332 (Ct. Int’l Trade 2020), and this court denied the government’s request that we stay the order pending appeal, *Transpacific Steel LLC v. United States*, 840 F. App’x 517 (Fed. Cir. 2020).

The government timely appealed the Trade Court’s judgment. We have jurisdiction under 28 U.S.C. § 1295(a)(5).⁵

II

The government challenges the Trade Court’s rulings that Proclamation 9772 violated 19 U.S.C. § 1862 and the Fifth Amendment’s guarantee of equal protection. In response, Transpacific defends those rulings, but it does not present here, or seek a conditional remand to press, its procedural-due-process challenge, which we therefore deem dropped. And although Transpacific briefly asserts a nondelegation challenge simply to preserve it, we have already rejected such a challenge, *American Inst. for Int’l Steel*, 806 F. App’x at 983, and Transpacific has presented no developed argument on nondelegation that warrants additional discussion. Accordingly, we limit ourselves to the § 1862 and equal-protection issues.

We review the judgment on the agency record without deference. *See Fedmet Resources Corp. v. United States*, 755 F.3d 912, 918 (Fed. Cir. 2014). This appeal involves only legal issues, which we decide de novo. *See GPX Int’l Tire Corp. v. United States*, 780 F.3d 1136, 1140 (Fed. Cir. 2015).

A

The Trade Court concluded that § 1862 prohibited the President from raising tariffs in Proclamation 9772 because the President issued that proclamation after the 90-day period for the President to decide to concur or disagree with the Secretary’s January 2018 finding of threat and to determine how to respond to the threat, and after the 15-day period for the President to implement the chosen response, without obtaining a new finding of threat from the Secretary. The Trade Court so concluded even though: Proclamation 9772 was a further implementation of Proclamation 9705; Proclamation 9705

⁵ Transpacific invoked the Trade Court’s jurisdiction under a provision that gives that court jurisdiction over “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” certain tariffs or duties of the sort at issue here. 28 U.S.C. § 1581(i). The provision clearly covers this case, with one possible, limited exception: There is a question (not raised by any party) whether the claim against the President comes within the provision. *See Corus Group PLC v. Int’l Trade Comm’n*, 352 F.3d 1351, 1359 (Fed. Cir. 2003) (concluding that the President is not an “officer[]” under § 1581(i) and dismissing claim against the President); *PrimeSource Bldg. Prods., Inc. v. United States*, 497 F. Supp. 3d 1333, 1365–70 (Ct. Int’l Trade 2021) (Baker, J., concurring in part and dissenting in part) (discussing the question). We need not address that question because jurisdiction existed over the claims against the other defendants and jurisdiction exists here to review the Trade Court’s judgment. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (for standing, all that need be decided is that one plaintiff has standing); *Horne v. Flores*, 557 U.S. 433, 445 (2009) (same). We reverse and remand this case for entry of judgment against Transpacific; but in the remand, the Trade Court may decide whether the judgment against Transpacific should include dismissal of the claim against the President.

was issued within the two specified time periods and expressly provided for future adjustments; and Proclamation 9772 adhered to the basis of the threat finding in the Secretary's January 2018 report, namely, the need for a particular domestic-plant utilization level, which the implementation measures had not yet achieved. We reverse. In these circumstances, we conclude that the Trade Court erred in determining that the President's issuance of Proclamation 9772 violated § 1862.

The key issue is whether § 1862(c)(1) permits the President to announce a continuing course of action within the statutory time period and then modify the initial implementing steps in line with the announced plan of action by adding impositions on imports to achieve the stated implementation objective. We conclude that the President does have such authority in the circumstances presented here. Specifically, we conclude that the best reading of the statutory text of § 1862, understood in context and in light of the evident purpose of the statute and the history of predecessor enactments and their implementation, is that the authority of the President includes authority to adopt and carry out a plan of action that allows adjustments of specific measures, including by increasing import restrictions, in carrying out the plan over time. Transpacific does not argue that Proclamation 9772 is unlawful under the statute if, as we conclude, the President has the authority to adopt and pursue such a continuing course of action.

In our statutory analysis, we consider text and context, including purpose and history. Judge Reyna, in dissent, reaches different conclusions about these considerations and about the bottom-line result. Our discussion of the individual considerations provides, without further direct reference to Judge Reyna's dissent, the reasons we take a different view on the points of disagreement.

1

We start with the text of 19 U.S.C. § 1862(c)(1) and its "ordinary meaning at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (cleaned up). Subsection (c)(1) states:

(c) Adjustment of imports; determination by President; report to Congress; additional actions; publication in Federal Register

(1)(A) Within 90 days after receiving a report submitted under subsection (b)(3)(A) in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall—

(i) determine whether the President concurs with the finding of the Secretary, and

(ii) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.

(B) If the President determines under sub-paragraph (A) to take action to adjust imports of an article and its derivatives, the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A).

§ 1862(c)(1).

Paragraph (1) contains several time directives. “Within 90 days after receiving a report” with a finding that importation of an article threatens to impair national security, the President “shall,” first, “determine whether the President concurs with the finding of the Secretary,” § 1862(c)(1)(A)(i), and, second, if the President concurs, “determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security,” § 1862(c)(1)(A)(ii). Then, if the President has concurred in the finding of threat and determined the action to be taken in response, the President “shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A).” § 1862(c)(1)(B).

The Trade Court’s interpretation of subsection (c)(1)’s time directives does not follow from the ordinary meaning of the provision’s language at the time of enactment. In two ways, the Trade Court took too narrow a view of what the ordinary meaning allows.

First: The Trade Court indicated its view that the “necessary implication” of the timing provisions was that no burden-increasing action could be taken after the specified times. *Transpacific I*, 415 F. Supp. 3d at 1275 n.13; *Transpacific II*, 466 F. Supp. 3d at 1252 (“[T]he temporal restrictions on the President’s power to take action pursuant to a report and recommendation by the Secretary is not a mere directory guideline, but a restriction that requires strict adherence. To require adherence to the statutory scheme does not amount to a sanction, but simply ensures that the deadlines are given meaning and that the President is acting on up-to-date national security guidance.”). But that is not a necessary implication of the words.

As a matter of ordinary meaning, a command to “take this action by time T” is often, in substance, a compound command—one, a directive (with conferral of authority) to take the action, and, two, a directive to do so by the prescribed time. A violation of the temporal obligation imposed by the second directive does not necessarily negate the primary obligation imposed by—let alone the grant of authority implicit in—the first directive. For example: Most people would understand the directive “return the car by 11 p.m.” to require the return of the car even after 11 p.m. *See, e.g., Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017) (using a conversation between friends to show ordinary meaning). That is why a real addition of meaning, or at least a resolution of uncertainty, results when “take this action by time T” is followed by words like “or else don’t take it at all.”

The Supreme Court has recognized this linguistic point in the context of statutory commands to executive officers to take action within a specified time. It has made clear that such a command does not, without more, entail lack of authority, or of obligation, to take the action after that date has passed, even though the obligation to act by the specified time has been violated. The Court so ruled in 1986 in *Brock v. Pierce County*, concluding that “the mere use of the word ‘shall’ in [a statute], standing alone, is not enough to remove the [official’s] power to act after” the time deadline. 476 U.S. 253, 262 (1986). As the Supreme Court summarized the point some years later, *Brock* held that the particular time command was “meant ‘to spur the Secretary to action, not to limit the scope of his authority,’ so that untimely action was still valid.” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003) (quoting *Brock*, 476 U.S. at 265). In 2003, the Court emphasized: “Nor, since *Brock*, have we ever construed a provision that the Government ‘shall’ act within a specified time, without more, as a jurisdictional limit precluding action later.” *Id.*; *see also, e.g., id.* at 157 (“It misses the point simply to argue that the October 1, 1993, date was ‘mandatory,’ ‘imperative,’ or a ‘deadline,’ as of course it was, however unrealistic the man-date may have been.”); *id.* at 160–61 (explaining that *Brock* made clear that “a statute directing official action needs more than a mandatory ‘shall’ before the grant of power can sensibly be read to expire when the job is supposed to be done”); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993) (“[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.”); *United*

States v. Montalvo-Murillo, 495 U.S. 711, 718–19 (1990); *Nielsen v. Preap*, 139 S. Ct. 954, 967–68 (2019) (Alito, J., joined by Roberts, C.J., and Kavanaugh, J.).

The commonsense linguistic point, and its application in the statutory setting, formed the backdrop to Congress’s amendments to § 1862 in 1988. The *Brock* decision issued two years before Congress’s amendments. See *Barnhart*, 537 U.S. at 160 (“The Coal Act was adopted six years after *Brock* came down, when Congress was presumably aware that we do not readily infer congressional intent to limit an agency’s power to get a mandatory job done merely from a specification to act by a certain time.”); *Nielsen*, 139 S. Ct. at 967 (Alito, J., joined by Roberts, C.J., and Kavanaugh, J.) (“This principle for interpreting time limits on statutory mandates was a fixture of the legal backdrop when Congress enacted [the statute at issue].”). We thus disagree with the Trade Court to the extent that it viewed the expiration of the time periods in § 1862(c)(1), standing alone, as automatically equating to the expiration of the President’s authority to take further burden-increasing steps, as he did here.

Second: The Trade Court’s ruling also appears to rest on a premise that the provisions of § 1862(c)(1) at issue apply their time requirements to each individual discrete imposition on imports, rather than to the adoption and initiation of a plan of action or course of action (with choices to impose particular burdens in the carrying out of the plan permissibly made later in time). The language of the provisions, however, does not support that premise.

The terms “action” and “take action” are not limited in that way, but can readily be used to refer to a process or launch of a series of steps over time. See, e.g., *Action*, Black’s Law Dictionary 49 (4th ed. 1957) (“an act or series of acts”); Black’s Law Dictionary 26 (5th ed. 1979) (same); Garner’s Dictionary of Modern Legal Usage 19 (2d ed. 1995) (“*action* suggests a process—the many discrete events that make up a bit of behavior—whereas *act* is unitary”); Garner’s Dictionary of Legal Usage 18 (3d ed. 2011) (same); Black’s Law Dictionary 37 (11th ed. 2019) (“The process of doing something”); see also, e.g., *Action*, Random House Webster’s Unabridged Dictionary 20 (2d ed. 2001) (similar); American Heritage Dictionary 17 (3d ed. 1992) (similar); Garner’s Dictionary of Modern American Usage 14 (1998) (“*Act* is unitary, while *action* suggests a process—the many discrete events that make up a bit of behavior.”); Garner’s Modern American Usage 16 (3d ed. 2009) (same). The authorization for the President to determine the “nature and duration of the action,” § 1862(c)(1)(A)(ii), supports, rather than excludes, coverage of a plan implemented over time, including options for contingency-dependent choices that are a

commonplace feature of plans of action. The phrase “implement that action,” § 1862(c)(1)(B), likewise conveys an understanding of “action” as covering plans of action. *See Implement*, 1 Shorter Oxford English Dictionary 1330 (5th ed. 2002) (“put (a decision or *plan*) into effect” (emphasis added)); The American Heritage Dictionary of the English Language 660 (1981) (“To provide a definite *plan* or procedure to ensure the fulfillment of” (emphasis added)); *see also, e.g., Implement*, Webster’s New World Dictionary of American English 677 (3rd College ed. 1988) (“to carry into effect” or “give practical effect to”); Random House College Dictionary 667 (Revised ed. 1982) (“to put into effect according to or by means of a definite plan or procedure”).

In short, the ordinary meaning of “action” in context indicates that the time directive applies to the announcement and adoption of the plan of action rather than each act following the adopted plan. *Cf. H.R. Rep. No. 100–576*, at 711 (1988) (Conf. Rep.) (“The House bill requires the President to decide whether to take action within 90 days after receiving the Secretary’s report, and to *proclaim* such action within 15 days.” (emphasis added)).

2

What the terms of subsection (c)(1) indicate, relevant statutory context reinforces. *See Merit Mgt. Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 892–93 (2018) (considering “[t]he language of [the provision at issue], the specific context in which that language is used, and the broader statutory structure”); *Johnson v. United States*, 559 U.S. 133, 139 (2010) (“Ultimately, context determines meaning.”); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 24, at 167 (2012) (“[T]he whole-text canon . . . calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.”).

Paragraph (3) specifically bolsters the understanding that the President is not barred, by paragraph (1), from adopting, outside the 15-day period for implementation, specific new burden-imposing measures not decided on and adopted within the period. Paragraph (3) so indicates for the situation when the initially proclaimed action is (bilateral or multilateral) negotiation:

(3)(A) If—

- (i) the action taken by the President under paragraph (1) is the negotiation of an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security, and
- (ii) either—

(I) no such agreement is entered into before the date that is 180 days after the date on which the President makes the determination under paragraph (1)(A) to take such action, or

(II) such an agreement that has been entered into is not being carried out or is ineffective in eliminating the threat to the national security posed by imports of such article,

the President shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security. The President shall publish in the Federal Register notice of any additional actions being taken under this section by reason of this subparagraph.

§ 1862(c)(3)(A).

Subparagraph (A) indicates that one of the President's options is to try to secure agreements with foreign nations. Negotiation and agreement themselves will typically occur after the 15 days specified in subsection (c)(1)(B) have passed. That is all the more true of the "other actions" the President is directed to take if negotiations fail or if resulting agreements are violated or are ineffective in eliminating the national-security threat. Those provisions run counter to the Trade Court's view that Congress forbade presidential imposition of newly specified burdens after § 1862(c)(1)'s 90-day and 15-day periods.⁶

More generally, § 1862's "evident purpose" is an aspect of the context that must be assessed to determine the fair reading of the statute. *See* Scalia & Garner, *Reading Law* § 4, at 63 (The presumption against ineffectiveness "follows inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness."); *see also id.* § 3, at 56 ("[C]ontext includes the purpose of the text."). The manifest purpose of this statute is to enable and obligate the President (in whom Congress vested the power to make the remedial judgments) to effectively alleviate the threat to national security identified in a finding by the Secretary with which the President has concurred. Reading § 1862(c)(1) to permit announcement of

⁶ Although the government in this case has not specifically argued that the President, in Proclamation 9772, determined that the steel-import agreements already entered into were "ineffective in eliminating the threat to the national security," § 1862(c)(3)(A)(ii)(II), it is not clear what substantive difference there is between that formulation and the President's declaration in the proclamation that further restrictions on imports were needed to meet the capacity-utilization target.

a plan within the specified 15 days, followed by implementation decisions reflecting contingencies affecting achievement of the goal defined by the Secretary's finding, furthers that evident purpose.

This does not mean that the statutory purpose is furthered by permitting *any* presidential imposition after the 15-day period, even an imposition that makes no sense except on premises that depart from the Secretary's finding, whether because the finding is simply too stale to be a basis for the new imposition or for other reasons. The statute indisputably incorporates a congressional judgment that an affirmative finding of threat by the Secretary is the predicate for presidential action, while also incorporating a congressional judgment that how to address the problem identified in the finding is a matter for the President, whose choices about remedy are not constrained by the Secretary's recommendations. See § 1862(c)(1) (predicating the President's power on the Secretary's "find[ing]" and not the Secretary's "recommendations"). This case involves presidential adherence to the key finding of a need for a certain capacity-utilization level, with no indication of staleness of that finding. We have no occasion to rule on other circumstances or to decide what aspects of presidential decisions under § 1862 are judicially reviewable.

It is enough to say that the Trade Court's categorical narrow reading of § 1862(c)(1)—precluding *all* impositions adopted after the 15-day period in implementation of a plan announced within the period—obstructs the statutory purpose. This case illustrates why. The threat to national security was tied to an excess of imports overall, from numerous countries, that left domestic capacity utilized less than an identified, plant-sustaining level. As the President struck deals with some countries as contemplated by Proclamation 9705, the agreed-to imports from those countries would logically affect—most relevantly, could *reduce*—the volume of imports from other countries, lacking agreements with the United States, that could be allowed if the stated goal of overall-imports reduction was still to be met. Paragraph (3) of § 1862(c) and Proclamation 9705 recognize this evident relationship. To prevent the President from increasing the impositions on non-agreement countries after the initial plan announcement would be to impede the President's ability to be effective in solving the specific problem found by the Secretary.

Transpacific has suggested that the President's authority to act outside the 15-day period without securing a new report from the Secretary is limited to relaxing impositions imposed initially within that period. See Oral Arg. at 1:07:48–1:10:00; see also *Transpacific I*, 415 F. Supp. 3d at 1275 (asserting that "the statute specifically grants the President power to 'determine the . . . duration of the action[,] a

power to end any action” (alterations in original) (quoting § 1862(c)(1)(A)(ii)). That suggestion, however, assumes a negative answer to the key question of whether the “action” authorized by paragraph (1) can be a plan under which later measures are imposed. It does not provide support for that answer. And that answer is not supported by the ordinary meaning of the language and conflicts with paragraph (3) of § 1862(c) and § 1862’s purpose entrusting the President with the duty to adopt effective measures for the threat found by the Secretary.

3

The “legal and historical backdrop” against which Congress legislated confirms that under § 1862(c)(1) the President has authority to pursue a continuing course of action, with adjustments (including additional impositions) adopted over time. *See Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703, 712 (2021) (“Congress drafted the expropriation exception and its predecessor, the Hickenlooper Amendment, against that legal and historical backdrop.”); *id.* at 711 (interpreting the statute at issue “[b]ased on this historical and legal background”).

a

Since 1955, Congress has delegated to the President broad discretion to adjust imports of an article that threaten to impair national security, if a designated executive officer has made a finding of such a threat. Subsequent amendments made changes, including changes to enhance the process leading to the predicate finding at the agency level and, at the presidential level, generally to add to the President’s authority and obligation to act in response to the relevant official’s threat finding. Throughout, Congress has retained the key term “action” in describing the President’s response.

Section 7 of the Trade Agreements Extension Act of 1955 provided in relevant part:

(b) In order to further the policy and purpose of this section, whenever the Director of the Office of Defense Mobilization has reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security, he shall so advise the President, and if the President agrees that there is reason for such belief, the President shall cause an immediate investigation to be made to determine the facts. If, on the basis of such investigation, and the report to him of the findings and recommendations made in

connection therewith, the President finds that the article is being imported into the United States in such quantities as to threaten to impair the national security, he shall take such *action* as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security.

Trade Agreements Extension Act of 1955, ch. 169, § 7, 69 Stat. 162, 166 (emphasis added). The provision gave the executive officer the responsibility to make a preliminary “reason to believe” finding, but it did not expressly declare that the officer, after investigation, must make a positive finding of threat as a precondition to presidential action.

In the Trade Agreements Extension Act of 1958, Congress made that precondition explicit and also made other amendments, while keeping the word “action.” *See Algonquin*, 426 U.S. at 568 (The 1958 amendments “added no limitations with respect to the type of action that the President was authorized to take. The 1958 re-enactment, like the 1955 provision, authorized the President under appropriate conditions to ‘take such action’ ‘as he deems necessary to adjust the imports.’” (cleaned up)). The 1958 statute provided in relevant part:

(b) Upon request of the head of any Department or Agency, upon application of an interested party, or upon his own motion, the Director of the Office of Defense and Civilian Mobilization (hereinafter in this section referred to as the “Director”) shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from other appropriate Departments and Agencies, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. If, as a result of such investigation, the Director is of the opinion that the said *article* is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall promptly so advise the President, and, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security as set forth in this section, he shall *take such action, and for such time*, as he deems necessary to adjust the imports of such article *and its derivatives* so that such imports will not so threaten to impair the national security.

Pub. L. No. 85–686, § 8(b), 72 Stat. 673, 678 (emphases added).

In addition to making explicit that the designated officer must make the threat finding, the 1958 provision embodied four relevant changes from the 1955 version. First, Congress expanded the President's power by adding that the President may adjust not only the "article" but also "its derivatives," even though the executive officer's report had to investigate only the "article." Second, Congress clarified that the President's discretion for the "action" included not only the nature of the action (*i.e.*, "such action") but its duration (*i.e.*, "for such time"). Third, Congress broadened what would suffice as the predicate for the President's authority: "[W]hile under the 1955 provision the President was authorized to act only on a finding that 'quantities' of imports threatened to impair the national security, the 1958 provision also authorized Presidential action on a finding that an article is being imported 'under such circumstances' as to threaten to impair the national security." *Algonquin*, 426 U.S. at 568 n.24. Fourth, Congress removed the requirement that the relevant officer seek the President's approval before starting an investigation. These features stayed materially the same until 1988.

