

# U.S. Customs and Border Protection



## 19 CFR PART 177

### **REVOCAION OF 8 RULING LETTERS, MODIFICATION OF ONE RULING LETTER, AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF FLEET TELEMATICS DEVICES**

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

**ACTION:** Notice of revocation of 8 ruling letters, modification of one ruling letter, and of revocation of treatment relating to the tariff classification of fleet telematics devices.

**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 8 ruling letters, and modifying one ruling letter, concerning tariff classification of fleet telematics devices 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. 38, on September 29, 2021. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after January 29, 2022.

**FOR FURTHER INFORMATION CONTACT:** Suzanne Kingsbury, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at [suzanne.kingsbury@cbp.dhs.gov](mailto:suzanne.kingsbury@cbp.dhs.gov).

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

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 38, on September 29, 2021, proposing to revoke 8 ruling letters, and modify one ruling letter, pertaining to the tariff classification of fleet telematics devices. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY N304264, NY N213872, NY N108329, NY N300201, and NY N301862, CBP classified fleet telematics devices in heading 8517, HTSUS, specifically in subheading 8517.62.00, HTSUS, which provides for "[T]elephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof: Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion

and transmission or regeneration of voice, images or other data, including switching and routing apparatus:.” In NY N201495, NY N108330, NY N148555, and NY N168766, CBP classified fleet telematics devices in heading 8526, HTSUS, specifically in subheading 8526.91.00, HTSUS, which provides for “[R]adar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus:.” CBP has reviewed NY N304264, NY N213872, NY N108329, NY N300201, NY N301862, NY N201495, NY N108330, NY N148555, and NY N168766 and has determined the ruling letters to be in error. It is now CBP’s position that fleet telematics devices that are composite machines and feature components described by headings that fall under Section XVI, and Chapter 90 if applicable, are classified pursuant to Note 3 to Section XVI, and Note 3 to Chapter 90 if applicable, as if consisting only of that component that performs the telematics device’s principal function. If it is not possible to determine the principal function, and the context does not otherwise require, classification will be determined pursuant to GRI 3(c). In applying this legal analysis, it is now CBP’s position that the subject fleet telematics devices, depending on their configuration, are properly classified, pursuant to GRI 3(c), under either heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS, which provides for “[R]adar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus:” or under heading 9031, HTSUS, specifically subheading 9031.80.80, HTSUS, which provides for “[M]easuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof: Other instruments, appliances and machines: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N304264, NY N213872, NY N108329, NY N300201, NY N301862, NY N201495, NY N108330, NY N148555, and modifying NY N168766, and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H312223, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated:

GREGORY CONNOR  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

*Attachment*

HQ H312223

November 9, 2021

OT:RR:CTF:EMAIN H312223 SKK

CATEGORY: Classification

TARIFF NOs: 8526.91.00; 9013.80.80

ERIC SEGAL

PANASONIC CORPORATION OF NORTH AMERICA

*TWO RIVERFRONT PLAZA*

*NEWARK, NJ 07102*

Re: Revocation of NY N304264; NY N213872; NY N108329, NY N300201, NY N301862, NY N201495, NY N108330, and NY N148555;  
Modification of NY N168766; Telematics device; Telemetry device; Fleet management device; Fleet tracker; Asset tracker; Cargo tracker.

This ruling is in reference to New York Ruling Letter (NY) N304264, dated May 22, 2019, in which U.S. Customs and Border Protection (CBP) classified a telematics device under heading 8517, Harmonized Tariff Schedule of the United States (HTSUS), specifically subheading 8517.62.00, HTSUS, which provides for “[T]elephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof: Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus:.” Upon reconsideration, we have determined that the tariff classification of the merchandise at issue in NY N304264 is incorrect.

CBP has also reviewed NY N213872, dated May 16, 2012, NY N108329, dated June 28, 2010, NY N300201, dated September 11, 2018, and NY N301862, dated December 11, 2018, which also involve the classification of telemetry devices in heading 8517.62.00, HTSUS. CBP has also undertaken the review of telemetry devices classified in NY N201495, dated February 14, 2012, NY N168766, dated June 21, 2011, NY N108330, dated June 22, 2010, and NY N148555, dated March 3, 2011, under heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS, which provides for “[R]adar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus.” We have also determined that the tariff classification of the merchandise at issue in these rulings is incorrect.

Upon reconsideration, we have determined that the tariff classification of the subject merchandise at issue in the above rulings is incorrect or partially incorrect. Accordingly, pursuant to the analysis set forth below, CBP is revoking NY N304264, NY N213872, NY N108329, NY N300201, NY N301862, NY N201495, NY N108330, and NY N148555 and modifying NY N168766.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice proposing to revoke NY N304264, NY N213872, NY N108329, NY N300201, NY N301862, NY N201495, NY N108330, and NY N148555, and to modify NY N168766, was published on

September 29, 2021, in Volume 58, Number 38 of the Customs Bulletin. No comments were received in response to the proposed action.

**FACTS:**

CBP rulings classifying telematics devices in heading 8517, HTSUS:

- NY N304264: The subject articles are identified as “Telematic Control Units,” referenced item numbers 51986538 and 519865390. The devices are designed for installation in vehicles and connect to a Controller Area Network (CAN bus).<sup>1</sup> They communicate vehicle data to a backend server. They feature an internal battery, BLE 4.2 connectivity, LTE/4G/3G/2G cell modem, GPS/GLOANASS functionality, and internal cellular and GPS antennas. The GPS functionality provides mobile phone access via the device to a vehicle’s position and routes the phone to that vehicle. The GPS functions to provide location data.
- NY N213872: The subject article is a telemetry device, identified as the “XT6000G.” The device mounts on a refrigerated ship container. It collects GPS location data and transmits/receives data (i.e., alarms, changes in power or environmental conditions) between the container’s microcontroller and the external server. The device features an integrated 3G modem and GPS to provide location data.
- NY N108329: The subject articles are identified as the “Communicator 500” and “Communicator 1000.” Both items are used for fleet management telemetry communications. The “Communicator 500” is a cellular CDMA/EvDO (transmission and reception) communications platform for vehicle fleets and includes an integrated GPS for location tracking. The unit mounts inside a vehicle and offers multiple input and output ports for monitoring vehicle functions and status. The “Communicator 1000” is a high speed, secure mobile hotspot available with GSM or CDMA cellular (transmission and reception) technology. This device integrates a 3G cellular modem, GPS, and wireless LAN technologies in a single vehicle-mounted platform. The “Communicator 1000” reduces fleet operational costs by tracking and improving vehicle-centric metrics, such as driver performance and safety behavior.
- NY N300201: The subject articles are identified as the “Flex OBD-II asset tracker,” the “TT600 solar powered asset tracker with Cat-M,” and the “TT603 solar powered asset tracker with Cat-M.” These devices enhance fleet management by collecting, recording and transmitting/receiving location and other data pertaining to vehicles, trailers or containers. All three models feature a cellular modem. The “Flex OBD-

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<sup>1</sup> A Controller Area Network (CAN bus) is a standard serial communication protocol, meaning that its support of distributed real-time control and multiplexing allows for the interchange of information among the different components of a vehicle. See <https://blog.ansi.org/2017/02/controller-area-network-can-standards-iso-11898/> (site last visited July 2021).

II” also features an OBD-II code reader.<sup>2</sup> Although NY N300201 does not specify whether the subject devices feature a GPS component, internet research on these products indicates that they possess a GPS component that collects location data.<sup>3</sup> CBP classified the subject articles in subheading 8517.62.00, HTSUS.

- NY N301862: The articles at issue consist of two externally mounted asset management/tracking devices, identified as the “Falcon GXT5002C” and the “GXT5002.” They are used to track/report various data elements from (generally) a tractor-trailer. They perform remote data collection that provides location information of assets and cargo status. They operate on a battery pack that recharges from an integrated solar panel. The devices feature a LTE network cellular modem. The ruling requester submitted to CBP that the subject devices do not feature a GPS. However, the product installation specifications for the “Falcon GXT5002C” describe the model as follows: “[T]he GXT5002C is a SkyBitz GPS tracking device used to determine the location as well as the loaded status of a trailer. It communicates via cellular technology and has a wireless interface capability for connectivity to other SkyBitz wireless devices.” The product specifications for the “Falcon GXT5002” do not reference a GPS and indicate that it features an accelerometer to collect start/stop data. CBP classified both products under subheading 8517.12.00, HTSUS.

CBP rulings classifying telematics devices in heading 8526, HTSUS:

- NY N201495: The article at issue is a Micro-Electro-Mechanical device, identified as item “CTDOBD1.” The device is designed for installation in a vehicle and contains a cellular modem, GPS, accelerometer, gyroscope, and magnetometer. It transmits the data from the GPS and sensors via a cellular modem to company servers. The device is used to assist in fleet management. Pursuant to Note 3 to Section XVI and Note 3 to Chapter 90, HTS, CBP determined that the subject article was classified under subheading 8526.91.00, HTSUS, on the basis that the GPS imparted the article’s principal function.
- NY N168766: Two articles were classified in this ruling, “GPS Personal Trackers” (referenced item numbers CR-GT80MT, CR-GT30GT, CR-GT30XGT, and CR-GT60GT), and “GPS Vehicle Trackers,” (referenced item numbers CR-GT300VT, CR-GT310VT, and CR-GT400MVT). Only the “GPS Vehicle Trackers” are subject to this reconsideration. The “GPS Vehicle Trackers” are designed for real-time tracking and fleet management. An integrated GPS collects location data and the data is transmitted to a specified mobile phone or server base through GPS, GSM, and GPRS capabilities. Pursuant to Note 3 to Section XVI, HTS, CBP classified the subject article under subheading 8526.91.00,

<sup>2</sup> OBD-II is an acronym for On-Board Diagnostic II, the second generation of on-board self-diagnostic equipment that provides access to data from the engine control unit.

<sup>3</sup> <https://flex.com/sketch-to-scale/deliver/tracking-solutions> (site last visited August 2020).

HTSUS, and determined that the principal function of the composite machine was performed by the GPS.

- NY N108330: The articles at issue are identified as the “Wireless Matrix Reporter 101” and the “Wireless Matrix Reporter 112.” These devices track mobile assets such as trucks. The tracking devices mount to a vehicle’s windshield or under the dashboard and are equipped with USB device ports for interface with USB-equipped devices. The “Wireless Matrix Reporter 101” consists of a GPS and cellular modem. The “Wireless Matrix Reporter 112” integrates a transceiver with a GPS receiver. CBP determined that subject articles were composite machines classified under subheading 8526.91.00, HTSUS, in accordance with Note 3 to Section XVI, HTS.
- NY N148555: The subject article is identified as the “TAG-150 GPS/GPRS Tracking Kit.” The device is a tracking unit consisting of a printed circuit board assembly with integrated GPS, GPRS modem, SIM card, Li-Polymer battery and firmware, all housed within a waterproof enclosure. The device is a fleet management tool used to monitor golf carts, utility vehicles and turf equipment by communicating location data to the TAG server through the cellular network. CBP determined that subject article is a composite machine classified under subheading 8526.91.00, HTSUS, in accordance with Note 3 to Section XVI, HTS.

In summary, the articles at issue in the above-referenced rulings are telematics devices, also commonly referred to as telemetry devices or fleet/asset/cargo management devices or trackers. The subject telematics devices measure and/or collect data at remote points and transmit/receive data via integrated cellular modems to the end user. The subject articles are telematics devices specifically used in fleet management applications.

## **LAW AND ANALYSIS:**

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

GRI 3(a) provides that “the heading which provides the most specific description shall be preferred to headings providing a more general description.” GRI 3(b) states, in pertinent part, that composite goods that cannot be classified by reference to GRI 3(a), are to be classified as if they consisted of the component that gives them their essential character. GRI 3(c) provides that when goods cannot be classified by reference to GRI 3(a) or 3(b), they are to be classified in the heading that occurs last in numerical order among the competing headings that equally merit consideration.