In 1962, Congress reenacted the 1958 provision—without material change, the Supreme Court has noted, though some wording was altered (*e.g.*, the predicate "opinion" became a predicate "finding")—as section 232 of the Trade Expansion Act of 1962, Pub. L. No. 87-796, 76 Stat. 872, 977. *See Algonquin*, 426 U.S. at 568 ("When the national security provision next came up for re-examination, it was re-enacted without material change as § 232(b) of the Trade Expansion Act of 1962."). Between 1966 and 1988, Congress made various changes to the statute that have not been featured in the arguments made to this court in this case. For example, in 1975, Congress made the Secretary of the Treasury the official with the predicate-finding responsibility and relocated the "unless" clause addressing presidential disagreement with the predicate threat finding. *See Trade Act of 1974*, Pub. L. No. 93-618, § 127(d)(3), 88 Stat. 1978, 1993 (replacing the Director of the Office of Emergency Planning with the Secretary of the Treasury). In 1980, Congress added a legislative-veto procedure for presidential action adjusting imports of petroleum or petroleum products. *See Crude Oil Windfall Profit Tax Act of 1980*, Pub. L. No. 96-223, § 402, 94 Stat. 229, 301.

Just before Congress enacted its amendments in 1988, 19 U.S.C. § 1862 read in relevant part:

Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of the Treasury (hereinafter referred to as the "Secretary") shall immediately make an appropriate investigation, in

the course of which he shall seek information and advice from, and shall consult with, the Secretary of Defense, the Secretary of Commerce, and other appropriate officers of the United States, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion.

The Secretary shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation. The Secretary shall report the findings of his investigation under this subsection with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, his recommendation for action or inaction under this section to the President within one year after receiving an application from an interested party or otherwise beginning an investigation under this subsection.

If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall so advise the President and the President shall take such *action*, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

§ 1862(b) (1980) (emphasis and paragraph breaks added).

In sum, from the beginning, Congress delegated broad powers to the President to combat imports that a designated executive officer found to threaten to impair national security. The word “action,” which reflected the President’s broad discretion in determining the nature of the act, has always been present. Congress broadened the President’s already broad power in 1958 and, at the same time, reinforced the range of presidential discretion by adding the phrase “for such time.”

b

Practice under § 1862 during the three decades leading up to the 1988 amendments, and the understanding expressed during that time, provide strong confirmation that the proper meaning of the

language at issue here (added by those amendments) is that presidential authority extends to carrying out a course of remedial measures, including measures that further restrict imports, chosen over time to address the threat identified in the underlying finding. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004) (“We think history and practice give the edge to this latter position.”).

i

From 1955 to 1988, Presidents frequently adjusted imports, including by increasing impositions so as to restrict imports, without seeking or obtaining a new formal investigation and report after the initial one. In 1959, acting under the 1958 version of § 1862, the relevant official (then, the Director of the Office of Civil and Defense Mobilization) formally investigated and submitted a report to the President stating “his opinion ‘that crude oil and the principal crude oil derivatives and products are being imported in such quantities and under such circumstances as to threaten to impair the national security.’” Proclamation 3729, 24 Fed. Reg. 1,781, 1,781 (Mar. 12, 1959) (quoting the report). The President agreed and issued Proclamation 3729, which put into place a scheme, including licenses, to adjust the imports of crude oil and its derivatives. *Id.* The President also ordered the “Secretary of the Interior [to] keep under review the imports into [certain areas] of residual fuel oil to be used as fuel” and gave the Secretary the authority to “make, on a monthly basis if required, such adjustments in the maximum level of such imports as he may determine to be consonant with the objectives of this proclamation.” *Id.* at 1,783, § 2(e). The President further ordered relevant officers to “maintain a constant surveillance of” the imports of the article at issue and “its primary derivatives” and to “inform the President of any circumstances which, . . . might indicate the need for further Presidential action.” *Id.* at 1,784, § 6(a).

The specific imposition initially adopted in Proclamation 3729 was modified at least 26 times before a new investigation and report were completed—16 years later in 1975. *See* Restriction of Oil Imports, 43 Op. Att’y Gen. 20, 22 (1975) (1975 AG Opinion) (“Proclamation 3279 has been amended at least 26 times since its issuance in 1959.” (citing 19 U.S.C. § 1862 note)). At least some of those modifications (made without a new report) “radically amended the program.” *Algonquin*, 426 U.S. at 553; *see also* 1975 AG Opinion at 22 (“Some of those amendments have been minor administrative[] changes; others have involved major alteration of the means by which petroleum imports were restricted; none have been preceded by a formal § 232(b) investigation and finding.”).

In 1975, the Attorney General formally opined on the proper interpretation of the statute and concluded that it permitted modifications of prior actions:

The normal meaning of the phrase “such action,” in a context such as this, is not a single act but rather a *continuing course of action*, with respect to which the initial investigation and finding would satisfy the statutory requirement. This interpretation is amply supported by the legislative history of the provision, which *clearly contemplates a continuing process of monitoring, and modifying the import restrictions, as their limitations become apparent and their effects change.*

1975 AG Opinion at 21 (emphases added).⁷ The Attorney General emphasized the long practice of presidential action resting on that interpretation and added that Congress was aware of this practice. *See id.* at 22 (“The interpretation here proposed, whereby import restrictions once imposed can be modified without an additional investigation and finding, has been sanctioned by the Congress’ failure to object to the President’s proceeding on that basis repeatedly during the past 15 years.”). The next year, the Supreme Court highlighted the breadth of presidential authority under the statute and added that Congress was aware of presidential practice. *See Algonquin*, 426 U.S. at 570 (“Only a few months after President Nixon invoked the provision to initiate the import license fee system challenged here, Congress once again re-enacted the Presidential authorization encompassed in § 232(b) without material change. . . . The congressional acquiescence in President Nixon’s action manifested by the re-enactment of § 232(b) provides yet further corroboration that § 232(b)

⁷ *See also* Presidential Authority to Adjust Ferroalloy Imports Under § 232(b) of the Trade Expansion Act of 1962, 6 Op. O.L.C. 557, 562 (1982) (“Moreover, as this Department has previously indicated, the statutory language and relevant legislative history contemplate a continuing course of action, with the possibility of future modifications.”); *id.* (“As noted in a Commerce Department memorandum, the constant monitoring contemplated by § 232 encompasses not only a review of factual circumstances to determine whether a particular remedy is effective, but also a review to determine whether the initial finding of a threat to the national security remains valid.”); Legal Authorities Available to the President to Respond to a Severe Energy Supply Interruption or Other Substantial Reduction in Available Petroleum Products, 6 Op. O.L.C. 644, 678 (1982) (“The President’s powers under § 232(b) have received a broad interpretation.”).

In 1982, the Office of Legal Counsel stated that, for at least some changes, it would be advisable to seek a new predicate finding, but the circumstances, involving remoteness or indirectness of the connection of the presidential action to the threat, are not present here. *See* 6 Op. O.L.C. at 561 (discussing remoteness of a program’s impact on importation); *see also* The President’s Power to Impose a Fee on Imported Oil Pursuant to the Trade Expansion Act of 1962, 6 Op. O.L.C. 74, 77–80 (1982) (discussing whether to get a new report with a predicate finding to avoid challenges based on the remoteness or indirectness of the proposed import restrictions). We have no occasion to explore such situations.

was understood and intended to authorize the imposition of monetary exactions as a means of adjusting imports.”).

Congress amended the statute in April 1980, adding what is now subsection (f), which addresses petroleum and sets out a congressional-disapproval process. Crude Oil Windfall Profit Tax Act, § 402, 94 Stat. at 301. Between the Attorney General’s 1975 opinion and that amendment, which was the last one before 1988, the President continued to modify measures adopted under the statute without obtaining new formal reports. *See PrimeSource Bldg. Prods., Inc. v. United States*, 497 F. Supp. 3d 1333, 1375–76, 1387–88 (Ct. Int’l Trade 2021) (Baker, J., concurring in part and dissenting in part) (noting at least seven instances). Between the April 1980 amendment and the inauguration of the new President in January 1981, the President modified a prior proclamation at least four times without a new investigation and report. *See id.* (noting at least four instances). It is not disputed before us that the modifications during the decades of practice included impositions of additional restrictions. *See, e.g., id.* at 1386–88.

At the time of the 1988 amendments, then, practice under and executive interpretation of the statute provided a settled meaning of “action” as including a “plan” or a “continuing course of action.” *See* Oral Arg. at 1:04:06–1:04:21 (Q: “The pre-1988 version, you would agree, it gave the President the authority to do subsequent actions years after the initial proclamation? Is that right?” A: “That is the way the statute reads.”). This settled meaning is strongly presumed to have continued through the 1988 amendments, which kept the key term “action,” even while making other changes to the provision, indeed the subsection, in which the term appeared. *See, e.g., Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633–34 (2019) (“In light of this settled pre-AIA precedent on the meaning of ‘on sale,’ we presume that when Congress reenacted the same language in the AIA, it adopted the earlier judicial construction of that phrase.”); *Dir. of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 324 (2001) (requiring a clear indication of a change in meaning to “disrupt the 50-year history of state taxation of banks for cooperatives”); *cf. NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (“[T]he longstanding practice of the government can inform our determination of what the law is.” (cleaned up)); *Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018) (looking at “historical practice” for statutory interpretation).

ii

Overcoming the strong implication of continuity of the settled meaning would require a “clear indication from Congress of a change in policy.” *United States v. O’Brien*, 560 U.S. 218, 231 (2010) (internal quotation marks omitted). There is no such indication. Congress did not change “action” in 1988. And what it did change fails to imply the narrowing of presidential authority the Trade Court found.

In the 1988 amendments, Congress elaborated on the process by which the executive official responsible for making the predicate finding of threat—by then, the Secretary of Commerce—was to make that decision. § 1862(b). And in numerous ways, Congress acted to “spur” governmental action, not “limit the scope of . . . authority” previously possessed. *Brock*, 476 U.S. at 265. Even as to the Secretary, Congress shortened the period for the determination to 270 days (from the earlier one year). § 1862(b). Congress then directed that, once the Secretary makes a finding of threat, the President is to respond to that finding within two short periods—one for the determination whether the President concurred in the finding and the determination what to do about the threat if so, the other for implementing the action the President deemed necessary. § 1862(c)(1). Congress also made express that the presidential action chosen could be a bilateral or multilateral negotiation—something the conferees themselves understood was already implicit in § 1862(c)(1), *see* Conf. Rep. at 712—but it put that option under new constraints so that the option would not be used for what ended up as inaction or ineffective action. § 1862(c)(3).

None of the new language in the statute, on its own or by comparison to what came before, implies a withdrawal of previously existing presidential power to take a continuing series of affirmative steps deemed necessary by the President to counteract the very threat found by the Secretary. To be sure, Congress did change “for such time” language to “duration” language, but that change was a “stylistic” one only, not suggesting a change of meaning. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 343 n.3 (2005); *see also* Scalia & Garner, *Reading Law* § 40, at 256 (“stylistic or nonsubstantive changes” do not imply change of prior meaning); *Universal Steel Prods., Inc. v. United States*, 495 F. Supp. 3d 1336, 1351–52 (Ct. Int’l Trade 2021); *PrimeSource*, 497 F. Supp. 3d at 1378 (Baker, J., concurring in part and dissenting in part). The same is true of the change from “take such action . . . as [the President] deems necessary” to “determine the nature . . . of the action that, in the judgment of the President, must be taken.”

The new provisions have the evident purpose of producing more action, not less—and of counteracting a perceived problem of inaction, including inaction through delay. In this context, the directive to the President to act by a specified time is not fairly understood as implicitly meaning “by then or not at all” as to each discrete imposition that might be needed, as judged over time.

There is no material dispute that the background to the 1988 amendments was a perceived problem of inaction, including by delay. The conferees stated the problem: “Present law provides no time limit after the Commerce Secretary’s report for the President’s decision on the appropriate action to take.” Conf. Rep. at 711. Indeed, in 1982, having received a report from the Secretary finding a national-security threat from imports of ferroalloy products, the President was advised by the Office of Legal Counsel that “[n]o time frame constrains the President” in acting on the report. Presidential Authority to Adjust Ferroalloy Imports Under § 232(b) of the Trade Expansion Act of 1962, 6 Op. O.L.C. 557, 562 (1982); *see also id.* at 558, 563. Congress plainly acted to oblige the President to act within specified periods, but as Transpacific has acknowledged, nothing in the legislative history suggests that, if that duty was breached, the President could not act later. Oral Arg. at 1:02:44–1:03:16 (Q: “Where is there any expression of legislative intent that these time limits that were installed in 1988 into section 232(b) were designed to yank away from the President any authority to take action outside of that time limit? Is the answer that there really isn’t anything in the legislative history on that?” A: “I would have to agree with Your Honor, yes, there is nothing in the legislative history that says that.”).

The specific focus of Congress’s concern involved presidential inaction concerning imports of machine tools. Based on a March 1983 request for investigation, the Secretary, in February 1984, sent the President a report finding that “imports in certain machine tools markets did threaten the U.S. national security.” *See General Accounting Office, International Trade: Revitalizing the U.S. Machine Tool Industry* 9 (1990) (GAO). The President responded that the “report should incorporate new mobilization, defense, and economic planning factors then being developed by an interagency group” and “directed the Secretary of Commerce to update the machine tools investigation.” Statement on the Machine Tool Industry, 1986 Pub. Papers 632, 632–33 (May 20, 1986). Nearly two years later, in March 1986, the Secretary submitted an updated report, and two months after that, the President announced that he agreed with the Secretary’s finding and proclaimed his “action plan,” his “course of action,”

id.—to “seek voluntary export restraint agreements to reduce machine tool imports as part of an overall Domestic Action Plan supporting the industry’s modernization efforts,” GAO at 9. About seven months later, in December 1986, the President announced that he reached a five-year voluntary restraint agreement with Japan and Taiwan. *Id.*; see also Statement on the Revitalization of the Machine Tool Industry, 1986 Pub. Papers 1632, 1632–33 (Dec. 16, 1986).

It is undisputed that “Congress did not applaud the” President’s delay for the machine-tools articles. *Fed. Republic of Germany*, 141 S. Ct. at 711. The Trade Court has recognized as much. See *Transpacific II*, 466 F. Supp. 3d at 1252 (“[T]he 1988 Amendments were passed against the backdrop of President Reagan’s failing to take timely action in response to the Secretary’s report finding that certain machine tools threatened to impair national security and Congress’s resulting frustration.”); *Universal Steel*, 495 F. Supp. 3d at 1352 n.17 (“The history of the 1988 amendments reveals that the amendments were motivated in no small part by a desire to accelerate Presidential action pursuant to Section 232. Congress had been frustrated by perceived undue Presidential delay in taking timely or effective action pursuant to the Secretary’s report that machine tools threatened to impair the national security.”); *id.* at 1353 (“Furthermore, the 1988 amendments to Section 232 were motivated by a desire to prevent Presidential inaction and inefficiency under Section 232.”).⁸ This history tends to undermine, not support, the Trade Court’s ruling that the new timing provisions were meant not only to create a duty to act within specified periods but also to disable the President from acting later if those periods had ended, even if the actions were needed to effectuate the Secretary’s finding of threat following a timely-announced plan of action.

⁸ See also, e.g., *Comprehensive Trade Legislation: Hearing on H.R. 3 Before the H. Comm. on Ways & Means*, 100th Cong. 199 (1987) (statement of Rep. Jim Wright, Speaker of the U.S. House of Representatives) (“Many of our trade problems can be directly traced to the delays, the abuses of discretion, and ill-considered policy decisions by those officially appointed to carry out American policy. One of the worst delays was the machine tools case.”); *Trade Reform Legislation: Hearing Before the Subcomm. on Trade of the H. Comm. on Ways & Means*, 99th Cong. 1282 (1986) (statement of Rep. Barbara B. Kennelly, Member, H. Comm. on Ways & Means) (noting that without a deadline, the President could “leave these cases to languish indefinitely”); *Threat of Certain Imports to National Security: Hearing on S. 1871 Before the S. Comm. on Fin.*, 99th Cong. 18 (1986) (statement of Sen. Charles E. Grassley, Member, S. Comm. on Finance) (“[I]t was almost 2 years from that date before the President asked several major foreign sources of machine tools to cut exports to the United States. And of course, when the national security is at stake, such a delay is incomprehensible to me and to most other people.”); *id.* at 24 (statement of Sen. Robert C. Byrd) (“So, there is no time limit under present law for the President to act in which he has to act. We have seen petitions by the ferroalloy industry and the machine tools industry drag on for months and months without resolution.”).

Transpacific suggests that the Trade Court's narrow reading of § 1862(c)(1) is necessary to avoid making § 1862(c)(3) superfluous. *See* Transpacific Response Br. at 25. We disagree. Subsection (c)(3) makes clear that an initial action can indeed be a plan that leads to additional impositions well after the time periods of subsection (c)(1) have passed. For example, if an agreement with one country is "ineffective in eliminating the threat to the national security posed by imports of such article," as assessed long after the 90-day and 15-day periods have ended, the President "shall take such other actions" as necessary "to adjust the imports of such article so that such imports will not threaten to impair the national security." § 1862(c)(3)(A). Having recognized that entry into negotiations can be part of the President's remedial choice under subsection (c)(1), Congress insisted that the negotiation/agreement option not be a route to inaction, or a substitute for effective action, by writing very specific directives that apply in that situation. Those directives are not superfluous of subsection (c)(1)'s contemplation of a plan of action with adjustment of implementation choices over time.

Relatedly, we reject Transpacific's suggestion that the Trade Court's interpretation of subsection (c)(1) is supported by the fact that paragraph (1) uses "action" (singular) while paragraph (3) uses "actions" (plural). Transpacific Response Br. at 24. "[U]nless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular." 1 U.S.C. § 1. In any event, "action," in particular, can refer to an extended-over-time process or a single event at a single moment. Here, paragraph (1)'s reference to "take action" (or "action that . . . must be taken") is addressing the initial announcement of the response as a whole, and naturally encompasses a plan that could have many components or types of components. In contrast, paragraph (3)'s reference to "actions" is in a context where the distinction is being made between one kind of component (bilateral or multilateral efforts, which have left imports too high) and another kind, drawing the focus to the more granular level. The broad scope of the singular formulation in paragraph (1) is not undermined by the use of the plural in paragraph (3). *See Cherokee Nation v. State of Georgia*, 30 U.S. 1, 19 (1831) (Marshall, C.J.) ("It has been also said, that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument: their meaning is controlled by the context. This is undoubtedly true."); *see also Yates v. United States*, 574 U.S. 528, 537 (2015).

Transpacific also suggests that the timing provisions were meant to prevent the President from acting on stale information. *Transpacific Response Br.* at 29; *see also Transpacific II*, 466 F. Supp. 3d at 1252. But that observation does not support the categorical narrow interpretation adopted by the Trade Court and pressed by *Transpacific*, especially given the already-discussed considerations of text and context, including purpose and history, that strongly undermine the narrow interpretation. Concerns about staleness of findings are better treated in individual applications of the statute, where they can be given their due after a focused analysis of the proper role of those concerns and the particular finding of threat at issue. In so stating, we add, we are not prejudging the scope of judicial reviewability of presidential determinations relevant to that concern.⁹

Here, there is no genuine concern about staleness. Proclamation 9772, the challenged proclamation, came only months after the initial announcement, which itself provided for just such a possible change in the future, and rested on a determination by the Secretary—about needed domestic-plant capacity utilization—as to which no substantial case of staleness has been made.¹⁰

Finally, *Transpacific* argues that the constitutional-doubt canon supports its narrow reading of § 1862 because a contrary reading raises serious nondelegation-doctrine concerns. *Transpacific Response Br.* at 16–17, 19, 31; *see also Transpacific II*, 466 F. Supp. 3d at 1253; *Transpacific I*, 415 F. Supp. 3d at 1275–76. Under governing precedent, there is no substantial constitutional doubt. *See generally Algonquin*, 426 U.S. at 550–70; *American Inst. for Int’l Steel*, 806 F. App’x at 983–91. The Supreme Court in *Algonquin* concluded that § 1862—before Congress added the timing deadlines—“easily fulfills” the intelligible-principle standard. 426 U.S. at 559. We have not been shown why the particular interpretation of § 1862(c)(1) at issue raises a materially distinct issue under the nondelegation doctrine.

* * *

For the foregoing reasons, we reverse the Trade Court’s determination that Proclamation 9772 violated § 1862.

⁹ We also note the possibility that § 1862(b)(1)(A) allows an “interested party” to request that the Secretary launch an investigation to determine that imports found to threaten national security no longer do so. We do not address that possibility.

¹⁰ The finding of the Secretary at issue was about the needed capacity utilization. How much reduction of imports is being achieved as measures are implemented is a separate matter, necessarily a future-oriented one, that is not the subject of § 1862(b). Proclamation 9705 put in place requirements for monitoring the import reductions so that the President had current information. *See* 83 Fed. Reg. at 11,628; *see also* Proclamation 9772, 83 Fed. Reg. at 40,429, ¶¶ 3–4 (relying on updated information); *cf.* Proclamation 3729, 24 Fed. Reg. at 1,783, § 2(e) and 1,784, § 6(a) (ordering monitoring in 1959); 1975 AG Opinion at 21 (contemplating a “continuing process of monitoring”); 6 Op. O.L.C. at 562 (same).

B

It is well established that the Fifth Amendment's Due Process Clause has an equal-protection guarantee that mirrors the Fourteenth Amendment's Equal Protection Clause. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); U.S. Const. amend. XIV, § 1 ("nor deny to any person within its jurisdiction the equal protection of the laws"); U.S. Const. amend. V ("nor be deprived of life, liberty, or property, without due process of law"). Here, the class allegedly being singled out for unfavorable treatment is the class of "U.S. importers of Turkish steel products." Transpacific Response Br. at 33. Transpacific's claim of unconstitutional discrimination against that class, we conclude, fails.

The most demanding standard that could apply here is the undemanding rational-basis standard. Transpacific has made no persuasive case that the class of importers of a particular product from a particular country falls into any category for which a heightened standard of review under equal-protection analysis has been recognized. The Supreme Court "has long held that a classification neither involving fundamental rights nor proceeding along suspect lines cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012) (cleaned up).

Under rational-basis review, Transpacific, as the challenger, has the burden to establish that there is no "reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (internal quotation marks omitted); *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."); *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 487–88 (1955) ("But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

Transpacific has failed to meet its burden. Proclamation 9772's "policy is plausibly related to the Government's stated objective to protect" national security. *Hawaii*, 138 S. Ct. at 2420. In Proclamation 9772, the President noted that the Secretary in the January 2018 report had recommended "applying a higher tariff to a list of specific

countries should [the President] determine that all countries should not be subject to the same tariff”—a list that includes Turkey—and stated that “Turkey is among the major exporters of steel to the United States for domestic consumption.” 83 Fed. Reg. at 40,429, ¶ 6. And the President highlighted that the Secretary “advised [him] that this adjustment will be a significant step toward ensuring the viability of the domestic steel industry.” *Id.* For at least those reasons, the President determined that it was “necessary and appropriate” to increase the tariff from 25% to 50% and that the increase would “further reduce imports of steel articles and increase domestic capacity utilization.” *Id.* Increasing tariffs on a major exporter is plausibly related to the achievement of the stated objective of achieving the level of domestic capacity utilization needed for plant sustainability found important to protect national security.

Transpacific complains that the President singled out Turkey, even though other countries export more. Transpacific Response Br. at 38 (noting that “Canada, Mexico, Brazil, South Korea, Russia, Japan, Germany, and China” are major exporters of steel). But it is rational for the President to try a steep increase on tariffs for only one major exporter to see if that strategy helps to achieve the legitimate objective of improving domestic capacity utilization without extending the increase more widely. That is especially true because the United States’s relations with any given country often will differ, in ways relevant to § 1862, from its relations with other countries. *See Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1357 (Fed. Cir. 2010) (“The reasons behind different duty rates vary widely based on country of origin, the type of product, the circumstances under which the product is imported, and the state of the domestic manufacturing industry. . . . Further, differential rates may be the result of trade concessions made by the United States in return for unrelated trade advantages.”).

Here, of the eight countries Transpacific mentions, the President was negotiating with at least four. *See, e.g.*, Proclamation 9740, 83 Fed. Reg. at 20,683–84, ¶¶ 4–6 (noting negotiations with South Korea, Brazil, Canada, and Mexico, among other countries). Of those four, the President had reached agreements with two of them (Brazil and South Korea) before issuing Proclamation 9772. *See, e.g., id.* at 20,683–84, ¶¶ 4–5 (agreement with South Korea, which included “a quota that restricts the quantity of steel articles imported into the United States from South Korea”); Proclamation 9759, 83 Fed. Reg. at 25,857–58, ¶ 5 (agreement with Brazil, among other countries). And of the four countries the President might not have been negotiating with, two of them did not appear on the Secretary’s list of a

subset of countries to impose tariffs on. See January 2018 report, 85 Fed. Reg. at 40,205 (not listing Japan or Germany but listing “Brazil, South Korea, Russia, Turkey, India, Vietnam, China, Thailand, South Africa, Egypt, Malaysia and Costa Rica”). More generally, we see no authority or sound basis for treating equal-protection analysis under the rational-basis standard as requiring judicial inquiry into differences among particular countries’ relations with the United States that might legitimately affect the possibility of negotiations or furnish reasons not to include particular countries in efforts to reduce overall imports of a particular article. See *Hawaii*, 138 S. Ct. at 2421 (“[W]e cannot substitute our own assessment for the Executive’s predictive judgments on such [foreign-policy] matters, all of which are delicate, complex, and involve large elements of prophecy.” (internal quotation marks omitted)).

The Trade Court concluded that the present “case is materially indistinguishable from *Allegheny Pittsburgh Coal Company v. County Commission of Webster County*, 488 U.S. 336 (1989).” *Transpacific II*, 466 F. Supp. 3d at 1258. We disagree. *Allegheny* must be read narrowly; the Supreme Court has made clear that it is the “exception,” the “rare case.” *Armour*, 566 U.S. at 686–87; see also *Nordlinger v. Hahn*, 505 U.S. 1, 16 (1992) (“*Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme.”). *Allegheny* involved a circumstance in which the only apparent basis for the county’s distinction between the favored and disfavored class was one the county was barred from asserting because the State’s constitution disclaimed it. See *Allegheny*, 488 U.S. at 338; *id.* at 345 (“But West Virginia has not drawn such a distinction. Its Constitution and laws provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value.”); *Armour*, 566 U.S. at 686–87 (describing *Allegheny* as resting on the fact that “in light of the state constitution and related laws requiring equal valuation, there could be no other rational basis for the [challenged] practice”).

In the present case, in contrast, there is no applicable federal-law prohibition on different treatment of the imports of articles from different countries. The Trade Court cited 19 U.S.C. § 1881 when asserting that “[t]he status quo under normal trade relations is equal tariff treatment of similar products irrespective of country of origin.” *Transpacific II*, 466 F. Supp. 3d at 1258 (citing § 1881). But the Trade Court did not assert that § 1881 is actually a prohibition on the distinction made in implementing § 1862 here. Nor does *Transpacific*

so contend—or even cite § 1881 in defending the Trade Court’s decision. Transpacific Response Br. at 31–55. In fact, § 1881 begins with the phrase, “Except as otherwise provided in this title,” before stating a principle that “any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement under this title or section 350 of the Tariff Act of 1930 [19 U.S.C. § 1351] of this title shall apply to products of all foreign countries, whether imported directly or indirectly.” The exception for “this title,” the government has explained (with no response from Transpacific), refers to Title II of the Trade Expansion Act of 1962, of which section 232 of that Act, *i.e.*, 19 U.S.C. § 1862, is a part. U.S. Opening Br. at 45. The overriding legal bar on the challenged distinction that was present in *Allegheny* is not present here. *See* Oral Arg. at 1:17:15–1:17:38 (Transpacific conceding that the applicable law here differs from the one in *Allegheny*).

Transpacific also points to certain sources outside the agency record—*i.e.*, outside the record on which the Trade Court’s judgment rested, by joint motion—to support its argument that the only purpose of Proclamation 9772’s policy is animus toward U.S. importers of Turkish steel. *E.g.*, Transpacific Response Br. at 43. But Transpacific has not shown how animus towards importers of goods from a particular country (which is not animus towards people from particular countries) would, if shown, alter the applicability of rational-basis review. And in any event, Transpacific’s evidence does not justify altering our conclusion. Nearly all of Transpacific’s extrinsic evidence consists of statements by the President that are too “remote in time and made in unrelated contexts” to “qualify as ‘contemporary statements’ probative of the decision at issue.” *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1916 (2020) (plurality opinion) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977)). And the statement from the President on the same day as Proclamation 9772 does not reflect animus toward U.S. importers of Turkish steel, let alone negate the reasonably conceivable state of facts establishing a rational basis for the policy. *See* J.A. 499.

We must “uphold [Proclamation 9772] so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.” *Hawaii*, 138 S. Ct. at 2420. Transpacific has failed to establish that Proclamation 9772 had no “legitimate grounding in national security concerns, quite apart from any . . . hostility” to U.S. importers of Turkish steel. *Id.* at 2421. We conclude that Proclamation 9772 did not violate the equal-protection guarantees of the Fifth Amendment’s Due Process Clause.

III

We reverse the Trade Court's decision and remand the case for entry of judgment against Transpacific. On remand, the Trade Court may determine whether that judgment should include dismissal of the claim against the President.

The parties shall bear their own costs.

REVERSED AND REMANDED

TRANSPACIFIC STEEL LLC, BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., BORUSAN MANNESMANN PIPE U.S. INC., THE JORDAN INTERNATIONAL COMPANY, Plaintiffs-Appellees v. UNITED STATES, JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, TROY MILLER, IN HIS OFFICIAL CAPACITY AS SENIOR OFFICIAL PERFORMING THE DUTIES OF THE COMMISSIONER FOR UNITED STATES CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF COMMERCE, GINA RAIMONDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE, Defendants-Appellants

Appeal No. 2020–2157

Appeal from the United States Court of International Trade in No. 1:19-cv-00009-CRK-GSK-JAR, Senior Judge Jane A. Restani, Judge Claire R. Kelly, Judge Gary S. Katzmann.

REYNA, *Circuit Judge* dissenting.

John Adams warned that “Power must never be trusted without a Check.”¹ The expression of caution from our Founding Father is as much true today as it was at the founding of our nation. It also has exact application to this appeal. The essential question posed by this appeal is whether Congress enacted § 232 to grant the President unchecked authority over the Tariff.

The U.S. Court of International Trade, in a special three judge panel,² determined that President Trump exceeded his statutory authority by adjusting tariffs imposed for national security reasons outside the time limits specified in § 232. My colleagues reverse the Court of International Trade holding that § 232 does not temporally limit the President’s authority to act. I would affirm the Court of International Trade and hold that the discretionary authority Congress granted the President under § 232 is temporally limited and that the President in this has case exceeded that authority. I dissent.

INTRODUCTION

My dissent is based on three grounds. First, the majority overlooks the context of § 232³ as a trade statute. In § 232, Congress has delegated to the Executive Branch certain narrow authority over

¹ Letter from John Adams to Thomas Jefferson (Feb. 2, 1816) (on file with the National Archives), <https://founders.archives.gov/documents/Jefferson/03-09-02-0285>.

² The chief judge of the Court of International Trade is authorized to designate a three-judge panel to decide a case that “(1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws.” 28 U.S.C. § 255(a).

³ Trade Agreement Expansion Act of 1962, Pub. L. No. 87–794, § 232, 76 Stat. 872, 877 (1962) (codified as amended at 19 U.S.C. § 1862) (“§ 232” or “§ 1862”).

trade—an area over which Congress has sole constitutional authority—for the purpose of safeguarding national security. The majority expands Congress’s narrow delegation of authority, vitiating Congress’s own express limits, and thereby effectively reassigns to the Executive Branch the constitutional power vested in Congress to manage and regulate the Tariff. *See* U.S. CONST. art. I, § 8. The majority therefore seeks to walk in the shoes of the Founders: its present expansion of Executive Authority is more than legislating from the bench, it is amending the Constitution. Second, § 232 is written in plain words that evoke common meaning and application. The majority articulates no sound reason to diverge from that plain language but expounds at great length, instead, on what the statute does not say or what it purportedly means to say. It engages in statutory leapfrog, hopping here and there but ignoring what it has skipped. Third, § 232’s legislative history shows that Congress intended, for good reason, to end the Executive Branch’s historical practice of perpetually modifying earlier actions without obtaining a new report from the Secretary of Commerce and without reporting to Congress.

DISCUSSION

I

Congress’s Authority Over Trade

The majority decision is based on a rationale that ignores the history of the U.S. trade law framework. It ignores that significant experience that Congress has in enacting delegation statutes, experience that stretches back to the founding of this country. In vitiating the express limits imposed on a narrow delegation of Congressional authority, the majority tears at the legal framework established by the Founders and Congress and imperils the very relief sought to be provided under § 232.

The Constitution vests in Congress sole power over the Tariff when it confers on Congress the power “To lay and collect Taxes, Duties, Imposts, and Excises” and “To regulate Commerce with foreign Nations.” U.S. CONST. art. I, § 8. Only Congress, therefore, has power derived from the Constitution to establish, revise, assess, collect, and enforce tariffs (which may include duties, taxes and impost) that are assessed and collected upon the importation of goods.

Over time, Congress has delegated to the Executive Branch authority to act on certain matters involving tariffs. For example, Congress has delegated to the Executive Branch authority to negotiate tariff reductions via multi-lateral trade agreements, such as the General

Agreement on Tariffs and Trade (“GATT”) (reciprocal and non-reciprocal tariff reduction among the contracting members); regional trade agreements, such as the North American Free Trade Agreement (“NAFTA”) (eliminating tariffs on almost 100% of the trade among the parties to the agreement); and non-reciprocal programs, such as the Generalized System of Preferences (“GSP”) (programs designed to assist the economic development of lesser developed economies).⁴ But in each instance, Congress has maintained oversight by, for example, reviewing negotiating objectives and holding hearings. Congress has also held the ultimate authority to approve the results of the Executive Branch’s negotiations.⁵ Under our constitutional scheme, any statutory limitations placed by Congress on a delegation of authority to the President bind him to act within those limits, and any action taken outside such limits exceeds such authority and is therefore illegal. That precisely is what happened in this case.

Section 232

Section 232 is a trade relief statute, a narrow delegation of authority by Congress to the President to take trade-related action when necessary to safeguard national security. *See* 19 U.S.C. § 1862. As such, we should be wary of any undue expansion, whether by the Executive or the Judicial branch, of the President’s delegated authority.

The § 232 procedures relevant to this appeal are straightforward and clear. At the outset, the Secretary of Commerce initiates an investigation on whether certain importation threatens to impair national security. 19 U.S.C. § 1862(b)(1)(A). Section 232 investigations are trade focused. The “evidence” examined is therefore trade data and economic statistics and any other circumstances involving the production, commercialization, and importation of the good subject to investigation. Factors examined often include U.S. shortages; U.S. and foreign production; excess and underutilized capacity; U.S. shipments and domestic consumption; plant closures; prices; and worker and manufacturing dislocations caused by bilateral or multi-lateral trade arrangements.⁶

No more than 270 days after the investigation is initiated, the Secretary of Commerce must submit a report to the President on the effects of the importation at issue, whether a threat to national

⁴ The GSP was authorized by Congress in the Trade Act of 1974, *see* Trade Act of 1974, Pub. L. No. 93-618, § 501, 88 Stat. 1978, 2066 (1975), and is subject to renewal by Congress.

⁵ *See, e.g.*, Uruguay Round Agreements Act, Pub. L. No. 103-465, § 101(a), 108 Stat. 4809, 4814 (1994) (approving the trade agreements and the statement of administrative action to implement the agreements submitted to Congress).

⁶ *See, e.g.*, 31 C.F.R. § 9.4.

security exists, and the recommended course of action, if any. *Id.* § 1862(b)(3). The President then has 90 days to determine whether he agrees with the Secretary’s findings and, if so, determine “the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports” at issue to address the threat. *Id.* § 1862(c)(1)(A). The President’s “adjustment of imports” may involve increasing or decreasing tariffs on imports of a good or the establishment or elimination of some other trade-related restriction. To the extent the President acts to “adjust imports” under § 232, such adjustments invariably seek to improve the competitiveness of the U.S. industry that produces the same or similar good as that subject to the investigation (in this case, steel).⁷

The President is then required to “implement that action *by no later than the date that is 15 days after the day on which the President determines to take action.*” *Id.* § 1862(c)(1)(B) (emphasis added). The President “shall” also, within 30 days after the President’s determination on whether to take action, submit to Congress a written statement of the reasons for the chosen action or inaction.⁸ *Id.* § 1862(c)(2).

Because the procedures set forth in § 232 are trade focused, and the relief provided is trade specific, the subject matter of § 232 flows directly Congress’s constitutional power over the Tariff. The majority decision, however, is untethered from the U.S. trade law context. As such, it answers the wrong question. *See King v. Burwell*, 576 U.S. 473, 492 (2015) (reciting the “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme” (citation and quotation omitted)). The real question is whether Congress has delegated to the President authority to act to adjust imports outside § 232’s time limits. For the reasons below, and as rightly concluded by the Court of International Trade, the answer is no. Congress has placed time limits upon the President that are plain, clear, and

⁷ *See, e.g.*, Proclamation No. 9705, 83 Fed. Reg. 11,625, 11,626 (Mar. 8, 2018) (“This relief will help our domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel workers, and maintain or increase production, which will reduce our Nation’s need to rely on foreign producers for steel and ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense.”).

⁸ Section 232 also contemplates that the President may decide to take action by way of negotiations with another country to limit or restrict imports into the U.S. *Id.* § 1862(c)(3). If the President decides to negotiate, subsection (c)(3) requires a different timeline. If no agreement is entered into before the date that is 180 days after the date on which the President made his § 1862(c)(1)(A) determination to take action, or if the negotiated agreement is not carried out or effective in eliminating the threat, the President “shall take such other actions as the President deems necessary to adjust the imports[.]” *Id.* § 1862(c)(3)(A). This appeal does not directly involve the negotiations alternative.

unmistakable, and has mandated that, if the President decides to act, he must do so “by no later than” those time limits.

II

The plain language and legislative history of § 232 demonstrate that the President must act within the specified time limits or else forfeits the right to do so until the Secretary of Commerce provides a new report.

The Plain Language

Statutory interpretation begins with the language of the statute. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). If the language is plain, then the inquiry ends, and “the sole function of the courts is to enforce it according to its terms.” *Id.* (citation and quotation omitted). Here, § 232 plainly requires that the President “shall,” within 90 days of receiving the Secretary’s report, determine whether she agrees with the report and determine the nature and duration of the action, if any, to take to avoid impairment to national security. 19 U.S.C. § 1862(c)(1)(A). If the President decides to act, she “shall” do so within 15 days of determining that the action is warranted. *Id.* § 1862(c)(1)(B).

The majority decides that “shall” means “may.” Maj. Op. at 23–24. I discern no sound reason for that interpretation permitting the President to modify the action indefinitely outside the statutory time limits. The word “shall” in a statute “normally creates an obligation impervious to judicial discretion.” *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); see also *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) (“Unlike the word ‘may,’ which implies discretion, the word ‘shall’ usually connotes a requirement.”); *United States v. Rodgers*, 461 U.S. 677, 706 (1983). Applying the normal legal meaning of “shall,” § 232 requires the President to follow the deadlines set forth in the statute. The result is not draconian: If the President does not act in time, he must obtain a new report from the Secretary of Commerce—which may be the same as or similar to the previous report—in order to be authorized again to take action to avoid impairment of national security. But nothing in § 232 gives the President discretion to ignore the time limits or modify the initial action indefinitely. “[W]ithout ‘any indication’ that [§ 232] allows the government to lessen its obligation, we must ‘give effect to [§ 232’s] plain command.’” *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1321 (2020) (quoting *Lexecon*, 523 U.S. at 35).