The articles in the rulings identified above feature cellular modems, described by heading 8517, HTSUS, which provides for, inter alia, apparatus for the wireless transmission or reception of data. All of the articles, with the exception of the “GXT5002” model the subject of NY N301862, also feature a GPS component for collecting location data, described by heading 8526,

HTSUS. Some of the articles also feature measuring devices such as an OBD-II code reader (the “Flex OBD-II asset tracker” at issue in NY N300201) and accelerometer (NY N201495 and NY N301862), described by heading 9031, HTSUS. Therefore, the following HTSUS headings are under consideration for all the rulings the subject of this reconsideration:

8517 Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission apparatus of heading 8443, 8525, 8527 or 8528; parts thereof:

8526 Radar apparatus, radio navigational aid apparatus and radio remote control apparatus:

In addition, for NY’s N300210, N201495 and N301862, the following HTSUS heading is also under consideration:

9031 Measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof:

Note 3 to Section XVI, HTSUS, provides:

Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

Note 3 to Chapter 90 states that the provisions of Note 3 to section XVI also apply to this chapter.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to Note 3 to Section XVI provide:

(VI) MULTI FUNCTION MACHINES  
AND COMPOSITE MACHINES  
(Section Note 3)

In general, multi-function machines are classified according to the principal function of the machine.

Multi-function machines are, for example, machine-tools for working metal using interchangeable tools, which enable them to carry out different machining operations (e.g., milling, boring, lapping).

Where it is not possible to determine the principal function, and where, as provided in Note 3 to the Section, the context does not otherwise require, it is necessary to apply General Interpretative Rule 3 (c); such is the case, for example, in respect of multi function machines potentially classifiable in several of the headings 84.25 to 84.30, in several of the headings 84.58 to 84.63 or in several of the headings 84.70 to 84.72.

The ENs to heading 85.26 state that this heading includes the following:

- (1) Radio navigational aid equipment (e.g., radio beacons and radio buoys, with fixed or rotating aerials; receivers, including radio compasses equipped with multiple aerials or with directional frame aerial). It also includes global positioning system (GPS) receivers.

As explained above, the subject articles are telematics devices used in fleet management applications. Fleet telematics devices function to monitor a variety of vehicle/cargo information (i.e., location, driver behaviour, vehicle activity, engine diagnostics, environmental conditions) and transmit that data in real time to fleet operators to enable them to manage their resources. Fleet telematics devices are designed in various configurations. Simpler devices may feature only a cellular modem and GPS; other devices may include additional integrated components that function to obtain data that is specific to the needs of the end-user. The articles at issue feature key components such as a cellular modem, GPS, code reader, and accelerometer. Data relating to location (GPS), vehicle diagnostics (code reader) and changes in velocity, orientation and driving habits (accelerometer) all provide essential information in the context of fleet management, and the cellular modem transmits that data to end-users in real-time. Each of these components (modem, GPS, code reader, accelerometer) contributes equally to the device's function, i.e., obtaining and transmitting real-time data for fleet management purposes. In this regard, we note that the importance of components that monitor essential data elements is dependent upon that data being able to reach the end user in real time. Similarly, the importance of the modem is negated if there is no data to transmit. Accordingly, we conclude that no single key component of the subject telematics devices imparts the principal function.

As it is not possible to determine which component imparts the principal function to the subject merchandise, classification is determined pursuant to GRI 3(c), which provides that goods are to be classified in the heading that occurs last in numerical order among the competing headings that equally merit consideration. As noted supra, all the subject articles contain a cellular modem described in heading 8517, HTSUS. All of the subject articles, with the exception of the "GXT5002" at issue in NY N301862, also feature a GPS component for collecting location data, described by heading 8526, HTSUS. The "Flex OBD-II asset tracker" at issue in NY N300201 also features an OBD-II code reader, described by heading 9031, HTSUS. The "CTDOBD1" at issue in NY N201495 and the "Falcon GXT5002" at issue in NY N301862 also feature an accelerometer, described by heading 9031, HTSUS. Accordingly, the articles the subject of this reconsideration are classified as follows:

- NY N304264: The "Telematic Control Units" (item numbers 51986538 and 51986539) feature a cellular modem (heading 8517, HTSUS) and GPS (heading 8526, HTSUS). Pursuant to GRI 3(c), the subject articles are classified in heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS, which provides for "[R]adar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus."

- NY N213872: The subject telemetry device identified as the “XT6000G” features a cellular modem and GPS. Pursuant to GRI 3(c), the subject article is classified in heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS.
- NY N108329: The subject articles identified as the “Communicator 500” and “Communicator 1000” feature a cellular modem and GPS. Pursuant to GRI 3(c), the subject articles are classified in heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS.
- NY N300201: The subject articles are identified as the “Flex OBD-II asset tracker,” the “TT600 solar powered asset tracker with Cat-M,” and the “TT603 solar powered asset tracker with Cat-M.” The “Flex OBD-II asset tracker” features a cellular modem, GPS, and OBD-II code reader. Pursuant to GRI 3(c), the “Flex OBD-II asset tracker” is classified in heading 9031, HTSUS, specifically subheading 9031.80.80, HTSUS, which provides for “[M]easuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof: other instruments, appliances and machines: other.” The “TT600 solar powered asset tracker with Cat-M” and the “TT603 solar powered asset tracker with Cat-M” feature a cellular modem and GPS. Pursuant to GRI 3(c), the “TT600 solar powered asset tracker with Cat-M” and the “TT603 solar powered asset tracker with Cat-M” are classified in heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS.
- NY N301862: The subject articles are identified as the “Falcon GXT5002C” and the “GXT5002.” The “Falcon GXT5002C” features a cellular modem and GPS. Pursuant to GRI 3(c), the “Falcon GXT5002C” is classified in heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS. The “Falcon GXT5002” features a cellular modem and an accelerometer. Pursuant to GRI 3(c), the “Falcon GXT5002” is classified in heading 9031, HTSUS, specifically subheading 9031.80.80, HTSUS.
- NY N201495: The “CTDOBD1” features a cellular modem, GPS, accelerometer, gyroscope, and magnetometer. CBP classified the subject article under subheading 8526.91.00, HTSUS, pursuant to Note 3 to Section XVI and Note 3 to Chapter 90, HTS. The subject article is properly classified, pursuant to GRI 3(c), under subheading 9031.80.80, HTSUS.
- NY N168766: Two articles are at issue in this ruling, “GPS Personal Trackers” (referenced items CR-GT80MT, CR-GT30GT, CR-GT30XGT, and CR-GT60GT), and “GPS Vehicle Trackers,” (referenced items CR-GT300VT, CR-GT310VT, and CR-GT400MVT). Only the “GPS Vehicle Trackers” are subject to this reconsideration. The “GPS Vehicle Trackers” feature a cellular modem and GPS. Although CBP correctly classified the subject “GPS Vehicle Trackers” under subheading 8526.91.00, HTSUS, the legal basis for such classification pursuant to Note 3 to

Section XVI, HTS, is incorrect. The subject “GPS Vehicle Trackers” are properly classified under subheading 8526.91.00, HTSUS, pursuant to GRI 3(c).