The majority also interprets the word “action” to encompass a “plan of action” that may be modified and completed long after the statutory time limits expire. Maj. Op. at 25–26. This reading is unavailing. Section 232 repeatedly refers to *taking* an action, and plans cannot be taken. Section 232’s use of the word “implement” does not change this conclusion: a tariff can be implemented, but that does not make that tariff a plan of action or series of actions. Further, Congress chose the singular form of “action” even though, there is no question, it was capable of selecting the plural. *See* 19 U.S.C. § 1862(c)(3) (referring to “actions”).

The majority’s reading should also be rejected because it clashes with several other aspects of § 232, rendering them superfluous, nonsensical, and useless.⁹ The Supreme Court has warned against statutory interpretations that “render[] superfluous another portion of that same law.” *Maine*, 140 S. Ct. at 1323 (citations and quotations omitted). First, § 232 requires the President to determine the “duration” of “*the action*” chosen. 19 U.S.C. § 1862(c)(1)(A)(ii). This requirement has no teeth if an “action” may include an open-ended series of actions that may be endlessly modified. Further, § 232 requires the President to provide Congress with a statement of the reasons for the chosen action (or inaction) within 30 days of his determination on whether to take action. *Id.* § 1862(c)(2). Such a requirement is useless to Congress if the statute permits the President to adopt a continuing plan of action that may be changed later.

Section 232 also permits the President to take “such other actions as the President deems necessary” if the President initially selected the action of negotiation and the ensuing negotiations are unfruitful. 19 U.S.C. § 1862(c)(3)(A). The majority argues that this provision’s reference to “other actions” suggests that the President may undertake a plan of action that is modifiable after the time limits expire. Maj. Op. at 26–28. But the opposite is true. The President would have no need for “other actions” if an “action” may include multiple actions modifiable over long periods. Moreover, subsection (c)(3) in no way suggests that the President has *carte blanche* to modify past actions in a continuing fashion without a new report from the Secretary of Commerce and without reporting to Congress. It is irrational to read the subsection on negotiations as expanding the President’s authority under different subsections pertaining to all other actions *excluding* negotiations.

⁹ Section 232 is but a small part of the overall U.S. trade framework, a framework replete with limitations on presidential authority over trade matters. The majority fails to explain why its interpretation in this case does, or does not, extend to the limitations articulated in other aspects of U.S. trade law.

The majority also reduces the statutory deadlines themselves to mere optional suggestions. The majority reasons that § 232 is analogous to a requirement that a person must “return a car by 11 p.m.”: Even if the 11 p.m. deadline passes, the obligation to return the car still remains. Maj. Op. at 23. For support, the majority cites *Brock v. Pierce County*, 476 U.S. 253, 265 (1986). But that case is inapposite. The statute in *Brock* authorized the agency to act “separate and apart” from the provision that contained time limitations. See *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 177 (2003) (Scalia, J., dissenting). No such separate authorization exists here. Nor does *Brock* involve the delegation to the President of a constitutional power belonging to Congress. Because § 232 is such a delegation, extra care should be taken to avoid unduly expanding that delegation—as the majority does now—lest we reweigh the careful balances drawn by both the Founders and Congress.

Lastly, even assuming that an “action” may encompass a “plan of action,” it does not follow that § 232’s deadlines are mere optional suggestions. To the extent “action” can include a “plan of action,” § 232 requires the President to implement *the plan*, not a part of the plan, “by no later than” a specific deadline. 19 U.S.C. § 1862(c)(1)(B) (requiring the President to “implement *that action* by no later than the date that is 15 days after the day on which the President determines to take action” (emphasis added)). The majority provides no persuasive reason why a “plan of action” is inherently free of time limits, requiring infinite time for completion of the plan.

Because § 232 is plain, the inquiry ends here. *Ron Pair*, 489 U.S. at 241.

Legislative History

The legislative history of § 232 also shows that Congress has not authorized the President to carry out open-ended plans of action, modifiable outside the statutory deadlines, without a new report from the Secretary of Commerce and without reporting to Congress. Before Congress amended § 232 in 1988, the provision stated that the President “shall take such action, and for such time, as he deems necessary.” Trade Agreement Expansion Act of 1962, Pub. L. No. 87–794, § 232, 76 Stat. 872, 877 (1962). Under that regime, the President had broad authority to take action and modify that action indefinitely even without obtaining a new report from the Secretary of Commerce. For example, President Eisenhower enacted Proclamation 3729, which was modified *26 times over 16 years* with no new report or investigation initiated. See *Restriction of Oil Imports*, 43 Op. Att’y Gen. 20, 22 (1975) (“Proclamation 3279 has been amended at least 26

times since its issuance in 1959.” (citation omitted)). In 1987, President Reagan adopted yet another modification to President Eisenhower’s proclamation. *Transpacific Steel LLC v. United States*, 466 F. Supp. 3d 1246, 1253 (Ct. Int’l Trade 2020). This state of affairs served as the backdrop for Congress’s 1988 amendments to § 232.

In 1988, “frustrated” with the status quo, *id.*, Congress enacted requirements that the President must set a duration for his action, carry out that action, and report to Congress, all within specific deadlines. Specifically, Congress amended § 232’s language to state that the President “shall *determine the nature and duration* of the action that, in the judgment of the President, must be taken.” Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1501(a), 102 Stat. 1107, 1258 (1988) (emphasis added). Congress also added time limits using the key language, “no later than,” which appears repeatedly throughout § 232. For example, Congress required the President to implement an action by “no later than the date that is 15 days after” the determination to take the action. 19 U.S.C. § 1862(c)(1)(A). Congress also added that, “[b]y no later than” 30 days after the determination on whether to act, the President must inform Congress of the reasons for the action or inaction. 19 U.S.C. § 1862(c)(2). By its plain terms, the language “no later than” bars action that occurs “later than” the statutory deadline. I see no legitimate reason to ignore the word “no” as the majority does.

The 1988 amendments were a “clear indication from Congress of a change in policy” that overcomes the implication of continuity, *United States v. O’Brien*, 560 U.S. 218, 231 (2010) (citation and quotation omitted), and the majority offers no support for its contention that the changes were only stylistic in nature, *Maj. Op.* at 41. Congress’s removal of the language, “for such time[] as he deems necessary,” indicates that the President may no longer act for such time as he deems necessary following the 1988 amendments. Indeed, “[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded.” *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 168 n.16 (1993) (citations and quotations omitted). “To supply omissions transcends the judicial function.” *Id.* (citation and quotation omitted). Congress’s addition of specific deadlines for acting and reporting to Congress compels the conclusion that the President may no longer adopt continuing, open-ended plans of action under § 232.

Congress’s approach in 1988 wisely ensured that the President acted with a current report and thus warded off continuing modifications based on stale information or based on a changed purpose,

such as a purpose or reasons not relating to the subject importation's effect on national security. I agree with the majority that the purpose of the 1988 amendments was to produce more action, not less. Maj. Op. at 41. But that does not negate that Congress has clearly required the President to act within the specified time limits. *See also* H.R. REP. NO. 99-581, pt. 1, at 135 (1986) ("The Committee believes that if the national security is being affected or threatened, this should be determined and acted upon as quickly as possible."). Although the majority contends that staleness concerns are not present here given that President Trump acted only a few months after the time limits under § 232 expired, Maj. Op. at 46, what is at stake here is not only this case but future readings of this provision. The majority's malleable interpretation of § 232 opens the door to modifications of prior presidential actions absent the Secretary of Commerce's provision of current information. Instead we should give life to § 232's language as plainly written, which gives the President a narrow window for taking an action after receiving a report from the Secretary of Commerce.

CONCLUSION

The Constitution vests Congress with sole power over the Tariff. U.S. CONST. art. I, § 8. When Congress enacted § 232, it delegated to the President limited authority to act to ameliorate harm caused to the national security by sudden increases of imports of certain goods. Congress, however, in clear and plain words expressly limited its delegation of authority. Yet, the majority interprets § 232 in a manner that renders Congress's express limitations meaningless. I fear that the majority effectively accomplishes what not even Congress can legitimately do, reassign to the President its Constitutionally vested power over the Tariff. I dissent.

U.S. Court of International Trade

Slip Op. 21–84

HYUNDAI HEAVY INDUSTRIES CO., LTD., Plaintiff, and HYOSUNG CORPORATION AND ILJIN ELECTRIC CO., LTD., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and ABB ENTERPRISE SOFTWARE INC., Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 18–00066

[Sustaining the second remand redetermination in the fourth administrative review of the antidumping duty order on large power transformers from the Republic of Korea.]

Dated: July 9, 2021

David E. Bond, William J. Moran, and Ron Kendler, White & Case LLP, of Washington, DC, for Plaintiff Hyundai Heavy Industries Co., Ltd.

J. David Park, Henry D. Almond, Daniel R. Wilson, and Leslie C. Bailey, Arnold & Porter Kaye Scholer LLP, of Washington, DC, for Consolidated Plaintiff Hyosung Corporation.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *David Richardson*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

R. Alan Luberda, David C. Smith, and Melissa M. Brewer, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenor ABB Enterprise Software Inc.

OPINION

Barnett, Chief Judge:

This matter is before the court following the U.S. Department of Commerce’s (“Commerce” or “the agency”) second remand results in the fourth administrative review (“AR4”) of the antidumping duty order on large power transformers from the Republic of Korea. *See Confidential Final Results of Redetermination Pursuant to [Second] Court Remand (“Second Remand Results”), ECF No. 154–1.*¹ Plaintiff Hyundai Heavy Industries Co., Ltd. (“HHI”),² and Consolidated Plaintiffs Hyosung Corporation (“Hyosung”), and Iljin Electric Co.,

¹ The administrative record associated with the Second Remand Results is divided into a Public Remand Record, ECF No. 156–3, and a Confidential Remand Record, ECF No. 156–2.

² Hyundai Electric & Energy Systems Co., Ltd. is the successor-in-interest to HHI. Letter from David E. Bond, Att’y, White & Case LLP, to the Court (Sept. 12, 2018), ECF No. 32.

Ltd. (“Iljin”) each challenged aspects of Commerce’s final results in the fourth administrative review of the antidumping duty order on large power transformers from the Republic of Korea. *See Large Power Transformers From the Republic of Korea*, 83 Fed. Reg. 11,679 (Dep’t Commerce Mar. 6, 2018) (final results of antidumping duty admin. review; 2015–2016) (“*Final Results*”), ECF No. 19–5, and accompanying Issues and Decision Mem., A-580–867 (Mar. 9, 2018), ECF No. 19–6. The court has issued two opinions resolving substantive issues raised in this case; familiarity with those opinions is presumed. *See Hyundai Heavy Indus. v. United States (“HHI (AR4) I”)*, 43 CIT ___, 393 F. Supp. 3d 1293 (2019); *Hyundai Heavy Indus. v. United States (“HHI (AR4) II”)*, 44 CIT ___, 485 F. Supp. 3d 1380 (2020).

Briefly, *HHI (AR4) I* remanded Commerce’s *Final Results* for further explanation or reconsideration regarding Commerce’s reliance on total adverse facts available (or “total AFA”) for both HHI and Hyosung. 393 F. Supp. 3d at 1322. With respect to HHI, and relevant to this discussion, the court found that substantial evidence did not support Commerce’s reliance on total AFA based on HHI’s reporting of accessories. *See id.* at 1313–17. While the court found that substantial evidence supported Commerce’s conclusion that the record was ambiguous as to whether HHI reliably and accurately reported home market gross unit prices, the court directed Commerce to revisit this issue on remand because it appeared to be related to the accessories issue. *See id.* at 1317–18. With respect to Hyosung, and relevant to this discussion, the court could not ascertain Commerce’s reasoning for finding that a certain invoice series that covered multiple sales across separate review periods was unreliable and found that Commerce failed to support its finding that certain price adjustments and discounts constituted grounds for total AFA. *See id.* at 1308–12.

In the first remand redetermination, with respect to HHI, Commerce concluded that the application of total AFA with respect to accessories was no longer warranted. *See Confidential Final Results of Remand Redetermination Pursuant to [First] Court Remand (“First Remand Results”)* at 15–16, ECF No. 91–1. However, Commerce continued to rely on total AFA because HHI understated its home market gross unit prices by failing to consistently report certain parts in home market sales as foreign like product. *See id.* at 16–19. With respect to Hyosung, Commerce determined that Hyosung did not act to the best of its ability when it failed to provide complete and accurate information concerning its sales adjustments and discounts

for U.S. sales. *See id.* at 15. While Commerce explained that Hyosung’s use of one invoice for multiple sales no longer warranted using total AFA, the unreported discounts and price adjustments continued to warrant the use of total AFA. *See id.* at 11–13.

In *HHI (AR4) II*, the court again remanded Commerce’s reliance on total AFA for HHI and Hyosung. 485 F. Supp. 3d at 1403–04. Regarding HHI, the court reasoned that Commerce’s decision to disregard HHI’s entire home market sales database and rely on total facts otherwise available was not supported by substantial evidence because Commerce failed to address whether HHI’s home market sales information met the criteria set forth in 19 U.S.C. § 1677m(e) to be used despite not meeting all of Commerce’s requirements. *See id.* at 1399–1400. Moreover, Commerce did not adequately support its use of an adverse inference because the agency merely restated its reasons for relying on neutral facts available. *See id.* at 1400–01. Regarding Hyosung, the court found that Commerce did not sufficiently support its reliance on total AFA because the agency did not explain why it was impracticable to issue a supplemental questionnaire after discovering Hyosung’s reporting deficiencies with respect to discounts and price adjustments for U.S. sales. *See id.* at 1391–92; *see generally* 19 U.S.C. § 1677m(d).

In the redetermination at issue here, Commerce, under respectful protest,³ *see* Second Remand Results at 11, 14, applied partial facts available, without an adverse inference, to determine a zero percent antidumping duty rate for both HHI and Hyosung, *see id.* at 24. With respect to HHI, Commerce determined that HHI understated the gross unit price for a home market sale in which it treated a certain part as non-foreign like product, whereas it had treated the same part as foreign like product in another home market sale. *See id.* at 14–15. With respect to Hyosung, Commerce relied on partial facts available, without an adverse inference, “for the discount for the sales for which there is record evidence of discounts.” *Id.* at 11. Commerce further explained that Hyosung’s failure to accurately report certain price adjustments to U.S. sales also warranted reliance on partial facts available without an adverse inference. *See id.*

Before the court, Defendant-Intervenor ABB Enterprise Software Inc. (“ABB”) opposes the Second Remand Results because, in ABB’s view, the court did not properly apply the standard of review in *HHI (AR4) I* and *HHI (AR4) II*. *See* [ABB’s] Cmts. in Opp’n to Commerce’s Second Remand Redetermination (“ABB’s Cmts.”) at 8, ECF No. 157. Consequently, ABB contends, the Second Remand Results are invalid,

³ By making the determination under protest, Commerce preserves its right to appeal. *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

and the *Final Results* should be reinstated without regard to the remand redeterminations. *See id.* HHI, Hyosung, and Defendant United States (“the Government”) urge the court to sustain Commerce’s Second Remand Results in full. *See* Pl.’s Responsive Cmts. in Supp. of the Final Results of Redetermination Pursuant to Court Remand at 5, ECF No. 158; Def.’s Resp. to Cmts. on Remand Redetermination at 5, ECF No. 159; Hyosung’s Cmts. in Supp. of Second Remand Results (“Hyosung’s Cmts.”) at 12, ECF No. 160.

For the reasons discussed herein, the court sustains Commerce’s Second Remand Results.⁴

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),⁵ and 28 U.S.C. § 1581(c) (2018). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed for compliance with the court’s remand order.” *Solar World Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (quoting *Xinjiaimei Furniture (Zhangzhou) Co. v. United States*, 38 CIT ___, ___, 968 F. Supp. 2d 1255, 1259 (2014)).

DISCUSSION

ABB’s opposition to the Second Remand Results is based on its disagreement with the court’s prior opinions in this proceeding. *See* ABB’s Cmts. at 8. ABB raises no specific arguments challenging the Second Remand Results that the court has not addressed in those prior opinions; rather, ABB seeks to preserve its “appellate rights.” *Id.* at 2. ABB has not, however, provided any reason for the court to revisit its findings in *HHI (AR4) I* and *HHI (AR4) II*. *See id.* (acknowledging that the court “will likely affirm the Second Remand [Results] based on Commerce following the Court’s direction in [*HHI (AR4) II*]”).

⁴ Iljin challenged Commerce’s determinations in the *Final Results* and the First Remand Results to calculate its rate (i.e., the rate for non-individually examined respondents) by averaging the total AFA rates determined for the mandatory respondents. *See HHI (AR4) II*, 485 F. Supp. 3d at 1402–03; *HHI (AR4) I*, 393 F. Supp. 3d at 1321. The court deferred ruling on Iljin’s challenge pending Commerce’s redetermination in the event it became moot. *See HHI (AR4) II*, 485 F. Supp. 3d at 1403; *HHI (AR4) I*, 393 F. Supp. 3d at 1321. In the Second Remand Results, Commerce calculated zero percent margins for both mandatory respondents and applied this rate to Iljin. Second Remand Results at 24. Iljin does not challenge the Second Remand Results.

⁵ All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition unless otherwise stated.

Commerce’s redetermination complies with the court’s order in *HHI (AR4) II* because it supplied reasoned explanations for its reliance on partial facts otherwise available to determine HHI’s and Hyosung’s⁶ margins.⁷ See Second Remand Results at 9–14.

CONCLUSION

In accordance with the foregoing, the court will sustain the Second Remand Results. Judgment will enter accordingly.

Dated: July 9, 2021

New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, CHIEF JUDGE

⁶ While Hyosung “disagrees with Commerce as to whether the documentation on the record indicates that a discount applied to one specific sale,” it does not challenge that determination before the court. Hyosung’s Cmts. at 3 n.1.

⁷ Commerce states that in *HHI (AR4) II* the court found “that [HHI] acted to the best of its ability” to respond to Commerce’s request for information regarding HHI’s treatment of certain parts as foreign like product in home market sales. Second Remand Results at 13 & n.65 (citing *HHI (AR4) II*, 485 F. Supp. 3d at 1399–1400). The court made no such finding. The court concluded that “the record [did] not support *Commerce’s characterization* of HHI’s reporting errors as sufficient to warrant an adverse inference.” *HHI (AR4) II*, 485 F. Supp. 3d at 1401 (emphasis added). And while the “record indicate[d] that HHI did not report [the parts at issue] as foreign like product in the two sales at issue based on its good faith position on an issue about which even Commerce previously acknowledged ambiguity,” *id.*, the court did not constrain Commerce from relying on total AFA for HHI if such a determination was supported by substantial evidence and in accordance with the law.

Slip Op. 21–85

FASTENAL COMPANY PURCHASING, Plaintiff, v. UNITED STATES, Defendant,
and MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 17–00269

JUDGMENT

Before the court are the *Final Results of Redetermination Pursuant to Court Remand in Fastenal Co. Purchasing v. United States*, (Dep’t Commerce Feb. 10, 2021) ECF No. 43 (“*Remand Results*”), which the United States Department of Commerce filed in response to the court’s Order, Nov. 12, 2021, ECF No. 41. In their Comments on Final Results of Redetermination, Mar. 12, 2021, ECF Nos. 45, 46, Plaintiff and Defendant-Intervenor each requested that the court sustain Commerce’s determination on remand that Fastenal’s zinc and nylon anchors do not fall within the scope of Commerce’s antidumping order on certain steel nails from China, *Notice of Antidumping Duty Order: Certain Steel Nails from the People’s Republic of China*, 73 Fed. Reg. 44,961 (Dep’t Commerce Aug. 1, 2008). Defendant, in its Response to Comments on Remand Results, Apr. 12, 2021, ECF No. 47, also requested that the court sustain the *Remand Results*. Because Commerce’s *Remand Results* comply with the court’s Order, are supported by substantial evidence, and are otherwise in accordance with law, and having received no objections to the Order or the *Remand Results*, it is hereby

ORDERED, ADJUDGED, and DECREED that the *Remand Results* are **SUSTAINED**.

Dated: July 12, 2021

New York, New York

/s/ Gary S. Katzmann

GARY S. KATZMANN, JUDGE

Slip Op. 21–86

MIDWEST FASTENER CORP., Plaintiff, v. UNITED STATES, Defendant, and
MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 17–00231

[Sustaining the U.S. Department of Commerce’s third remand redetermination that strike pin anchors are not within the scope of the antidumping duty order covering certain steel nails from the People’s Republic of China.]

Dated: July 12, 2021

Robert Kevin Williams and *Mark Rett Ludwиковski*, Clark Hill PLC, of Chicago, IL, for plaintiff, Midwest Fastener Corp.

Sosun Bae, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. Also on the briefs were *Patricia M. McCarthy*, Assistant Director, *Jeanne E. Davidson*, Director, and *Brian M. Boynton*, Acting Assistant Attorney General. Of Counsel was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Adam Henry Gordon and *Ping Gong*, The Bristol Group PLLC, of Washington, DC, for defendant-intervenor, Mid Continent Steel & Wire, Inc.

OPINION**Kelly, Judge:**

Before the court is the U.S. Department of Commerce’s (“Commerce”) third remand determination filed pursuant to the court’s order in *Midwest Fastener Corp. v. United States*, 45 CIT __, 494 F. Supp. 3d 1335 (Jan. 21, 2021) (“*Midwest III*”). See Final Results of Redetermination Pursuant to Ct. Remand [in *Midwest III*], March 22, 2021, ECF No. 104–1 (“*Third Remand Results*”). In *Midwest III*, the court remanded for a third time Commerce’s determination that Midwest Fastener Corp.’s (“Midwest” or “Plaintiff”) strike pin anchors are within the scope of the antidumping duty (“ADD”) order covering certain steel nails from the People’s Republic of China (“PRC”). See *Midwest III*, 45 CIT at __, 494 F. Supp. 3d at 1341–42; see also *Midwest Fastener Corp. v. United States*, 44 CIT __, __, 435 F. Supp. 3d 1262, 1272 (March 4, 2020) (“*Midwest II*”); *Midwest Fastener Corp. v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1297, 1301–03 (Oct. 19, 2018) (“*Midwest I*”); [ADD] Order on Certain Steel Nails from the [PRC]: Final Ruling on Midwest Fastener Strike Pin Anchors, (Aug. 2, 2017), ECF No. 21–3 (“Final Scope Ruling”); Final Results of Redetermination Pursuant to Ct. Remand [in *Midwest I*], Apr. 25, 2019, ECF No. 61 (“*First Remand Results*”); Final Results of Redetermination Pursuant to Ct. Remand [in *Midwest II*], June 17, 2020,

ECF No. 87–1 (“*Second Remand Results*”); *Certain Steel Nails from the [PRC]*, 73 Fed. Reg. 44,961 (Dep’t Commerce Aug. 1, 2008) (notice of [ADD] order) (“*PRC Nails Order*”).

On August 28, 2020, the Court of Appeals for the Federal Circuit (“Court of Appeals”) decided *OMG, Inc. v. United States*, 972 F.3d 1358 (Fed. Cir. 2020), *aff’g* 43 CIT __, 389 F. Supp. 3d 1312 (2019) (“*OMG*”), interpreting nearly identical language in the ADD and countervailing duty (“CVD”) orders covering certain steel nails from, in pertinent part, the Socialist Republic of Vietnam (“Vietnam”).

In *Midwest III*, the court reconsidered its ruling in *Midwest I* that the language of the *PRC Nails Order* is ambiguous and ordered Commerce to make its determination in accordance with the Court of Appeals’ decision in *OMG*. See *Midwest III*, 45 CIT at __, 94 F. Supp. 3d at 1341. In its *Third Remand Results*, Commerce determines that Midwest’s strike pin anchors do not fall within the scope of the *PRC Nails Order*. See *Third Remand Results* at 1. Both Midwest and Defendant-Intervenor Mid Continent Steel & Wire, Inc. (“Mid Continent” or “Def. Intervenor”) submit comments agreeing with Commerce’s *Third Remand Results*. See Pl.’s Cmts. on Remand Determination, Apr. 20, 2021, ECF No. 106 (“Pl.’s Cmts. on Third Remand Results”); Cmts. on Final Results Determination, Apr. 21, 2021, ECF No. 107 (“Def.-Intervenor’s Cmts. on Third Remand Results”). Defendant United States (“Defendant”) requests that the court sustain Commerce’s *Third Remand Results*. See Def.’s Resp. to Cmts. on Remand Results, May 19, 2021, ECF No. 108 (“Def.’s Resp. Br.”). For the following reasons, the court sustains Commerce’s *Third Remand Results*.

BACKGROUND

The court presumes familiarity with the facts of this case as set out in its previous opinion ordering remand to Commerce, and now recounts those relevant to the court’s review of the *Third Remand Results*. See *Midwest III*, 45 CIT at __, 494 F. Supp. 3d at 1337–40.

On August 1, 2008, Commerce issued the *PRC Nails Order*, which covers, in relevant part, “nails...constructed of two or more pieces.” See *PRC Nails Order*, 73 Fed. Reg. at 44,961. In *Midwest I*, the court held that Commerce’s determination that the *PRC Nails Order* unambiguously covers Midwest’s strike pin anchors¹ was unsupported

¹ Midwest is an importer of strike pin anchors. As explained in *Midwest II*:

Midwest’s strike pin anchors have four components—a steel pin, a threaded body, a nut and a flat washer. Midwest avers that the pin component is not meant to be removed from the anchor and can only be removed with the aid of a claw hammer or pliers. The strike pin anchor is prepared for use by first drilling a hole through an object, and then drilling another hole into the masonry upon which the object is to be attached. After the

by substantial evidence and remanded for Commerce to conduct a formal scope inquiry and an analysis under 19 C.F.R. § 351.225(k)(2)(2017)² (“(k)(2) analysis”). *Midwest I*, 42 CIT at __, 348 F. Supp. 3d at 1302–06. On remand, Commerce continued to assert that the *PRC Nails Order* unambiguously covers Midwest’s strike pin anchors, *First Remand Results* at 7–11, but conducted a (k)(2) analysis under protest. *Id.* at 11–19.

In *Midwest II*, the court held that Commerce’s position that the scope of the order unambiguously covers Midwest’s strike pins was unsupported by substantial evidence because Commerce’s analysis did not reasonably demonstrate how the phrase “nails...constructed of two or more pieces” encompasses the strike pin anchors. *See Midwest II*, 44 CIT at __, 435 F. Supp. 3d at 1267–71; *see also PRC Nails Order*, 73 Fed. Reg. at 44,961. The court also held that Commerce’s (k)(2) analysis erred in several respects, *see Midwest II*, 44 CIT at __, 435 F. Supp. 3d at 1271–72, and rejected Commerce’s attempt to find only the pin component dutiable. *See id.* at __, 435 F. Supp. 3d at 1272. On the second remand, Commerce again determined that the *PRC Nails Order* is unambiguous but conducted a revised (k)(2) analysis in light of *Midwest II*. *See Second Remand Results* at 6–28.

However, after the conclusion of the briefing of the *Second Remand Results* before this court, the Court of Appeals affirmed a decision of this court disposing of an appeal from Commerce’s final ruling clarifying the scope of ADD and CVD orders covering certain steel nails from, in pertinent part, Vietnam. *See generally OMG*, 972 F.3d 1358; *see also Certain Steel Nails from [Vietnam]*, 80 Fed. Reg. 41,006 (Dep’t Commerce July 14, 2015) ([CVD] order) (“*Vietnam CVD Order*”); *Certain Steel Nails from the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and [Vietnam]*, 80 Fed. Reg. 39,994 (Dep’t Commerce July 13, 2015) ([ADD] orders) (“*Vietnam ADD Order*”) (collectively “*Vietnam Orders*”). As in the *PRC Nails Order*, the pertinent language from the *Vietnam Orders* states that the orders cover “[c]ertain steel nails...of one piece construction or constructed of two or more pieces.” *Compare Vietnam CVD Order*, 80 Fed. Reg. at 41,006 (citations omitted), and *Vietnam ADD Order*, 80 Fed. Reg. at 39,995 (citations omitted), with *PRC Nails Order*, 73 Fed. Reg. at 44,961.

On September 8, 2020, the court requested further submissions from the parties regarding their respective positions on the relevance

two holes are aligned, the anchor is pushed through the hole in the object and into the hole in the masonry. The nut and washer components are then tightened to orient and position the anchor, and the pin component is subsequently struck with a hammer. The action of striking the pin component expands the anchor body and results in the fastening of the desired item against the masonry.

Midwest II, 44 CIT at __, 435 F. Supp. 3d at 1265–66 (citations omitted).

² Further citations to the Code of Federal Regulations are to the 2017 Edition.

of *OMG* to the disposition of this action. See Letter Req. Suppl. Briefing, Sept. 8, 2020, ECF No. 93. All parties indicated that whether Midwest's anchors fall within the scope of the order should be reconsidered in light of *OMG*. See Def.'s Resp. Ct.'s Order on Suppl. Briefing, Nov. 3, 2020, ECF No. 97; Def.-Intervenor's Resp. Ct.'s Order on Suppl. Briefing, Nov. 3, 2020, ECF No. 98; Pl.'s Resp. Ct.'s Order on Suppl. Briefing, Nov. 4, 2020, ECF No. 99.

On remand for the third time, Commerce determines that Midwest's strike pin anchors are not "nails...constructed of two or more pieces" and therefore are not covered by the *PRC Nails Order*. *Third Remand Results* at 5. All parties request that the court sustain Commerce's findings. See Pl.'s Cmts. on Third Remand Results at 1–2; Def.-Intervenor's Cmts. on Third Remand Results at 1; Def.'s Resp. Br. at 2.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over Plaintiff's challenge to Commerce's scope determination pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2012),³ and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting scope determinations that find certain merchandise to be within the class or kind of merchandise described in an ADD or CVD order. See 19 U.S.C. § 1516a(a)(2)(B)(vi); 28 U.S.C. § 1581(c) (2012). The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Defendant argues that Commerce's *Third Remand Results* are supported by substantial evidence and are otherwise in accordance with law and asks the court to sustain the results. Def.'s Resp. Br. at 2. Both Plaintiff and Def.-Intervenor agree with the *Third Remand Results* and also ask the court to sustain the results. Pl.'s Cmts. on Third Remand Results at 1–2; Def.-Intervenor's Cmts. on Third Remand Results at 1. For the following reasons, the court sustains the *Third Remand Results* as supported by substantial evidence and otherwise in accordance with law.

The language of an antidumping duty order dictates its scope. See *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) ("*Duferco*") (citing *Ericsson GE Mobile Commc'ns, Inc. v. United*

³ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

States, 60 F.3d 778, 782 (Fed. Cir. 1995) (“*Ericsson GE Mobile*”). Commerce’s regulations authorize it to issue scope rulings to clarify whether a particular product is within the scope of an order. See 19 C.F.R. § 351.225(a). To determine whether a product is within the scope of an ADD order, Commerce looks at the plain language of that order. See *Duferco*, 296 F.3d at 1097. “[T]he first step in a scope ruling proceeding is to determine whether the governing language is in fact ambiguous.” *ArcelorMittal Stainless Belgium N.V. v. United States*, 694 F.3d 82, 87 (Fed. Cir. 2012). “If it is not ambiguous, the plain meaning of the language governs.” *Id.*

Commerce has broad authority “to interpret and clarify its anti-dumping duty orders.” *Ericsson GE Mobile*, 60 F.3d at 782; see also *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012) (stating that “Commerce is entitled to substantial deference with regard to its interpretations of its own antidumping orders.”).

In *OMG*, the Court of Appeals held that the *Vietnam Orders* were unambiguous with respect to the importer’s anchors, that the anchors are not nails regardless of whether they are comprised of two pieces, and that Commerce erred in focusing its analysis on the pin component of the anchor. See *OMG*, 972 F.3d at 1364–66. In *Midwest III*, the court ordered Commerce to reconsider its finding that Midwest’s strike pin anchors are covered under the *PRC Nails Order* in light of *OMG*. See *Midwest III*, 45 CIT at ___, 494 F. Supp. 3d at 1341.

For its third remand, Commerce first compares the *Vietnam Orders* to the *PRC Nails Order*. *Third Remand Results* at 4–5. Commerce determines that the relevant language of the orders (“Certain steel nails may be of one-piece construction or constructed of two or more pieces”) is identical and thus *OMG* is applicable to Commerce’s analysis of whether Midwest’s strike pin anchors are covered by the *PRC Nails Order*. *Id.*

Commerce then analyzes the similarity between Midwest’s strike pin anchors to *OMG, Inc.*’s (“*OMG*”) zinc masonry anchors at issue in *OMG*. *Id.* at 5. In *OMG*, the Court of Appeals found that *OMG*’s zinc masonry anchors were unitary articles of commerce and must be analyzed as a single product. *OMG*, 972 F.3d at 1364–65. The Court of Appeals also determined that even though *OMG*’s anchors require a hammer to be installed, nails are defined by their fastening mechanism (i.e. nails are “driven by impact through the materials to be fastened”), and *OMG*’s anchors are not nails because they rely on a distinct fastening mechanism that relies not on impact but on the “[e]xpansion of the zinc body against the interior of the pre-drilled

hole.” *Id.* Commerce observes numerous similarities between Midwest’s strike pin anchors and OMG’s zinc masonry anchors and finds those similarities support the conclusion that Midwest’s anchors are not covered by the *PRC Nails Order*. *Third Remand Results* at 5; compare *OMG*, 972 F.3d at 1364–65 with *Midwest II*, 44 CIT ___, 435 F. Supp. 3d at 1265–66. None of the parties challenges Commerce’s redetermination. See Pl.’s Cmts. on Third Remand Results at 1–2; Def.-Intervenor’s Cmts. on Third Remand Results at 1; Def.’s Resp. Br. at 2.

Commerce’s analysis is reasonable, supported by substantial evidence, and in accordance with law. The record evidence supports Commerce’s finding that Midwest’s strike pin anchors are substantially similar to OMG’s zinc masonry anchors and that the relevant language of the *PRC Nails Order* and the *Vietnam Orders* is identical. Compare *OMG*, 972 F.3d at 1364–65; with *Midwest II*, 44 CIT ___, 435 F. Supp. 3d at 1265–66; and compare *Vietnam CVD Order*, 80 Fed. Reg. at 41,006 (citations omitted), and *Vietnam ADD Order*, 80 Fed. Reg. at 39,995 (citations omitted), with *PRC Nails Order*, 73 Fed. Reg. at 44,961. Therefore, Commerce reasonably determines that pursuant to the Court of Appeals’ decision in *OMG*, Midwest’s anchors are not “nails...constructed of two or more pieces” and are not covered by the *PRC Nails Order*.

All parties agree with Commerce’s determinations in the *Third Remand Results* and request that the *Third Remand Results* be sustained. See Pl.’s Cmts. on Third Remand Results at 1–2; Def.-Intervenor’s Cmts. on Third Remand Results at 1. Defendant notes that neither party challenges the results and asserts that the results “comply with the court’s remand order, are supported by substantial evidence, and otherwise in accordance with law,” and thus should be sustained. Def.’s Resp. Br. at 2. The court agrees, and the *Third Remand Results* are sustained.

CONCLUSION

For the foregoing reasons, Commerce’s *Third Remand Results* are supported by substantial evidence and comply with the court’s order in *Midwest III* and are therefore sustained. Judgment will enter accordingly.

Dated: July 12, 2021

New York, New York

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

Slip Op. 21–87

THE ANCIENTREE CABINET CO., LTD., Plaintiff, and CABINETS TO GO, LLC, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and AMERICAN KITCHEN CABINET ALLIANCE, Defendant-Intervenor.

Before: Judge Gary S. Katzmman,
Court No. 20–00114

[Plaintiff's motion is granted, in part, and Commerce's *Final Determination* is remanded for further explanation.]

Dated: July 12, 2021

Gregory S. Menegaz and *Alexandra H. Salzman*, DeKieffer & Horgan, PLLP, of Washington, D.C., argued for plaintiff. With them on the brief was *J. Kevin Horgan*.

Mark R. Ludwikowski, Clark Hill PLC, of Washington, D.C., argued for plaintiff-intervenor. With him on the brief were *Courtney Gayle Taylor*, *R. Kevin Williams* and *William Sjoberg*.

Iona Cristei, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant. With her on the brief were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of Counsel *Savannah Rose Maxwell*, Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Luke A. Meisner, Schagrin Associates, of Washington, D.C., argued for defendant-intervenor. With him on the brief were *Roger B. Shagrin*, *Christopher T. Cloutier*, and *Elizabeth J. Drake*.

OPINION

Katzmann, Judge:

This case arises from an investigation by the U.S. Department of Commerce (“Commerce”) concerning whether wooden cabinets and vanities from the People’s Republic of China (“China”) were being imported at less than fair value in violation of domestic statutes designed to protect American products from unfair trade. The principal questions are whether in the resulting antidumping (“AD”) investigation, Commerce based both its primary surrogate country selection and surrogate factors of production (“FOP”) valuations on substantial evidence and calculated the subsequent financial ratios in a way that was not arbitrary and capricious. Plaintiff, The Ancientree Cabinet Co., Ltd. (“Ancientree”), and Plaintiff-Intervenor, Cabinets to Go, LLC,¹ exporters of wooden cabinets, vanities, and components

¹ The court uses Ancientree’s briefs to represent both plaintiffs’ arguments as Plaintiff-Intervenor Cabinets to Go, LLC, incorporated by reference all of Ancientree’s arguments into its brief. See Pl.-Inter.’s R. 56.2 Mot. for J. on the Agency R. at 3, Sept. 11, 2020, ECF No. 27 (“Pl.-Inter.’s Br.”). Cabinets to Go is an importer of subject merchandise, including from two non-party mandatory respondents, see n.2 *infra*, to Commerce’s investigation — Rizhao Foremost Woodwork Manufacturing Company Ltd. and Dalian Meisen Woodworking Company Ltd. — and from separate rate respondents. Pl.-Inter.’s Br. at 2–3. Cabinets

thereof from China, brought this suit against Defendant the United States (“Government”) to challenge Commerce’s surrogate value analysis and calculation in its *Wooden Cabinets and Vanities and Components Thereof From the People’s Republic of China: Corrected Notice of Final Affirmative Determination of Sales at Less Than Fair Value for*, 85 Fed. Reg. 17,855 (Dep’t Commerce Mar. 31, 2020); *Wooden Cabinets and Vanities and Components Thereof From the People’s Republic of China: Antidumping Duty Order*, 85 Fed. Reg. 22,126 (Dep’t Commerce Apr. 21, 2020) (“Order”) (collectively, “*Final Determination*”). Pl.’s Mot. For J. on Agency R. and Supp. Opening Br., Sept. 11, 2020, ECF No. 27 (“Pl.’s Br.”). The Government and Defendant-Intervenor American Kitchen Cabinet Alliance (“AKC Alliance”) ask the court to sustain Commerce’s determination. Def.’s Mem. in Opp’n to Pl. and Pl.-Inter.’s Rule 56.2 Mot. for J. on the Agency R., Dec. 22, 2020, ECF No. 35 (“Def.’s Br.”); Def.-Inter.’s Resp. Br. in Opp’n to the Mots. For J. on the Agency R., Dec. 21, 2020, ECF No. 34 (“Def.-Inter.’s Br.”). The court denies Plaintiff’s motion, in part, and grants Plaintiff’s motion, in part. Commerce’s *Final Determination* is remanded for further explanation consistent with this opinion.