- NY N108330: The subject articles are identified as the “Wireless Matrix Reporter 101” and the “Wireless Matrix Reporter 112.” The devices consist of a cellular modem and GPS. Although CBP correctly classified these articles under subheading 8526.91.00, HTSUS, the legal basis for such classification pursuant to Note 3 to Section XVI, HTS, is incorrect. The subject articles are properly classified under subheading 8526.91.00, HTSUS, pursuant to GRI 3(c).
- NY N148555: The “TAG-150 GPS/GPRS Tracking Kit” features a cellular modem and GPS. Although CBP correctly classified this article under subheading 8526.91.00, HTSUS, we note that the legal basis for such classification pursuant to Note 3 to Section XVI, HTS, is incorrect. The subject article is properly classified under subheading 8526.91.00, HTSUS, pursuant to GRI 3(c).

#### **HOLDING:**

By application of GRIs 1, 3(c) and 6, the subject fleet telematics devices at issue in NY N304264, NY N213872, NY N108329, NY N300201 (only the “TT600 solar powered asset tracker with Cat-M” and “TT603 solar powered asset tracker with Cat-M”), N301862 (only the “Falcon GXT5002C”), NY N201495, NY N108330, NY N148555 and NY N168766 (only the “GPS Vehicle Trackers”) are classified under heading 8526, HTSUS, specifically subheading 8526.91.00, HTSUS, which provides for “[R]adar apparatus, radio navigational aid apparatus and radio remote control apparatus: Other: Radio navigational aid apparatus:.” The applicable rate of duty is free.

By application of GRIs 1, 3(c) and 6, the subject fleet telematics devices at issue in NY N201495, NY N300201 (only the “Flex OBD-II asset tracker”), and NY N301862 (only the “Falcon GXT5002”) are classified under heading 9031, HTSUS, specifically subheading 9031.80.80, HTSUS, which provides for “[M]easuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors; parts and accessories thereof: other instruments, appliances and machines: other.” The applicable rate of duty is free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at [www.usitc.gov](http://www.usitc.gov).

#### **EFFECT ON OTHER RULINGS:**

NY N304264, dated May 22, 2019, NY N213872, dated May 16, 2012, NY N108329, dated June 28, 2010, NY N300201, dated September 11, 2018, NY N301862, dated December 11, 2018, NY N201495, dated February 14, 2012, NY N108330, dated June 22, 2010, and NY N148555, dated March 3, 2011, are hereby REVOKED.

NY N168766, dated June 21, 2011, is hereby MODIFIED.

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

*Sincerely,*  
GREGORY CONNOR  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

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**PROPOSED REVOCATION OF TWO RULING LETTERS  
AND PROPOSED REVOCATION OF TREATMENT  
RELATING TO THE TARIFF CLASSIFICATION OF SODIUM  
BICARBONATE CARTRIDGES/BAGS**

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

**ACTION:** Notice of proposed revocation of two ruling letters, and proposed revocation of treatment relating to the tariff classification of sodium bicarbonate cartridges/bags.

**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 two ruling letters concerning tariff classification of sodium bicarbonate cartridges/bags 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 December 31, 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](mailto: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:** Marina Mekheil, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–0974.

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

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke 2 ruling letters pertaining to the tariff classification of sodium bicarbonate cartridges/bags. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N276739, dated July 12, 2016 (Attachment A), and Headquarters Ruling Letter ("HQ") 957022, dated January 24, 1995 (Attachment B), 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 two 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 N276739 and HQ 957022, CBP classified sodium bicarbonate cartridges/bags in heading 2836, HTSUS, specifically in subheading 2836.30.00, HTSUS, which provides for "Carbonates; peroxocarbonates (percarbonates); commercial ammonium carbonate containing ammonium carbamate: Sodium hydrogencarbonate (Sodium bicar-

bonate).” CBP has reviewed NY N276739 and HQ 957022 and has determined the ruling letters to be in error. It is now CBP’s position that sodium bicarbonate cartridges/bags are properly classified, in heading 3004, HTSUS, specifically in subheading 3004.90.92, HTSUS, which provides for “Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale: Other: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N276739 and HQ 957022 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H312361, set forth as Attachment C to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: October 25, 2021

ALLYSON MATTANAH  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

Attachments

N276739

July 12, 2016

CLA-2-28:OT:RR:NC:2:236

CATEGORY: Classification

TARIFF NO.: 2836.50.0000

MR. ROBERT SILVERMAN

GRUNFELD, DESIDERIO, LEBOWITZ, SILVERMAN & KLESTADT, LLP

399 PARK AVENUE, 25TH FLOOR

NEW YORK, NY 10022-4877

RE: The tariff classification of “Bibag” from France

DEAR MR. SILVERMAN:

In your letter received June 17, 2016, on behalf of your client, Fresenius Medical Care Renal Therapies Group, LLC, you requested a classification ruling on “Bibag.” You have stated that the product at issue consists of a polyamide/polyethylene bag filled with sodium bicarbonate powder. The “Bibag” is secured to a “Bibag” connector for use with a hemodialysis machine. The sodium bicarbonate is automatically mixed with water to produce a saturated solution, which is used for hemodialysis. The “Bibag” is available in both 650 gram and 900 gram sizes. Your submission indicates that sodium bicarbonate powder is the only substance contained in the disposable polyamide/polyethylene bag.

Sodium bicarbonate is specifically provided for under subheading 2836.30.00, Harmonized Tariff Schedule of the United States (HTSUS).

GRI 5(b) states that:

Subject to the provisions of rule 5(a) above, packing materials and packing containers entered with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision does not apply when such packing materials or packing containers are clearly suitable for repetitive use.

The polyamide/polyethylene bags are merely single-use, disposable containers for the conveyance and storage of the sodium bicarbonate powder, even if they are specially shaped to be connected for use with a hemodialysis machine, it does not alter the classification of the good pursuant to GRI 1.

The applicable subheading for “Bibag” will be 2836.30.0000, HTSUS, which provides for Carbonates; peroxocarbonates (percarbonates); commercial ammonium carbonate containing ammonium carbamate: Sodium hydrogencarbonate (Sodium bicarbonate). The general rate of duty will be free.

This merchandise may be subject to the requirements of the Toxic Substances Control Act (TSCA), which are administered by the U.S. Environmental Protection Agency. Information on the TSCA can be obtained by contacting the EPA at 1200 Pennsylvania Avenue, N.W., Mail Code 70480, Washington, D.C., by telephone at (202) 554-1404, or by visiting their website at [www.epa.gov](http://www.epa.gov).

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Nuccio Fera at [nuccio.fera@cbp.dhs.gov](mailto:nuccio.fera@cbp.dhs.gov).

*Sincerely,*

STEVEN A. MACK

*Director*

*National Commodity Specialist Division*

HQ 957022

January 24, 1995

CLA-2 CO:R:C:M 957022 DWS

CATEGORY: Classification

TARIFF NO.: 2836.30.00

Ms. LYNN S. BAKER  
KATTEN MUCHIN & ZAVIS  
525 WEST MONROE STREET, SUITE 1600  
CHICAGO, IL 60661-3693

RE: Reconsideration of HQ 557669; "BiCart Column" Cartridges; Sodium Bicarbonate; Dialysis Machines; GRI 5(b); HQs 082357; Kores Manufacturing Inc. v. U.S.; 9018.90.75

DEAR Ms. BAKER:

This is in response to your letters of May 10 and October 31, 1994, on behalf of Cobe Laboratories Inc., requesting reconsideration of HQ 557669, dated March 3, 1994, concerning the classification of "BiCart Column" cartridges under the Harmonized Tariff Schedule of the United States (HTSUS). Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), 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, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of HQ 557669 was published December 21, 1994, in the Customs Bulletin, volume 28, Number 51.

**FACTS:**

The merchandise consists of "BiCart Column" cartridges, designed for use solely with dialysis machines. The cartridges are comprised of a specially shaped polypropylene cartridge containing 650 grams of sodium bicarbonate powder. They are imported in packages of ten units and are designed for one time use only. When attached to a special holder affixed to the kidney dialysis machine, the cartridge allows "on line" production of the liquid bicarbonate concentrate required for dialysis.

Healthy human kidneys produce bicarbonate, which neutralizes the large quantities of acid produced in the body by cell metabolism. Because persons with renal disease (kidney failure), who require dialysis, are unable to naturally produce bicarbonate, the chemical must be provided through dialysis treatment. The dialysis solution is made up of an electrolyte solution which approximates the concentrate of normal plasma. Most often, the solution produced by the dialysis machine contains five chemical compounds: sodium chloride, sodium bicarbonate, calcium chloride, potassium chloride, and magnesium chloride. Due to the tendency of the bicarbonate and the remaining chemicals to react over time and form magnesium carbonate or limestone, which clogs the dialysis machine, two separate concentrates are used: sodium bicarbonate and acid concentrate. A dual proportioning system contained in the dialysis machine itself continuously mixes the two concentrates as needed during the dialysis procedure to produce a constant supply of free flowing dialysis solution.

Traditionally, bicarbonate concentrate was sold to hospitals in two forms, dry powder or liquid concentrate. With dry powder, the hospital is required to mix it with water to produce the concentrate. Liquid concentrate is heavy and difficult to store. Delivery of bicarbonate concentrate from the powder directly

to the dialysis machine helps eliminate the problems associated with these other two forms. This process is achieved by the use of the “BiCart Column” cartridges. Each cartridge snaps into a special holder attached to the dialysis machine. When the cartridge is placed in the special holder, water is drawn from the dialysis machine through the cartridge to produce a saturated sodium bicarbonate solution. The dialysis machine, through its dual proportioning system, then mixes the solution with water and the acid concentrate to produce the dialysis solution.

The subheadings under consideration are as follows:

9018.90.75: [i]nstruments and appliances used in medical, surgical, dental or veterinary sciences, . . . ; parts and accessories thereof: [o]ther instruments and appliances and parts and accessories thereof: [o]ther: [e]lectra-medical instruments and appliances and parts and accessories thereof: [o]ther: [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 4.2 percent ad valorem.

2836.30.00: [s]odium hydrogencarbonate (Sodium bicarbonate).

Goods classifiable under this provision receive duty-free treatment.

#### **ISSUE:**

Whether the “BiCart Column” cartridges are classifiable under subheading 9018.90.75, HTSUS, as parts of medical instruments, or under subheading 2836.30.00, HTSUS, as sodium bicarbonate.

#### **LAW AND ANALYSIS:**

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification is determined according to the terms of the headings and any relative section chapter notes.

In HQ 557669, we held that the sodium bicarbonate cartridges were classifiable under subheading 9018.90.75, HTSUS, as parts of medical instruments.

Sodium bicarbonate is specifically classifiable under subheading 2836.30.00, HTSUS.

GRI 5(b) states that:

[s]ubject to the provisions of rule 5(a) above, packing materials and packing containers entered with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision does not apply when such packing materials or packing containers are clearly suitable for repetitive use.

The cartridge themselves are merely containers for the conveyance and storage of the sodium bicarbonate, even if they are specially shaped in order to be incorporated in a dialysis machine. Goods are almost always transported in some form of container or package. However, even if that package is specially shaped, it does not alter the classification of the good pursuant to GRI 1.

As we stated in HQ 082357, dated November 29, 1989 [a Tariff Schedules of the United States (TSUS) ruling concerning the classification of toner cartridges]:

[r]ather than a part, the cartridge supplies fuel for the copier, fuel which is as expendable as any other fuel. As mentioned in T.D. 35151, a completed rifle does not contemplate the cartridges used. So, too, the concept of a photocopier would not necessarily include the toners. The toner enables the machine to produce a printed image on paper, it is just as complete without the toner. The toner cartridge represents a minuscule, if not infinitesimal, portion of the cost of the copier. The cartridge is nothing more than a container for fuel which must be constantly replenished.