BACKGROUND

I. Legal Background

Congress’s AD statute empowers Commerce to impose remedial duties on imported goods when those goods are sold in the United States for less than their fair market value, and when the International Trade Commission (“ITC”) determines that the domestic industry is thereby “materially injured, or . . . is threatened with material injury.” See 19 U.S.C. § 1673(2)(A)(i)–(ii); *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017). Dumping constitutes unfair competition because it permits foreign producers to undercut domestic companies by selling products below their fair market value. *Sioux Honey Ass’n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). To address the harmful impact of such unfair competition, Congress enacted the Tariff Act of 1930, which empowers Commerce to investigate potential dumping and, if necessary, to issue orders instituting duties on subject merchandise. *Id.* at 1047. In these instances, “the amount of the [AD] duty is ‘the amount by which the normal value exceeds the export price (or the con-

to Go thus asks the court to apply “any recalculation under this appeal of Plaintiff’s AD rate resulting from a change of the surrogate country to Malaysia” to all other imports of subject merchandise. *Id.* at 3. Because the court affirms Commerce’s selection of surrogate country, the court denies Cabinets to Go’s motion.

structed export price) for the merchandise.” *Shandong Rongxin Imp. & Exp. Co. v. United States*, 42 CIT __, __, 331 F. Supp. 3d 1390, 1394 (2018) (quoting 19 U.S.C. § 1673), *aff’d*, 779 F. App’x 744 (Fed. Cir. 2019).

If the exporting country is a non-market economy that provides insufficient information to determine the normal value, Commerce may use surrogate values from market economy countries for “the [FOPs] utilized in producing the merchandise and . . . for general expenses and profit plus the cost of containers, coverings, and other expenses.” 19 U.S.C. § 1677b(c)(1). Section 1677b(c)(3)(A)–(D) lists the FOPs as including, but not limited to: (A) labor hours required; (B) quantities of raw materials used; (C) energy and other utilities consumed in production; and (D) capital costs and depreciation. “Once Commerce has selected and totaled the surrogate values, the agency then adds an amount designed to approximate the producing firm’s noninput costs of production, which include factory overhead, selling, general, and administrative expenses, and profit.” *CP Kelco US, Inc. v. United States*, 40 CIT __, __, 37 ITRD 2984, Slip Op. 16–36 at 3 (Apr. 8, 2016). To incorporate these costs, Commerce generates surrogate financial ratios from “the financial statements of other manufacturing firms” within the primary surrogate country and using “select financial statements based on which provide the ‘best available information.’” *Id.* Commerce then uses the market economy surrogate values and financial ratios to calculate a surrogate value — used in place of a home-market value — for comparison to the export price. *Id.*

Section 1677b(c)(1) requires that Commerce value the FOPs “based on the best available information regarding the values of such factors in a market economy country.” In determining which data are the best available, “Commerce has broad discretion to determine the best available information because ‘best available information’ is not defined by statute.” *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011) (citing *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1322 (Fed. Cir. 2010); *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999)); *see also Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994). However, Commerce’s discretion to select surrogate values is “curtailed by the purpose of the statute, *i.e.*, to construct the product’s normal value as it would have been if the NME country were a market economy country.” *Rhodia, Inc. v. United States*, 25 CIT 1278, 1286, 185 F. Supp. 2d 1343, 1351 (2001) (citing *Nation Ford Chem. Co.*, 166 F.3d at 1375). Commerce must also establish AD margins as

accurately as possible. *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001).

In choosing “one or more market economy countries” to provide surrogate factor values, 19 U.S.C. § 1677b(c)(4) requires that Commerce “utilize, to the extent possible” costs of FOPs from market economy countries that are “at a level of economic development comparable to that of the nonmarket economy country, and . . . significant producers of comparable merchandise.” Although Commerce “normally will value all factors in a single surrogate country,” 19 C.F.R. § 351.408(c)(2), Commerce may also “mix and match” surrogate country values where a non-primary country provides values that are more accurate, *Lasko Metal Prods., Inc. v. United States*, 16 CIT 1079, 1082, 810 F. Supp. 314, 317 (1992), *aff’d*, 43 F.3d 1442 (Fed. Cir. 1994). If more than one market economy country meets the requirements to provide surrogate values, Commerce may choose a primary surrogate country based on whether the FOP data are (1) publicly available; (2) contemporaneous with the period of investigation (“POI”); (3) a broad market average covering a range of prices; (4) from an approved surrogate country; (5) specific to the input in question; and (6) tax exclusive. See Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process (Mar. 1, 2004), <http://enforcement.trade.gov/policy/bull04-1.html> (last accessed July 8, 2021) (“Policy Bulletin 04.1”); see also, e.g., *Jiaxing Bro. Fastener Co. v. United States*, 822 F.3d 1289, 1302 (Fed. Cir. 2016) (finding “no error in Commerce’s . . . preference to appraise surrogate values from a single surrogate country” with statistics that were “specific, contemporaneous, and represented broad market averages”). Upon review of Commerce’s choice of certain surrogate values as the best available information, the court will not determine whether the data used were actually the best available, but “whether a reasonable mind could conclude that Commerce chose the best available information.” *Jiaxing Bro. Fastener*, 822 F.3d at 1301 (citing *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011)); see also *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1359 (Fed. Cir. 2017) (citation omitted).

II. Factual Background

On March 26, 2019, Commerce initiated an AD duty investigation on the importation of wooden cabinets and vanities from China during the POI of July 1, 2018 to December 31, 2018. See *Wooden Cabinets and Vanities and Components Thereof From the People’s*

Republic of China: Initiation of Less-Than-Fair-Value Investigation, 84 Fed. Reg. 12,587 (Dep't Commerce Apr. 2, 2019). Commerce selected Ancientree as a mandatory respondent to the investigation.² See Dep't, Respondent Selection Mem. (June 4, 2019), P.R. 838. Commerce then issued an AD questionnaire to Ancientree, which requested that Ancientree report the FOPs consumed to produce its wooden cabinets — the merchandise under investigation. See Dep't, AD Questionnaire (Apr. 25, 2019), P.R. 842. In its response, Ancientree reported various FOPs, including birch and poplar sawnwood, particleboard, medium density fibreboard (“MDF”), and paint. See Pl.’s Br. at 6, 23; Ancientree, Sec. C and D Questionnaire Resp. at Ex. D-2.1 (July 19, 2019), P.R. 911 (“Ancientree Sec. CDQ Resp.”).

On June 17, 2019, Commerce’s Office of Policy (“OP”) determined that Romania, Malaysia, Russia, Mexico, Brazil, and Kazakhstan were all countries at a comparable level of economic development as China based on the World Development Report’s per capita 2017 gross national income data. See Dep’t, Request for Economic Development, Surrogate Country and Surrogate Value Comments and Information at Attach. (June 17, 2019), P.R. 850. Commerce also requested interested party comments on the potential surrogates, including on: (1) the OP’s list of countries; (2) surrogate country selection broadly; and (3) surrogate value data. See *id.* at 1–2. AKC Alliance recommended Romania as the primary surrogate country, while Ancientree recommended Malaysia. See Petitioner, Initial Surrogate Value Comments (Aug. 7, 2019), P.R. 956–61 (“AKC Alliance Prelim. SV Comments”); Ancientree, Prelim. Surrogate Value Submission (Aug. 7, 2019), P.R. 952–53 (“Ancientree Prelim. SV Comments”).

On October 9, 2019, Commerce issued its preliminary determination. *Wooden Cabinets and Vanities and Components Thereof from the People’s Republic of China: Preliminary Affirmative Determination of Sales at Less than Fair Value, Postponement of Final Determination and Extension of Provisional Measures*, 84 Fed. Reg. 54,106 (Dep’t

² In AD investigations, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), which provides:

If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—

- (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
- (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

Commerce Oct. 9, 2019) (“*Preliminary Determination*”), and accompanying Preliminary Decision Memorandum (“PDM”), P.R. 1407, as corrected by *Wooden Cabinets and Vanities and Components Thereof from the People’s Republic of China: Preliminary Affirmative Determination of Sales at Less than Fair Value, Postponement of Final Determination and Extension of Provisional Measures*, 84 Fed. Reg. 56,420 (Dep’t Commerce Oct. 22, 2019). Commerce selected Romania as the primary surrogate country because it had a comparable level of economic development as China, it was a significant producer of comparable merchandise, and it had reliable and useable surrogate value data. See PDM at 14. Further, when comparing Romania and Malaysia, Commerce examined financial statements provided by Ancientree, AKC Alliance, and other respondents — those of one Romanian company, S.C. Sigstrat S.A. (“Sigstrat”), and of three Malaysian companies, Lii Hen Industries Bhd (“Lii Hen”), Poh Huat Furniture Industries Sdn Bhd (“Poh Huat”), and Yeo Aik Wood Sdn Bhd (“Yeo Aik”) — to determine that the Romanian surrogate data provided the best available information. See *id.* at 13–14. Using this information, Commerce preliminarily selected surrogate values for FOPs, including energy, labor, packing materials, manufacturing overhead, and certain raw materials such as birch and poplar sawnwood, particleboard, MDF, glue, and paint, and calculated a financial ratio. Dep’t, Prelim. Surrogate Value Memo (Oct. 3, 2019), P.R. 1411–12 (“Prelim. SV Memo”). Following Commerce’s *Preliminary Determination*, Ancientree and other interested parties submitted case briefs. See Ancientree, Case Br. (Dec. 17, 2019), P.R. 1511 (“Ancientree’s Admin. Case Br.”).

On February 28, 2020, Commerce issued its *Final Determination*, in which it concluded that wooden cabinets and vanities from China were being sold at less than fair value in the United States. 85 Fed. Reg. at 11,953; see also Final IDM (Feb. 21, 2020), P.R. 1554 (“IDM”). Commerce continued to find that Romania provided the best available surrogate information and would serve as the primary surrogate country. IDM at 26. Commerce largely maintained its surrogate value analysis and determinations, including its calculation of a financial ratio using Sigstrat’s financial statements. *Id.* at 29–40. Commerce corrected punctuation errors in this determination on March 31, 2020. *Wooden Cabinets and Vanities and Components Thereof from the People’s Republic of China: Corrected Notice of Final Affirmative Determination of Sales at Less Than Fair Value*, 85 Fed. Reg. 17,855 (Dep’t Commerce Mar. 31, 2020). Following the ITC’s affirmative injury determination, Commerce issued a final AD duty order on April 21, 2020. *Order*, 85 Fed. Reg. 22,126.

III. Procedural History

Ancientree initiated this litigation on May 21, 2020. Summons, ECF No. 1; Compl., ECF No. 6. AKC Alliance joined the litigation as Defendant-Intervenor on June 17, 2020. Consent Mot. to Intervene as Def.-Inter., ECF No. 10; Order Granting Mot. to Intervene, ECF No. 14. Cabinets To Go then joined this litigation as Plaintiff-Intervenor on June 19, 2020. Consent Mot. to Intervene as Pl.-Inter., ECF No. 15; Order Granting Mot. to Intervene, ECF No. 19. On September 11, 2020, Ancientree and Cabinets To Go filed motions for judgment on the agency record pursuant to Rule 56.2 of the Rules of the United States Court of International Trade. *See* Pl.'s Br; Pl.-Inter.'s R. 56.2 Mot. for J. on the Agency R., Sept. 11, 2020, ECF No. 27. The Government and AKC Alliance responded in opposition to Ancientree's motion on December 21 and 22, 2020. *See* Def.'s Br.; Def.-Inter.'s Br. Ancientree replied in support of its motion on January 21, 2021. Pl.'s Reply Br., ECF No. 36. Oral argument was held on April 14, 2021. Oral Arg., ECF No. 47. Prior to oral argument, the court issued and the parties responded to questions regarding the case. Amended Letter re: Questions for Oral Arg., Mar. 30, 2021, ECF No. 41; Pl.'s Answers to Ct.'s Questions for Oral Arg., Apr. 8, 2021, ECF No. 43; Pl.-Inter.'s Letter in Resp. to Ct.'s Questions, Apr. 8, 2021, ECF No. 42; Def.'s Resp. to the Ct.'s Questions for Oral Arg., Apr. 8, 2021, ECF No. 46; Def.-Inter.'s Written Answers to the Ct.'s Questions for Oral Arg., Apr. 8, 2021, ECF No. 45. As directed by the court, the parties also filed briefs following oral argument. Pl.'s Post-Arg. Submission, Apr. 19, 2021, ECF No. 53; Pl.-Inter.'s Letter Post-Oral Arg., Apr. 19, 2021, ECF No. 54; Def.'s Post-Arg. Submission, Apr. 19, 2021, ECF No. 52; Def.-Inter.'s Br. Following the Apr. 14, 2021 Oral Arg., Apr. 19, 2021, ECF No. 51.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii). Section 1516a(b)(1)(B)(i) states the standard of review in AD duty proceedings: “[t]he Court shall hold unlawful any determination, finding, or conclusion” by Commerce that is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.”

Commerce “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.’” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168,

(1962)) (referring to the arbitrary and capricious standard); *see also Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013) (citing *Amanda Foods (Vietnam) Ltd. v. United States*, 33 CIT 1407, 1416, 647 F. Supp. 2d 1368, 1379 (2009)) (requiring the same of Commerce with respect to the substantial evidence standard). A determination by Commerce “is supported by substantial evidence if a reasonable mind might accept the evidence as sufficient to support the finding.” *Maverick Tube Corp.*, 857 F.3d at 1359 (citing *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence may nevertheless support Commerce’s determination even if there is “evidence that detracts from the agency’s conclusion or [if] there is a ‘possibility of drawing two inconsistent conclusions from the evidence.’” *Aluminum Extrusions Fair Trade Comm. v. United States*, 36 CIT 1370, 1373, 34 ITRD 2119 (2012) (quoting *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966)). Finally, although Commerce is not required to address every piece of evidence submitted, it is required to respond to those arguments the parties make that are material to Commerce’s determination. *Id.*; *Itochu Bldg. Prods., Co. v. United States*, 40 CIT __, __, 163 F. Supp. 3d 1330, 1337 (2016).

DISCUSSION

As discussed below, Ancientree challenges: (I) Commerce’s selection of Romania as the primary surrogate country; (II) Commerce’s financial ratio calculation; and (III) Commerce’s selection of HTS headings for surrogate value inputs. Pl.’s Br. at 6–28. The court addresses each in turn and concludes that: Commerce’s selection of Romania as the primary surrogate country was supported by substantial evidence; Commerce’s explanation of its financial ratio calculation was arbitrary and capricious; and Commerce’s selection of surrogate values were supported by substantial evidences and sufficiently specific.

I. Commerce’s Decision to Select Romania as the Primary Surrogate Country was Supported by Substantial Evidence and In Accordance with Law.

Ancientree contends that Commerce abused its discretion in selecting Romania as the primary surrogate country over Malaysia because, according to Ancientree, Malaysia provided superior data. *See id.* at 5–6. Ancientree does not dispute that, in accordance with 19 U.S.C. § 1677b(c)(4), Commerce determined that both Romania and Malaysia are at comparable levels of economic development to China and that they are both significant producers of comparable merchandise. *See* IDM at 31–32; Pl.’s Br. at 5. Commerce found that Romania provided the best available data because it had “complete, contempo-

raneeous Romanian Global Trade Atlas (“GTA”) data for each input used by the respondents” and concluded that “the Romanian surrogate financial statements on the record are preferable to the Malaysian financial statements because these statements specifically break out energy costs from other manufacturing costs.” IDM at 32. Nevertheless, Ancientree challenges three aspects of Commerce’s decision: (1) the reliability of the Romanian sawnwood values, Pl.’s Br. at 6–13; (2) the superiority of the Romanian financial statements, *id.* at 13–21; and (3) the selection of Romania in light of the superiority of Malaysian values for other inputs such as brokerage and handling (“B&H”) fees and labor data, *id.* at 21–23. For the reasons discussed below, the court is unpersuaded by Ancientree’s arguments and concludes that Commerce acted based on substantial evidence in determining that Romania provided the best available information and selecting it as the primary surrogate country.

A. Commerce’s Decision to Rely on the Romanian Sawnwood Values Was Supported by Substantial Evidence.

First, Ancientree alleges that the Romanian sawnwood values were unreliable due to their small quantities. *Id.* at 8–13. Commerce determined that the Romanian birch and poplar sawnwood import quantities within the six-digit HTS subheadings, totaling 173,530 kg and 137,700 kg, respectively, “do not appear to be immaterial [quantities]” and explained that Ancientree provided no “metric, other than relative to its own consumption, [by which] such volumes would be considered insignificant.” IDM at 43. Commerce also determined it was unable to conduct an aberrancy analysis due to the lack of sufficient information in the record. *Id.* at 42–43. In short, Commerce simply stated that, without evidence suggesting otherwise, the size of the Romanian quantities indicated that they were commercial and representative of market prices. *Id.* at 43.

When evaluating the reliability of surrogate values, Commerce does not have “a longstanding practice of omitting import values merely because they were the product of a small quantity of imported goods,” but may disregard small import values where they are distortive or aberrational. *Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1481, 1501, 460 F. Supp. 2d 1338, 1356 (2006). “The proposition that a small import volume *may indicate* that the data relied upon is aberrational is not the same as the proposition that a small import volume *makes* the data aberrational.” *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 37 CIT 308, 316 (2013). However, while “Commerce need not duplicate respondent’s exact production experience,” “a surrogate value must be as representative of the

situation in the NME country as is feasible.” *Nation Ford Chem.*, 166 F.3d at 1377 (quoting *Nation Ford Chem Co. v. United States*, 21 CIT 1371, 1375, 985 F. Supp. 133, 137 (1997)); see also *Longkou Haimeng Mach. Co. v. United States*, 33 CIT 603, 612–13, 617 F. Supp. 2d 1363, 1372–73 (2009). “Representativeness is important if Commerce is to fulfill its statutory mandate of calculating dumping margins as accurately as possible.” *Jacobi Carbons AB v. United States*, 42 CIT __, __, 313 F. Supp. 3d 1344, 1361 (2018). Therefore, Commerce must “adequately address the commercial significance of the quantities underlying its selected surrogate values.” *Id.*; see also *Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT 480, 495, 318 F. Supp. 2d 1339, 1352 (2004) (finding error by Commerce where it failed to address the commercially significant quantity of imports and “summarily discarded the alternatives as flawed” without evaluating the reliability of its selection).

Typically, Commerce determines the commercial significance of a quantity by analyzing whether the small quantity leads to an aberrational average unit value (“AUV”) compared to other potential surrogate countries. See *Shakeproof Assembly Components*, 23 CIT at 485, 59 F. Supp. 2d at 1360. “The burden of creating an adequate record, however, lies with [interested parties] and not with Commerce.” *QVD Food*, 658 F.3d at 1324 (quoting *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992)). Thus, if respondents fail to provide data for Commerce to adequately compare to the disputed quantity, then the court will not disturb Commerce’s determination. See *Baoding Mantong Fine Chem. Co. v. United States*, 41 CIT __, __, 222 F. Supp. 3d 1231, 1248 (2017) (“Baoding Mantong did not submit such a wider set of data for the record during the review, leaving Commerce to consider the question of whether the surrogate price was aberrational, and to make its ultimate decision, from a limited record.”); *Trust Chem. Co. v. United States*, 35 CIT 1012, 1020, 791 F. Supp. 2d 1257, 1265 (2011) (“Plaintiff did not introduce evidence, for example, that the [World Trade Atlas data] volume was only a small fraction of India’s domestic consumption. Therefore, on this record, Plaintiff’s argument that the cumulative total for imports from 2004–2008 is too small must fail.”).