The “BiCart Column” cartridges are not classifiable under subheading 9018.90.75, HTSUS, as parts of medical instruments. Whether an article is a part of another article depends on the nature of the so-called “part” and its usefulness, function and purpose in relation to the article in which it is designed to serve. *Kores Manufacturing Inc. v. U.S.*, 3 CIT 178, 179 (1982), *aff’d* appeal No. 82–83 (C.A.F.C. 1983).

Counsel has stated that the cartridges are not essential to the operation of the dialysis machine. In fact, the sodium bicarbonate can be added through other, more traditional methods. However, the process is much easier through the use of the cartridges. Similar to the toner cartridge in HQ 082357, the “BiCart Column” cartridges are nothing more than containers of a chemical which must be constantly replenished. The dialysis machine is a complete machine and operates as such with or without the presence of a “BiCart Column” cartridge.

Therefore, in accordance with GRIs 1 and 5(b), the “BiCart Column” cartridges are classifiable under subheading 2836.30.00, HTSUS.

**HOLDING:**

The “BiCart Column” cartridges are classifiable under subheading 2836.30.00, HTSUS, as sodium bicarbonate.

HQ 557669, dated March 3, 1994, is hereby revoked. In accordance with section 625, this ruling will become effective 60 days after its publication in the Customs Bulletin. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

*Sincerely,*

JOHN DURANT,

*Director*

*Commercial Rulings Division*

HQ H312361

OT:RR:CTF:CPMM

H312361MMM

CATEGORY: Classification

TARIFF NO.: 3004.90.92

MR. ROBERT SILVERMAN  
GRUNFELD, DESDIERIO, LEBOWITZ, SILVERMAN &  
KLESTADT, LLP  
399 PARK AVENUE, 25TH FLOOR  
NEW YORK, NY 100-22-4877

RE: Revocation of NY N276739 and HQ 957022; Classification of sodium bicarbonate cartridges/bags

DEAR MR. SILVERMAN:

This is in reference to the New York Ruling Letter (NY) N276739, issued to you by U.S. Customs and Border Protection (CBP) on July 12, 2016, concerning classification of a Bibag from France, under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed your ruling, and determined that it is incorrect, and for the reasons set forth below, are revoking your ruling.

We have also review Headquarters Ruling (HQ) 957022, dated January 24, 1995, and for the reasons set forth below, are revoking that ruling.

**FACTS:**

In your ruling NY N276739, CBP stated as follows in reference to the subject merchandise, a Bibag:

[T]he product at issue consists of a polyamide/polyethylene bag filled with sodium bicarbonate powder. The “Bibag” is secured to a “Bibag” connector for use with a hemodialysis machine. The sodium bicarbonate is automatically mixed with water to produce a saturated solution, which is used for hemodialysis. The “Bibag” is available in both 650 gram and 900 gram sizes. Your submission indicates that sodium bicarbonate powder is the only substance contained in the disposable polyamide/polyethylene bag.

Additionally, in HQ 957022, CBP stated as follows with respect to the subject merchandise:

The merchandise consists of “BiCart Column” cartridges, designed for use solely with dialysis machines. The cartridges are comprised of a specially shaped polypropylene cartridge containing 650 grams of sodium bicarbonate powder. They are imported in packages of ten units and are designed for one time use only. When attached to a special holder affixed to the kidney dialysis machine, the cartridge allows “on line” production of the liquid bicarbonate concentrate required for dialysis.

In both rulings, CBP classified the merchandise in heading 2836, HTSUS, as a carbonate.

**ISSUE:**

Whether the bicarbonate cartridges/bags are classified in heading 2836, HTSUS, as a “carbonate,” heading 3004, HTSUS as “Medicaments.”

**LAW AND ANALYSIS:**

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

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. GRI 2(a) provides, in relevant part, that “[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished articles has the essential character of the complete or finished article.”

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

The 2021 HTSUS provisions under consideration are as follows:

- 2836: Carbonates; peroxocarbonates (percarbonates); commercial ammonium carbonate containing ammonium carbamate:
- 3004: Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale:

Note 2 to Section VI provides as follows:

Subject to Note 1 above, goods classifiable in heading 30.04, 30.05, 30.06, 32.12, 33.03, 33.04, 33.05, 33.06, 33.07, 35.06, 35.07 or 38.08 by reason of being put up in measured doses or for retail sale are to be classified in those headings and in no other heading of the Nomenclature.

Note 3 to Chapter 30 provides as follows:

3. For the purposes of headings 3003 and 3004 and of note 4(d) to this chapter the following are to be treated—

- (a) As unmixed products:
- (2) All goods of chapter 28 or 29; and

Explanatory Notes 30.04 provides as follows:

This heading covers medicaments consisting of mixed or unmixed products, provided they are:

- (a) Put up in measured doses or in forms such as tablets, ampoules, capsules, cachets, drops or pastilles, medicaments in the form of transdermal administration systems, or small quantities of powder, ready for taking as single doses for therapeutic or prophylactic use.

(b) In packings for retail sale for therapeutic or prophylactic use. This refers to products (for example, sodium bicarbonate and tamarind powder) which, because of their packing and, in particular, the presence of appropriate indications (statement of disease or condition for which they are to be used, method of use or application, statement of dose, etc.) are clearly intended for sale directly to users (private persons, hospitals, etc.) without repacking, for the above purposes.

These indications (in any language) may be given by label, literature or otherwise. However, the mere indication of pharmaceutical or other degree of purity is not alone sufficient to justify classification in this heading.

The subject merchandise is *prima facie*, classifiable in heading 2836.30, HTSUS, as sodium bicarbonate. However, as described in the EN 30.04, when used for therapeutic or prophylactic purposes and packed in a way that indicates such use, an unmixed product like sodium bicarbonate can be *prima facie*, classifiable in heading 3004.

When merchandise is *prima facie* classifiable under two or more headings or subheadings of the HTSUS, we apply GRI 3 to resolve the classification.<sup>1</sup> GRI 3(a) states that “[t]he heading which provides the most specific description shall be preferred to headings providing a more general description.”<sup>2</sup> “Under this so-called rule of relative specificity, we look to the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty.”<sup>3</sup>

Additionally, in determining which of the two headings at issue is more specific, courts have held that the general rule of customs jurisprudence is that “in the absence of legislative intent to the contrary, a product described by both a use provision and an *eo nomine* provision is generally more specifically provided for under the use provision.”<sup>4</sup> However, this rule is not mandatory, and only provides a “convenient rule of thumb for resolving issues where the competing provisions are otherwise in balance.”<sup>5</sup> This rule of thumb was only applicable where the alternative competing provisions were “in balance” or equally descriptive of the article being classified.<sup>6</sup>

Following *Orlando*, the subject merchandise is more specifically classified in heading 3004. The subject merchandise is more intricate than general use sodium bicarbonate and heading 3004 describes the merchandise with the most accuracy, as it not only describes the “components,” but provides for the use and packing of the merchandise.

As a use provision, heading 3004, HTSUS, is more specific for sodium bicarbonate packaged for direct use in the dialysate solution which will correct metabolic acidosis in the treatment of kidney failure.

<sup>1</sup> *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1251 (Fed. Cir. 2004).

<sup>2</sup> General Rules of Interpretation (GRI) 3(a).

<sup>3</sup> *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998).

<sup>4</sup> *Id.* (quoting *United States v. Siemens Am., Inc.*, 653 F. 2d 471, 477 (C.C.P.A. 1981)).

<sup>5</sup> *United States v. Carl Zeiss*, 195 F. 3d 1375, 1380 (Fed. Cir. 1999) (quoting *United States v. Siemens Am., Inc.*, 653 F.2d at 478 n. 6); see also *Totes Inc. v. United States*, 69 F. 3d 495, 500 (Fed. Cir. 1995).

<sup>6</sup> *Orlando Food Corp.*, 140 F. 3d at 1441.

While NY N276739 and HQ 957022 reference GRI 5(b) as follows, GRI 5(b) is irrelevant to the subject merchandise.<sup>7</sup>:

The polyamide/polyethylene bags are merely single-use, disposable containers for the conveyance and storage of the sodium bicarbonate powder, even if they are specially shaped to be connected for use with a hemodialysis machine, it does not alter the classification of the good pursuant to GRI 1. *See* NY N276739, dated July 12, 2016.

The cartridge themselves are merely containers for the conveyance and storage of the sodium bicarbonate, even if they are specially shaped in order to be incorporated in a dialysis machine. Goods are almost always transported in some form of container or package. However, even if that package is specially shaped, it does not alter the classification of the good pursuant to GRI 1. *See* HQ 957022, dated January 24, 1995.

The subject merchandise is classifiable under heading 3004 by application of GRI 1. The language in heading 3004 as well as the ENs to heading 3004 provide guidance to the type of specific packaging required by heading 3004.

Additionally, the classification of a similar product was raised to the HSC:

Based on the outcomes of the last Session of the SSC, several delegates shared the view of the Tunisian delegate. They pointed out that there was no difference between this product and other forms of sodium bicarbonates for medical use in heading 30.04, as it was clearly labelled and in packings for retail sale for therapeutic use. It was also pointed out that as the product at issue was intended to be used directly in the hemodialysis process, it met specific medical standards (e.g., grade and purity) and this made it different from sodium bicarbonates for general use.

The subject merchandise is classified in heading 3004.

#### **HOLDING:**

By application of GRIs 1 and 3(a) the sodium bicarbonate bags/cartridges are classified in heading 3004, HTSUS, specifically in subheading 3004.90.92, HTSUS, which provides for: “Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale: Other.” The 2021 column one general rate of duty for subheading 3004.90.92, HTSUS, is Free.

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

#### **EFFECT ON OTHER RULINGS**

New York Ruling Letter N276739, dated July 12, 2016, and Headquarters Ruling Letter 957022, dated January 24, 1995, is hereby REVOKED in accordance with the above analysis.

<sup>7</sup> NY N276739, dated July 12, 2016 and HQ 957022, dated January 24, 1995 didn’t consider classification under heading 3004.

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



**19 CFR PART 177**

**MODIFICATION OF ONE RULING LETTER AND  
REVOCATION OF TREATMENT RELATING TO THE  
TARIFF CLASSIFICATION OF ROOIBOS TEA**

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

**ACTION:** Notice of modification of one ruling letter and of revocation of treatment relating to the tariff classification of Rooibos Tea.

**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 modifying one ruling letter concerning tariff classification of Rooibos Tea 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. 39, on October 6, 2021. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after January 29, 2022.

**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), a notice was published in the *Customs Bulletin*, Vol. 55, No. 39, on October 6, 2021, proposing to modify one ruling letter pertaining to the tariff classification of Rooibos Tea. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N280540, dated November 18, 2016, CBP classified Rooibos Tea in heading 1211, HTSUS, specifically in subheading 1211.90.40, HTSUS, which provides for "Plants and parts of plants (including seeds and fruits), of a kind used primarily for perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes, fresh, chilled, frozen or dried, whether or not cut, crushed or powdered: Other: Mint leaves: Other." CBP has reviewed NY N280540 and has determined the ruling letter to be in error. It is now CBP's position that Rooibos Tea is properly classified, in heading 1211, HTSUS, specifically in subheading 1211.90.92, HTSUS, which provides for "Plants and parts of plants (including seeds and fruits), of a kind used primarily for perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes, fresh, chilled, frozen or dried, whether or not cut, crushed or powdered: Other: Other: Fresh or dried."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N280540 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H320527, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §

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

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

Dated:

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

*Attachment*

HQ H320527

November 12, 2021

OT:RR:CTF:FTM H320527 MD

CATEGORY: Classification

TARIFF NO.: 1211.90.92

Ms. NELI ANDERSEN  
W31 LLC  
1237 SMOKETREE DRIVE  
FOREST, VIRGINIA 24551

RE: Modification of NY N280540; Tariff Classification of Rooibos Tea from South Africa

DEAR Ms. ANDERSEN:

This is in reference to New York Ruling Letter (“NY”) N280540, dated November 18, 2016, which was issued to you concerning the tariff classification of various teas. Specifically, U.S. Customs and Border Protection (“CBP”) found that “Rooibos Tea” from South Africa was classified within subheading 1211.90.4020, Harmonized Tariff Schedule of the United States Annotated (“HTSUSA”), which provides for “Plants and parts of plants (including seeds and fruits), of a kind used primarily for perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes, fresh, chilled, frozen or dried, whether or not cut, crushed or powdered: Other: Mint leaves: Other: Herbal teas and herbal infusions (single species, unmixed).” The general, column one duty rate was 4.8 percent *ad valorem*.