Ancientree argues that Commerce did not properly establish that the Romanian imports were of a sufficient commercial quantity for Romania to be chosen as the primary surrogate country because the Romanian sawnwood import values are “based on insignificant and uncommercial quantities.” Pl.’s Br. at 8. Ancientree notes that the total Romanian sawnwood imports are small relative to Malaysia’s imports, which includes 691% more poplar and 369% more birch than

Romania. *Id.* at 8–10. Thus, Ancientree contends that the Romanian imports are so small, with some shipments being of a container or less of sawnwood, that they are not commercial quantities. *Id.* at 9–10. Finally, Ancientree argues that Commerce did not adequately respond to this argument when they raised it, thereby, making Commerce’s decision arbitrary and capricious. *Id.* at 11–12. The Government and AKC Alliance respond that Romania’s import quantity could not be analyzed as aberrational because Ancientree did not provide AUV data for the other potential surrogate countries or historical import quantity data for Romania. Def.’s Br. at 23; Def.-Inter.’s Br. at 14. Consequently, they argue that Ancientree simply stated that Romania’s quantity was much lower than Malaysia’s and, in turn, did not prove that the import quantities were aberrational or uncommercial. Def.’s Br. at 24–25; Def.-Inter.’s Br. 14–20. Thus, they argue that Commerce’s use of the Romanian sawnwood values was supported by record evidence. *Id.*

The court concludes that Commerce’s decision to rely on the Romanian sawnwood values was based on substantial evidence. While Commerce solely relied on the Romanian sawnwood quantity’s weight in deeming it commercially significant, it based its determination on a limited record. Typically, when presented with a low import quantity, Commerce will not immediately label it unreliable but begin an aberrancy analysis where it compares the materials’ AUVs to those of other surrogate countries or the historical data from the selected country. *See* IDM at 38; *Shakeproof Assembly Components*, 23 CIT at 485, 59 F. Supp. 2d at 1360. In this instance, however, Commerce only had the Malaysian and Romanian values for the POI on the record. *See* IDM at 38. Commerce could not perform the aberrancy or commercial significance analysis because Ancientree failed to provide comparative data to Commerce, and thus failed to satisfy its burden to build the record, leaving Commerce no basis for rejecting the Romanian import quantities as commercially insignificant. *See* *QVD Food*, 658 F.3d at 1324.

In the past, this court has found that Commerce’s commercial significance and aberrancy analyses are interdependent and require comparative data from potential surrogate countries. *See* *Baoding Mantong Fine Chem.*, 222 F. Supp. 3d. at 1247–48; *Trust Chem.*, 35 CIT at 1014–15, 791 F. Supp. 2d at 1261. Given that these analyses are heavily dependent on comparative data, the court has held that when a party does not “offer a standard, or record evidence, demonstrating that [the quantity] was too commercially insignificant,” then Commerce’s determination that the data was not aberrational based

on “a limited record” could be sustained. *Baoding Mantong Fine Chem.*, 222 F. Supp. 3d. at 1248 (quotation omitted). Furthermore, the court has determined that a respondent’s burden to provide comparative data for the commercial significance analysis extends to cases where a country’s domestic production may impact the import quantity. For example, in *Trust Chem*, Commerce sourced the Indian data from the World Trade Atlas (“WTA”) rather than the sources provided by petitioners and respondent. 35 CIT at 1014–15, 791 F. Supp. 2d at 1261. When the plaintiff argued that the WTA data provided import volumes that were commercially insignificant, the court ruled that Commerce’s selection of surrogate value information was permissible because respondent did not introduce evidence that the WTA data was distortive relative to other data, such as India’s domestic consumption. 35 CIT at 1020, 791 F. Supp. 2d at 1265.

Ancientree argues that previous opinions of the court established an affirmative duty on behalf of Commerce to determine that a small quantity may be commercial regardless of the aberrancy analysis. Pl.’s Br. at 8–11 (citing, e.g., *Shanghai Foreign Trade*, 318 F. Supp. 2d at 1350–53; *Juancheng Kangtai Chem. Co. v. United States*, 39 CIT __, __, 2015 WL 4999476, at *25, Slip Op. 15–93 at 38–46 (Aug. 21, 2015); *Jacobi Carbons*, 313 F. Supp. 3d at 1361–62). However, quite apart from the fact that as a general matter other decisions of this court are not binding precedent, although they may have persuasive value, the cited cases are distinguishable from the case at bar because in each underlying investigation or review the respondent had developed a more comprehensive record to highlight the quantities’ commercial insignificance. *Shanghai Foreign Trade*, 28 CIT at 495, 318 F. Supp. 2d at 1352 (noting that the record contained data revealing distortion and aberrancy in the data used by Commerce); *Juancheng Kangtai Chem.*, 2015 WL 4999476, at *23–*25, Slip Op. 15–93 at 41–42 (explaining that the commercial significance test is typically based on cross-country comparisons of data); *Jacobi Carbons*, 313 F. Supp. 3d at 1362 (rejecting Commerce’s failure to explain commercial significance where record evidence supported domestic sourcing of an input over imports). Thus, where, as here, there was no comparative data on the record of either imports or domestic production, Commerce was not obligated to say more about the commerciality of import data when selecting a primary surrogate country. Accordingly, the court finds that Commerce’s determination that the Romanian sawnwood quantities were commercially significant was based on substantial evidence.

B. Commerce’s Determination that the Romanian Financial Statements Provided Superior Data Was Supported by Substantial Evidence.

Next, in challenging Commerce’s selection of Romania as the primary surrogate country, Ancientree contends that the Romanian financial statements were inferior to the available Malaysian financial statements. Pl.’s Br. at 13–21. In its *Final Determination*, Commerce determined that the Romanian Sigstrat financial statements “represent the financial position of a profitable Romanian producer of comparable wooden products . . . that explicitly identify energy costs, are contemporaneous and cover the entire POI, and contain no evidence of countervailable subsidies.” IDM at 33. While Commerce stated that Malaysian data included financial statements from three different producers of comparable merchandise, Commerce noted that Sigstrat’s Romanian financial statements segregate two costs, energy and manufacturing overhead, which are important to its analysis. *Id.* Since the Malaysian financial statements failed to segregate these two costs, Commerce determined that Sigstrat’s financial statements provided the best available information for purposes of its analysis. *Id.* at 37.

Commerce has wide discretion in choosing between two reasonable alternatives for surrogate value sources. *FMC Corp. v. United States*, 27 CIT 240, 251 (2003), *aff’d*, 87 F. App’x 753 (Fed. Cir. 2004). While Commerce occasionally relies on financial statements that lack certain details, such as energy or overhead, it prefers financial statements that “contain the full level of details.” *Diamond Sawblades Mfrs.’ Coal. v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1368, 1381 (2017); see *Qingdao Qihang Tyre Co. v. United States*, 42 CIT __, __, 308 F. Supp. 3d 1329, 1354 (2018) (concluding Commerce rationally determined that a set of financial statements “was not usable because it did ‘not adequately break out energy costs.’”). Specifically, it is within Commerce’s discretion to decide against using financial statements that do not segregate energy costs. See *China Mfrs. All., LLC v. United States*, 41 CIT __, __, 205 F. Supp. 3d 1325, 1352 (2017) (“Commerce acted within its discretion in deciding against the Gajah Tunggal financial statements because of the lack of a breakdown for energy costs.”).

Ancientree argues that Malaysia provides superior surrogate financial data as there were three contemporaneous financial statements of Malaysian manufacturers that solely or primarily produce comparable and identical goods on the record, whereas there was only one such financial statement from Romania. Pl.’s Br. at 13–14, 16–17. Contrary to Commerce’s conclusion, Ancientree argues that the re-

cord provides evidence that the three Malaysian companies manufacture identical products, which makes Malaysia a better source of information than the merely comparable Romanian data. *Id.* at 14–16. Furthermore, Ancientree states that Commerce overemphasizes the lack of segregate energy and overhead costs in the Malaysian financial statements because that lack of detail has not prevented Commerce from using similar statements in past decisions. *Id.* at 19–20.

In response, the Government and AKC Alliance argue that the Romanian Sigstrat financial statement was contemporaneous, “from a producer of comparable merchandise,” and “more detailed than the Malaysian financial statements.” Def.’s Br. at 15; *see* Def.-Inter.’s Br. 20–24. Because of these characteristics, the Government and AKC Alliance argue that Commerce rationally exercised its discretion by choosing an appropriate financial statement for the surrogate value calculation. *Id.* Furthermore, they argue that there was not enough evidence in the record for Ancientree to sufficiently contend that two of the three Malaysian manufacturers, Lii Hen and Poh Huat, produce identical merchandise to the subject merchandise. Def.’s Br. at 15–16; Def.-Inter.’s Br. 22–23. Finally, they argue that the Sigstrat financial statement is more detailed as it breaks out energy costs and manufacturing overhead, line items that are ambiguously accounted for in the Malaysian financial statements. Def.’s Br. at 17–19; Def.-Inter.’s Br. 20–21.

These contentions comprise two disagreements: (1) whether the merchandise covered by the Lii Hen and Poh Huat financial statements was identical or merely comparable to subject merchandise; and (2) whether Commerce reasonably chose a single, arguably superior Romanian financial statement over three Malaysian financial statements. First, the court concludes that Commerce’s determination that the Malaysian companies do not produce identical merchandise is based on substantial evidence. The record contains the financial statements and pictures from the websites of three Malaysian producers, Lii Hen, Poh Huat, and Yeo Aik. *See* Ancientree, Final Surrogate Value Submission at Ex. 3 (Lii Hen financial statement), Ex. 5 (Poh Huat financial statement), Exh. 7 (Yeo Aik financial statement) (Sept. 2, 2019), P.R. 1328–31 (“Ancientree Final SV Comments”). It is undisputed that these three manufacturers produce comparable merchandise to Ancientree, however, Commerce concluded that no evidence supported that they produce identical merchandise. *See* IDM at 33. The court agrees with Commerce that the websites of Lii Hen and Poh Huat, the two manufacturers Ancientree argues produce identical merchandise, do not prove they produce

furniture identical to the in-scope wooden cabinets and vanities. *See id.* at 32. The court’s review of the record evidence shows that the websites demonstrate that the two companies produce a variety of desks, bed frames, nightstands, dressers, and television stands, but no evidence of wooden cabinets and vanities for permanent installation, typically within a kitchen as Ancientree contends. *See, e.g.*, Ancientree Final SV Comments at Exs. 3 and 5. The court also agrees that Commerce reasonably found the website screenshots to be of little probative value as neither the pictures of the websites nor the financial statements themselves explicitly identified that the Malaysia manufacturers produce identical merchandise. IDM at 32. Furthermore, Ancientree’s argument that the financial statements of the two firms demonstrate that they consume identical raw materials to Ancientree is of little dispositive value because Sigstrat also consumes the same raw materials but does not engage in the production of identical merchandise. *See* AKC Alliance Prelim. SV Comments at Ex. 10B. Therefore, the court concludes that Commerce’s determination that the Malaysian companies produce comparable, rather than identical, merchandise to Ancientree was based on substantial evidence.

Ancientree also argues that Sigstrat’s merchandise is less comparable than the merchandise produced by the Malaysian manufactures because Sigstrat mainly produces plywood and veneering. Pl.’s Br. at 16–17. Commerce reasonably concluded, however, that the record is unclear as to whether Sigstrat primarily produces plywood and veneering or wooden furniture. *See* IDM at 35. Ancientree does not dispute that Sigstrat uses similar raw materials to produce “wooden plywood, veneering, seats and backrests, chairs, tables, wood chip lights, and other wooden products,” but disputes the comparability of Sigstrat’s products to its own. *See* Pl.’s Br. at 16–77 (citing 2018 Sigstrat Financial Statement at 21). At best, the record supports that Sigstrat produces comparable merchandise to Yeo Aik, based on the website picture in the record, and Foremost, one of the respondents to the AD investigation. *See* Ancientree Final SV Comments at Ex. 7; IDM at 35. Therefore, Commerce reasonably determined that Romanian Sigstrat data is “at least an equally valid source of [surrogate value] information as the Malaysian statements” because it produces wooden furniture, has increasingly produced more furniture every year since 2016, and the Malaysian financial statements do not identify the relative production amounts by product. IDM at 35. Given that the Romanian company and the Malaysian companies all manufacture comparable products to Ancientree, Commerce has wide discretion to select between the two countries as reasonable alterna-

tives. *See FMC Corp.*, 27 CIT at 251. Therefore, the court affirms Commerce's selection of Romania on the record because it is supported by substantial evidence and within its discretion.

Second, the court concludes that Commerce acted within its discretion when selecting the single, superior Romanian financial statement to the three Malaysian statements. While there are three Malaysian financial statements, as Commerce noted, none of them segregate energy costs and all of them ambiguously account for overhead expenses. *See* IDM at 33; Ancientree Final SV Comments at Exs. 3, 5, 7. Meanwhile, Sigstrat's financial statement has a line item for "production overhead" and an itemized expense for energy costs. *See* AKC Alliance Prelim. SV Comments at Ex. 10B n.7; *see also* IDM at 34. Given that it is within Commerce's discretion to discard financial statements that do not segregate out energy costs, Commerce reasonably concluded that the quality of the Sigstrat financial statement outweighed that Malaysia provided three inferior financial statements. *See China Mfrs. All.*, 205 F. Supp. 3d at 1352.

Therefore, the court holds that Commerce acted based on substantial evidence and within its discretion to determine that the Romanian financial statement was superior to the Malaysian financial statements for purposes of surrogate country selection.

C. Commerce's Decision to Value Select Other Inputs from Both Romania and Malaysia Was Supported by Substantial Evidence.

Finally, Ancientree points to Commerce's selection of data for less important FOP inputs as erroneous and supportive of Malaysia as the best source of information. Pl.'s Br. at 21–23. In its *Final Determination*, Commerce used the Romanian labor value and a Malaysian B&H value in its financial ratio calculations. IDM at 39–40. Although Ancientree suggested a specific, Malaysian labor rate for "manufacture of wooden and cane furniture," Commerce determined that the Romanian labor value was superior because Ancientree did not explain what portion of the Malaysian labor rate was from the manufacturing of cane furniture. *Id.* at 39. Furthermore, in response to Ancientree's case brief arguments, Commerce explained that the Romanian labor rate is specific to manufacturing and that "there is no evidence on the record that would suggest a wage rate specific to furniture manufacturing would necessarily be any more precise, or that the Romanian manufacturing wage rate is any less specific . . . than a wage rate for 'cane furniture.'" *Id.* at 40. Regarding the Malaysian B&H value, Commerce agreed with Ancientree that it is more specific than the Romanian value but found that the superiority of

one FOP input value did not outweigh its other considerations in selecting Romania as the primary surrogate country. *Id.*

While Commerce has a practice of valuing all FOPs from the same surrogate country when possible, Commerce deviates from this preference where particular surrogate values from outside the primary country are superior. See *Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States*, 37 CIT 1116, 1119–21, 929 F. Supp. 2d 1352, 1355–56 (2013). Furthermore, “Commerce need not prove that its methodology was the only way or even the best way to calculate surrogate values for [FOPs] as long as it was a reasonable way.” *Coal. for Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 118, 44 F. Supp. 2d 229, 258 (1999) (“*Brake Drum*”).

In arguing that Malaysia was the better primary surrogate country, Ancientree argues that Malaysia sources superior information concerning less crucial inputs, specifically labor and B&H expenses. Pl.’s Br. at 21. Ancientree contends that Malaysia provides a specific labor rate for manufacturers of wooden and cane furniture that is more specific and detailed than the general overall manufacturing labor rate in Romania. *Id.* Additionally, Ancientree contends that Commerce’s acknowledgment of Malaysia’s superior B&H expense data supports that Commerce should have selected Malaysia as the primary surrogate country. *Id.* at 22–23. In response, the Government states that “Ancientree contradicts its own argument by conceding these [FOPs] are ‘less important.’” Def.’s Br. at 26 (quoting Pl.’s Br. at 21); see Def.-Inter.’s Br. 24–25. They note that the superiority of less crucial FOP values does not, however, mean that Commerce was obligated to choose Malaysia as the primary surrogate when Romania provided more accurate values for the main inputs. Def.’s Br. at 27; Def.-Inter.’s Br. at 24–25. Regarding Commerce’s selection of Romanian data to value labor expenses, the Government and AKC Alliance contend that there is no evidence detailing what percentage of the Malaysian labor rate is related to cane furniture manufacturing and, given cane furniture is produced in a different manner than wooden furniture, the Malaysian rate is not superior to Romania’s “general manufacturing” labor rate. Def.’s Br. at 26; Def.-Inter.’s Br. at 24.

The court concludes that Commerce’s decision to use the Romanian labor rate was within its discretion and based on substantial evidence. Commerce determined that both the Romanian and Malaysian labor rates lacked some detail. IDM at 39–40. The Romanian data provided a broad “manufacturing” labor rate, while Malaysia’s labor rate combined both wooden and cane furniture manufacturing. *Id.* Therefore, Commerce, faced with two reasonable alternatives, prop-

erly exercised its discretion. *See FMC Corp.*, 27 CIT at 251. Given that Commerce was using Romania as its primary surrogate and both rates were not detailed, it reasonably selected the Romanian rate exercising its discretion. *See Brake Drum*, 23 CIT at 118, 44 F. Supp. 2d at 258.

Furthermore, the court concludes that Commerce's decision to use the Malaysian B&H value was within its discretion and based on substantial evidence. Ancientree does not dispute that the Malaysian B&H value was superior to the Romanian value. *See Pl.'s Br.* at 22. Commerce is statutorily permitted to use multiple sources of surrogate value and the usage of a less crucial value from a non-primary surrogate country does not require Commerce to change its primary surrogate country. *See* 19 U.S.C. § 1677b(c)(1); *see also Camau Frozen Seafood Processing*, 37 CIT at 1119–21, 929 F. Supp. 2d at 1355–56. Therefore, Commerce reasonably used the Malaysian B&H values without selecting Malaysia as the primary surrogate. Because the court sustains Commerce's decisions regarding the reliability of the Romanian sawnwood quantities, the superiority of the Romanian financial statement, Ancientree's arguments regarding these less important FOPs cannot defeat Commerce's selection of Romanian as the primary surrogate country.

In sum, the court sustains Commerce's selection of Romania as the primary surrogate country as supported by substantial evidence and otherwise in accordance with law.

II. Commerce's Sigstrat Financial Ratio Calculation Was Arbitrary and Capricious.

Ancientree next challenges the *Final Determination* by arguing that Commerce's financial ratio calculation was inconsistent with its past calculations and did not address Ancientree's objections on that point, and thus was arbitrary and capricious. In calculating the Romanian surrogate financial ratios to incorporate into the surrogate normal value, Commerce used Sigstrat's 2018 financial statements. *See* Prelim. SV Memo; Dep't, Final Surrogate Value Memo (Feb. 21, 2020), P.R. 1560, 1571 ("Final SV Memo"). Commenting on surrogate value selections, Ancientree submitted a financial ratios calculation for the 2018 Sigstrat financial statement and Commerce's "calculation of the 2017 Sigstrat financial ratios" from *Multilayered Wood Flooring From the People's Republic of China: Final Results of Anti-dumping Duty Administrative Review and Final Determination of No Shipments; 2016–2017*, 84 Fed. Reg. 38,002 (Dep't Commerce Aug. 5, 2019) ("*Multilayered Wood Flooring*") to argue that AKC Alliance's proposed financial ratio calculation was incorrect and that Commerce "should calculate the financial ratios consistent with its methodology

in past reviews.” See *Ancientree, Rebuttal Prelim. Surrogate Value Submission* at 1, Exs. SVR-1–SVR-2 (Aug. 19, 2019), P.R. 1007. In its case brief, Ancientree again brought attention to this issue by arguing that Commerce’s preliminary financial ratio calculation differed from Commerce’s past calculations of financial ratios using Sigstrat’s financial statements. See Ancientree’s Admin. Case Br. at 14. Specifically, Ancientree argued that, in each past determination using Sigstrat financial statements and financial ratios, Commerce “used significantly more delineated line items in Sigstrat’s financial statement,” which “provide[d] far more critical detail, including line items for raw materials and consumables and personnel expenditure.” *Id.* at 14–15. As in its *Preliminary Determination*, Commerce’s *Final Determination* Commerce’s methodology differed from *Multi-layered Wood Flooring* by reducing the number of line items used for expenses from fifteen to eight. Prelim.SV Memo; compare Ancientree, *Rebuttal Prelim. Surrogate Value Submission* at Exs. SVR-1–SVR-2 with *Final SV Memo* at Attach. 12 (Financial Ratios Calculation Worksheet). Commerce, however, did not directly address Ancientree’s challenge in the *Final Determination*. See IDM at 44–45 (explaining the financial ratio calculation).

“[C]onsistency has long been a core interest of administrative law, and inconsistent treatment is inherently significant.” *DAK Americas LLC v. United States*, 44 CIT __, __, 456 F. Supp. 3d 1340, 1355 (2020) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Chisholm v. Def. Logistics Agency*, 656 F.2d 42, 47 (3d Cir. 1981)). “[W]here an agency departs from prior determinations, it is appropriate to compel the agency to explain whether: (1) good reasons prompt that departure; or (2) the prior determinations are inapposite such that it is not in fact a departure at all.” *Id.* at 1356. Though Commerce’s prior determinations are not legally binding, its exercise of discretion is constrained by the need to provide an adequate explanation for any deviation from its past practice and interpretations. *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (“[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.” (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996))). Furthermore, “while [Commerce’s] explanations do not have to be perfect, the path of [Commerce’s] decision must be reasonably discernable.” *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Ancientree argues that Commerce’s financial ratio calculation for Sigstrat, the Romanian wooden cabinets and vanities manufacturer,

differed from how it consistently calculated financial ratios using the same financial statements in past determinations. Pl.'s Br. at 26–28. Ancientree contends that Commerce previously “used several detailed notes in the Sigstrat statement to break[]out [fifteen] different line items for expenses,” while here it only used “[eight] line items and relied on the general Profit & Loss and Balance Sheet rather than the detailed notes.” *Id.* at 27. Ancientree states that Commerce erred in not explaining its change in the use of the Sigstrat financial ratio calculation. *Id.* at 27–28. Further, Ancientree contends that Commerce’s decision was deficient because it failed to respond to Ancientree’s comment on that subject. *Id.* at 27. The Government argues that the detailed calculation worksheet in Commerce’s Final SV Memo adequately explained the changes to the Sigstrat financial ratio calculation. *See* Def.’s Br. at 21. The Government and AKC Alliance contend that Commerce’s financial ratio calculation was reasonable “because it was based on an examination of all information on the record, as well as the arguments advanced by the parties.” Def.’s Br. at 20; *see* Def. Inter.’s Br. 31. Additionally, they contend that Ancientree failed to explain why Commerce’s calculation methodology resulted in an erroneous financial ratio because Ancientree provided only one alternate calculation methodology for Sigstrat’s financial ratio. *See* Def.’s Br. at 21; Def.-Inter.’s Br. 29–31. Moreover, AKC Alliance states that the 2017 Sigstrat financial statement is absent from the record, making the applicability of Commerce’s methodology in *Multilayered Wood Flooring* from China unclear. Def.-Inter.’s Br. at 30. Furthermore, AKC Alliance highlights that Ancientree’s own suggested calculation differed from the methodology used by Commerce in *Multilayered Wood Flooring* from China, and thus that Ancientree should have provided the Sigstrat financial statement so that Commerce could have analyzed the accuracy of Ancientree’s proposed calculation. *See id.* The Government and AKC Alliance also contend that Commerce’s decision not to respond to Ancientree’s argument concerning the alleged inconsistent calculation does not inherently make Commerce’s decision arbitrary because the reasoning behind Commerce’s calculation is reasonably discernable. Def.’s Br. at 21; Def.-Inter.’s Br. 29–31.

The court concludes that Commerce did not adequately explain its calculation of Sigstrat’s financial ratio in light of Ancientree’s direct contention that its calculation differed from its past decisions. The Government and AKC Alliance’s argument that “the path of” Commerce’s calculation was “reasonably discernable” is unpersuasive. *See id.* Commerce did not explain any change in its financial ratio calculation in response to Ancientree’s comment, but rather explained only

how the new calculation was performed. This is insufficient. *See NMB Singapore*, 557 F.3d at 1319–20 (“[I]n the anti-dumping context, a final determination by Commerce must include an explanation of the basis for its determination that addresses relevant arguments[] made by interested parties who are parties to the investigation or review.” (quoting 19 U.S.C. § 1677f(i)(3)(A))). While AKC Alliance argues that Ancientree’s proposed methodology differed from the previous calculation in *Multilayered Wood Flooring from China* and that Ancientree did not place relevant Sigstrat financial statements on the record, Def.-Inter.’s Br. at 30–31, neither of these facts relieves Commerce of its obligation to address Ancientree’s argument and to explain any change in its methodology between the two administrative reviews. Ancientree’s challenge to the financial ratio calculation was material to Commerce’s *Final Determination* because it affects Ancientree’s AD duty margin. *See CP Kelco US*, Slip Op. 16–36 at 3. Thus, Commerce was obligated to address it. Accordingly, the court remands Commerce’s calculation of Sigstrat’s financial ratio for further explanation. On remand, Commerce may reopen the record as necessary to gather any financial statements or documents needed to respond to Ancientree’s argument. *Shandong Rongxin Imp. & Exp. Co.*, 41 CIT __, __, 203 F. Supp. 3d 1327, 1337 (2017) (“The [c]ourt may remand with instructions for Commerce to decide whether to reopen and supplement the record, in order to obtain necessary information or resolve ambiguities, per its discretion.” (citing *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012))).

III. Commerce’s Surrogate Value Selections for Ancientree’s Sawnwood, MDF, Paint, and Particleboard Inputs Were Supported by Substantial Evidence.

Ancientree’s third and last challenge to Commerce’s *Final Determination* is that Commerce erroneously selected HTS headings for surrogate value inputs that were less specific than the HTS headings Ancientree suggested for its actual sawnwood, MDF, paint, and particleboard FOPs. Pl.’s Br. at 6–7, 23–25. The Government and AKC Alliance respond that Commerce selected surrogate values for Ancientree’s sawnwood, MDF, paint, and particleboard inputs based on substantial evidence. Def.’s Br. at 27; Def.-Inter.’s Br. 26–29. The court concludes that Commerce’s selected surrogate values were sufficiently product specific to Ancientree’s inputs and were based on substantial record evidence in light of the limited information provided by Ancientree regarding its FOPs.³

³ AKC Alliance argues that Ancientree made certain factual submissions too late in the investigation to form a basis for FOPs different than those used by Commerce. Def.-Inter.’s

When confronted with a surrogate value specificity issue, the question the court must ask itself is “whether substantial evidence on the record supports that [the surrogate HTS heading] is sufficiently product-specific to the FOP at issue to allow a comparison with other criteria.” *United Steel and Fasteners, Inc., v. United States*, 44 CIT __, __, 469 F. Supp. 3d 1390, 1398 (2020) (citing *Taian Ziyang Food Co., v. United States*, 35 CIT 863, 906–07, 783 F. Supp. 2d 1292, 1330 (2011)). The surrogate value is sufficiently product specific to the material input when the surrogate data is “not so removed from the material input such that they are not comparable.” *Id.* at 1398–99. In fact, there is no general principle requiring Commerce to select the most specific surrogate HTS heading because it is within Commerce’s discretion “to select a reasonable surrogate in light of each of the criteria outlined in Policy Bulletin 04.1.” *Id.* at 1400. Finally, “the burden of creating an adequate record lies with [interested parties] and not with Commerce.” *QVD Food*, 658 F.3d at 1324 (quoting *Tianjin Mach. Imp. & Exp. Corp.*, 806 F. Supp. at 1015).

A. Commerce’s Selection of a Sawnwood Surrogate Value Was Supported by Substantial Evidence.

Commerce selected surrogate values of Romanian birch and poplar sawnwood under the six-digit HTS subheadings 4407.96 and 4407.97, respectively, which cover birch and poplar “wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded, or end-jointed of a thickness exceeding 6 mm.” IDM at 43. Commerce explained that this heading was sufficiently specific because Ancientree’s questionnaire responses did not describe its wood inputs “in any detail greater than ‘birch sawnwood’ or ‘poplar sawnwood.’” *Id.* at 43–44. Ancientree contends that Commerce’s selection of a six-digit HTS heading for surrogate value of its sawnwood FOPs is overly broad and includes dissimilar wood products. Pl.’s Br. at 6–7. Rather, Ancientree argues that Commerce should have used the ten-digit Malaysian HTS value because it is more specific to the type of wood used by Ancientree. *Id.* at 7. The Government and AKC Alliance respond by highlighting that the record only describes Ancientree’s sawnwood as “birch sawnwood” and “poplar sawnwood” and, therefore, Commerce reasonably used the broader Romanian HTS classi-

Br. at 28. The court need not reach this issue since it finds Ancientree’s challenge unpersuasive. Similarly, in response to the court’s questioning on this issue, Ancientree also argues that Commerce could have asked for further information on Ancientree’s inputs, as it has done in past investigations. Pl.’s Post-Arg. Submission at 4–5. The court notes that simply because Commerce can request additional information during an investigation, does not mean Commerce must have done so, especially where, as here, Commerce did not identify a deficiency or gap in the record and relied on information provided by Ancientree regarding its FOPs.

fication to value those FOPs rather than the more specific Malaysian HTS heading. Def.'s Br. at 28; Def.-Inter.'s Br. 11–12.

Commerce's selection of surrogate values for Ancientree's birch and poplar sawnwood inputs is supported by substantial evidence. Ancientree's suggestion that a narrower surrogate HTS heading should be assigned to its sawnwood inputs is not supported by record evidence. In the past, the court has rejected similar challenges by respondents that provided Commerce broad descriptions of its inputs and then requested more narrow HTS headings be used for surrogate FOPs. *See, e.g., Dorbest Ltd. v. United States*, 30 CIT 1671, 1728, 462 F. Supp. 2d 1262, 1311 (2006); *An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1256, 1273 (2017). For example, in *Dorbest*, the respondent described its styrofoam input as simply "styrofoam" then asked for a more specific HTS heading be used to value that input. 30 CIT at 1728–29, 462 F. Supp. 2d at 1311. The court found that "respondents did not provide an abundance of detail in their description" and "Commerce credited Respondents' descriptions of the nature of their products as much as possible[] and sought to match the descriptions to HTS subheadings." 30 CIT at 1729–30, 462 F. Supp. 2d at 1312. The court concludes that this analysis applies equally in this case. Here, Commerce was given a limited record and, as a result, used the information at its disposal to match the sawnwood inputs with a surrogate HTS heading that was sufficiently product-specific. *See also United Steel and Fasteners, Inc.*, 469 F. Supp. 3d at 1398. As a result, the court holds that Commerce's sawnwood surrogate value selection was based on substantial evidence.

B. Commerce's MDF and Particleboard Surrogate Value Selections Were Supported by Substantial Evidence.

To value Ancientree's MDF inputs, Commerce used HTS category 4411.14.90, which is a basket "other" category covering MDF not otherwise specified in 4411.14. IDM at 55–56. Commerce rejected Ancientree's proposed surrogate HTS heading 4411.14.10, covering "[MDF] of Wood, Of A Thickness > 9 Mm, Not Mechanically Worked Or Surface-Covered." *Id.* Rather, Commerce stated that Ancientree "failed to provide documentation demonstrating that HTS category 4411.14.10 specifically applies to the MDF input it consumes (*i.e.*, through input descriptions, purchase invoices, or photographs of the input on the record)." *Id.* at 56. Due to the lack of record evidence and Ancientree's admission that its MDF was "surface covered," Commerce found 4411.14.90 to be the appropriate surrogate HTS heading

to value MDF inputs that have “processing imparted to them.” *Id.* For similar reasons, Commerce used HTS heading 4410.11.90, covering particleboard not otherwise specified in HTS category 4410.11, to value Ancientree’s particleboard inputs. *Id.* at 57–58. Commerce determined that HTS category 4410.11.90 was more accurate than HTS 4410.10.10, the classification Ancientree recommended, because of Ancientree’s statement that its particleboard has a laminate overlay. *Id.* at 58.

Ancientree here renews its challenge to Commerce’s selection of MDF and particleboard surrogate values. It again argues that the MDF it uses for its products should be valued under the more specific HTS category 4411.14.10, because Ancientree buys unworked MDF that it then processes during production. Pl.’s Br. at 24. Ancientree also argues that it purchases unprocessed particleboard contrary to Commerce’s selection of a surrogate value of processed particleboard. Pl.’s Br. at 26. In support of Commerce’s surrogate value selections, the Government and AKC Alliance note that Ancientree admitted its MDF is surface-covered and the record demonstrates that its cabinets include a laminated exterior. Def.’s Br. at 30; Def.-Inter.’s Br. 26–27. Additionally, they contend that Ancientree provided no evidence that it purchases the MDF unworked then, subsequently, processes it. Def.’s Br. at 29; Def.-Inter.’s Br. 26–27. Rather, they argue that the record shows that Ancientree does purchase processed MDF and, therefore, Commerce’s HTS surrogate value selection was based on substantial evidence. *Id.* Similarly, the Government and AKC Alliance contend that there is no record support for Ancientree’s assertion that it purchases unworked or sanded particleboard. Def.’s Br. at 32; Def.-Inter.’s Br. 27. They contend that the record shows the particleboard used in Ancientree products is processed and, consequently, Commerce’s decision to use a surrogate HTS heading for processed particleboard was based on substantial evidence. Def.’s Br. at 32–33; Def.-Inter.’s Br. 27.

The court concludes that Commerce’s decisions to value Ancientree’s MDF inputs under HTS heading 4411.14.90 and particleboard inputs under HTS heading 4410.11.90 are supported by substantial evidence. The record contravenes Ancientree’s contentions that its submissions to Commerce support the selection of more specific surrogate values for MDF and particleboard. Ancientree’s production flowchart provided to Commerce does not indicate that Ancientree covers the MDF or particleboard with any sort of surface covering. *See* Ancientree, Fourth Suppl. Questionnaire Resp. at Ex. SQ 4–10 (Sept. 23, 2019), P.R. 1367. Additionally, Ancientree’s product brochure indicates that its cabinets and vanities which include MDF and par-

ticleboard include a “matching laminate exterior.” *See* IDM at 55; Ancientree, Sec. A Questionnaire Resp. at Ex. A-5 (July 3, 2019), P.R. 870. Thus, Commerce’s selection of surrogate HTS headings for the MDF and particleboard inputs were reasonably specific because these categories include products that Ancientree’s evidence shows that it uses. Therefore, Commerce acted based on substantial evidence and within its discretion when selecting the 4411.14.90 and 4410.11.90 for surrogate valuations of these FOP inputs. *See QVD Food*, 658 F.3d at 1323–24.

C. Commerce’s Selectin of Paint Surrogate Value Was Supported by Substantial Evidence.

During the investigation, Ancientree suggested that Commerce use HTS heading 3209.10, which covers paints and varnishes “dispersed or dissolved in an aqueous medium,” IDM at 56, in valuing its paint input. *See* Ancientree Prelim. SV Comments at Ex. SV-1. However, Commerce determined that HTS heading 3208.10.90, which covers paints and varnishes “dispersed or dissolved in a non-aqueous medium,” was the proper surrogate for Ancientree’s paint inputs. IDM at 56–57. During verification, Commerce did not uncover any documentation detailing the chemical composition for Ancientree’s paint input. *Id.* at 57. The translated invoices, however, stated that Ancientree purchased “water based UV paint” and “water based color paint” alongside “paint.” Ancientree, Verification Exhibits (Nov. 15, 2019), P.R. 1486.

Ancientree argues that there is record support that it consumes paint that is “dispersed or dissolved in an aqueous medium” and, as a result, Commerce erred in valuing its paint inputs using the HTS heading that covers non-aqueous based paint. Pl.’s Br. at 25. The Government and AKC Alliance respond by arguing that Ancientree did not provide record evidence that it used water-based paint — in particular, that Ancientree’s paint purchase invoices did not indicate what portion, if any, of its paint inputs is water-based. Def.’s Br. at 31; Def.-Inter.’s Br. 27–28. Therefore, they argue that Commerce’s surrogate value selection for paint inputs as non-aqueous was supported by substantial evidence. Def.’s Br. at 31–32; Def.-Inter.’s Br. 27–29.

The court concludes that Commerce’s decision to value Ancientree’s paint inputs under HTS heading 3209.10.90 is supported by substantial evidence. As with its MDF input, Ancientree failed to provide detailed characteristics for its paint inputs. While some of its invoices are for water-based paint, most of the invoices are for simply “paint.” Ancientree, Verification Exhibits. Given this ambiguous and limited record, Commerce reasonably selected the non-aqueous paint surro-

gate HTS heading to value Ancientree's paint inputs. *See QVD Food*, 658 F.3d at 1323–24.

In short, the court is unpersuaded by this challenge to Commerce's *Final Determination* and concludes that Commerce's selections of surrogate values were sufficiently product specific to Ancientree's inputs and based on substantial record evidence. *See United Steel and Fasteners, Inc.*, 469 F. Supp. 3d at 1398.

CONCLUSION

The court concludes that Commerce's selection of Romania as the primary surrogate country and selection of surrogate values in its *Final Determination* are each supported by substantial evidence and otherwise in accordance with law. However, the court remands Commerce's calculation of Sigstrat's financial ratio for further explanation consistent with this opinion in light of Ancientree's unaddressed contention that Commerce changed its calculation methodology from its past decisions using Sigstrat's financial statements. Commerce shall file with this court and provide to the parties its remand results within ninety (90) days of the date of this order; thereafter, the parties shall have thirty (30) days to submit briefs addressing the revised final determination with the court, and the parties shall have thirty (30) days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: July 12, 2021
New York, New York

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

Index

Customs Bulletin and Decisions
Vol. 55, No. 29, July 28, 2021

U.S. Customs and Border Protection

General Notices

	<i>Page</i>
Revocation of Three Ruling Letters, Modification of One Ruling Letter and Revocation of Treatment Relating to the Tariff Classification of Fire Pits	1
Revocation of Six Ruling Letters and Revocation of Treatment Relating to the Tariff Classification of Menorahs	8
Proposed Revocation of One Ruling Letter and Proposed Revocation of Treatment Relating to the Tariff Classification of Press Sleeves	14

U.S. Court of Appeals for the Federal Circuit

	<i>Appeal No.</i>	<i>Page</i>
TR International Trading Company, Inc., Plaintiff-Appellant v. United States, United States Department of Commerce, International Trade Administration, Gina M. Raimondo, Secretary of Commerce, Troy Miller, in his Official Capacity as Senior Official Performing the Duties of the Commissioner for United States Customs and Border Protection, United States Customs and Border Protection, Defendants-Appellees	2020-1830	27
Transpacific Steel LLC, Borusan Mannesmann Boru Sanayi Ve Ticaret A.S., Borusan Mannesmann Pipe U.S. Inc., The Jordan International Company, Plaintiffs-Appellees v. United States, Joseph R. Biden, Jr., in his Official Capacity as President of The United States, United States Customs and Border Protection, Troy Miller, In His Official Capacity as Senior Official Performing The Duties of the Commissioner for United States Customs and Border Protection, Department of Commerce, Gina Raimondo, in her Official Capacity as Secretary of Commerce, Defendants-Appellants	2020-2157	35
Transpacific Steel LLC, Borusan Mannesmann Boru Sanayi Ve Ticaret A.S., Borusan Mannesmann Pipe U.S. Inc., The Jordan International Company, Plaintiffs-Appellees v. United States, Joseph R. Biden, Jr., in his Official Capacity as President of The United States, United States Customs And Border Protection, Troy Miller, in his Official Capacity As Senior Official Performing The Duties of the Commissioner For		

United States Customs And Border Protection, Department of Commerce, Gina Raimondo, in her Official Capacity as Secretary of Commerce, Defendants-Appellants	2020–2157	72
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U.S. Court of International Trade
Slip Opinions

	Slip Op. No.	Page
Hyundai Heavy Industries Co., Ltd., Plaintiff, and Hyosung Corporation and Iljin Electric Co., Ltd., Consolidated Plaintiffs, v. United States, Defendant, and ABB Enterprise Software Inc., Defendant-Intervenor.	21–84	83
Fastenal Company Purchasing, Plaintiff, v. United States, Defendant, and Mid Continent Steel & Wire, Inc., Defendant-Intervenor.	21–85	88
Midwest Fastener Corp., Plaintiff, v. United States, Defendant, and Mid Continent Steel & Wire, Inc., Defendant- Intervenor.	21–86	89
The Ancientree Cabinet Co., Ltd., Plaintiff, and Cabinets To Go, LLC, Plaintiff-Intervenor, v. United States, Defendant, and American Kitchen Cabinet Alliance, Defendant-Intervenor. . .	21–87	95