We have reviewed NY N280540 and determined the tariff classification of “Rooibos Tea” to be in error. As such, this ruling serves to modify NY N280540 with regard to the tariff classification of the “Rooibos Tea” from South Africa. CBP’s determination with respect to the remainder of NY N280540, including the tariff classifications of the other varieties of teas, is not affected by this action.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed action was published on October 6, 2021, in Volume 55, Number 39, of the *Customs Bulletin*. No comments were received in response to this notice.

**FACTS:**

In NY N280540, the “Rooibos Tea” from South Africa was described as follows:

The subject merchandise is described as [...] rooibos tea, [] bearing the product name “Royal T-Stick.” [...] “Rooibos Tea” consists of 100 percent rooibos tea (*Aspalathus linearis*).

[...]

The applicable subheading for the “Rooibos Tea” Royal T-Sticks will be 1211.90.4020, Harmonized Tariff Schedule of the United States (“HTSUS”), which provides for “Plants and parts of plants (including seeds and fruits) of a kind used primarily in perfumery, in pharmacy or for insecticidal, fungicidal, or similar purposes, fresh or dried, whether or

not cut, crushed, or powdered: Other: Mint leaves: Other: Herbal teas and herbal infusions (single species, unmixed). The general rate of duty will be 4.8 percent *ad valorem*.

While previously classified within subheading 1211.90.4020, HTSUSA, CBP now believes that the proper classification for the “Rooibos Tea” from South Africa is under subheading 1211.90.9280, HTSUSA.

### ISSUE:

What is the tariff classification of the “Rooibos Tea” from South Africa?

### LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) is determined 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 2 through 6 may then be applied in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and, *mutatis mutandis*, to GRIs 1 through 5.

The 2021 HTSUS provisions under review are as follows:

1211	Plants and parts of plants (including seeds and fruits), of a kind primarily used in perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes, fresh, chilled, frozen or dried, whether or not cut, crushed or powdered:
1211.90	Other:
	Mint leaves:
1211.90.40	Other:
1211.90.4020	Herbal teas and herbal infusions (single species, unmixed).
	*        *        *
	Other:
1211.90.92	Fresh or dried:
	Other:
1211.90.9280	Herbal teas and herbal infusions (single species, unmixed)
	*        *        *

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

In relevant part, the ENs to heading 1211 provide:

Certain plants or parts of plants (including seeds or fruits of this heading may be up (e.g. in sachets) for making herbal infusions or herbal “teas.”

Such products consisting of plants or parts of plants (including seeds or fruits of a single species (e.g., peppermint “tea”) remain classified in this heading.

\* \* \*

As noted, the “Rooibos Tea” from South Africa is understood to consist of “100 percent rooibos tea (*Aspalathus linearis*).” Further described within NY N280540, “[a]ll of the Royal T-Stick products are packaged [...] [in] individual wrapped oriented polypropylene micro-perforated foil pouches or ‘sticks’ [which are] steeped in a cup of hot water to make a beverage.” While not discussed in earnest within NY N280540, it is important to note that the “Rooibos Tea” is properly classified within heading 1211, HTSUS, as opposed to heading 0902, which provides for teas exclusively derived from the botanical genus *Thea*. Specifically, the ENs to heading 0902 state, in pertinent part that “this heading covers the different varieties of tea derived from the plants of the botanical genus *Thea* (*Camellia*).” Moreover, the ENs elaborate that “the heading further excludes products not derived from the plants of the botanical genus *Thea* but sometimes called “teas,” e.g.: ... (b) Products for making herbal infusions or herbal “teas.” These are classified, for example, in headings 08.13, 09.09, 12.11 or 21.06.” Although the preparation of the “Rooibos Tea” may mirror that of traditionally prepared teas, its composition of “100 percent rooibos tea (*Aspalathus linearis*),” which is not within the *Thea* genus precludes classification therein. Thus, we find the exclusion of the “Rooibos Tea” from heading 0902, HTSUS, to be proper because the plant from which it is derived is not of the *Thea* genus. The ENs for heading 1211 allow for “Certain plants or parts of plants (including seeds or fruits of this heading may be up (e.g. in sachets) for making herbal infusions or herbal ‘teas.’ Such products consisting of plants or parts of plants (including seeds or fruits of a single species (e.g., peppermint ‘tea’) remain classified in this heading.” Here, the “tea” made from the rooibos plant meets this definition and is properly classified therein. Accordingly, the “Rooibos Tea,” at the heading level, is properly classified within heading 1211, HTSUS, as an “herbal tea” derived from the “plants or parts of plants” typically classified therein.

That said, in NY N280540, the “Rooibos Tea” from South Africa was incorrectly classified in subheading 1211.90.4020, HTSUSA. Subheading 1211.90.4020, HTSUSA explicitly provides for “Plants and parts of plants (including seeds and fruits), of a kind used primarily for perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes, fresh, chilled, frozen or dried, whether or not cut, crushed or powdered: Other: *Mint leaves*: Other: Herbal teas and herbal infusions (single species, unmixed).” While the “Rooibos Tea” is derived from the “plants or parts of plants” of heading 1211, HTSUS, and is an “herbal tea [or] herbal infusion” made from a single plant species, there is no information to suggest that the “Rooibos Tea” at issue contains any mint leaves. Additionally, there is no information, legal or biological, to suggest that mint (*Mentha*) and rooibos (*Aspalathus*) are similar enough to one another that they could be classified interchangeably.

Accordingly, we determine that the “Rooibos Tea” from South Africa are properly classified under subheading 1211.90.9280, HTSUSA, which provides for “Plants and parts of plants (including seeds and fruits), of a kind used primarily for perfumery, in pharmacy or for insecticidal, fungicidal or similar

purposes, fresh, chilled, frozen or dried, whether or not cut, crushed or powdered: Other: Other: Fresh or dried: Other: Herbal teas and herbal infusions (single species, unmixed).”

**HOLDING:**

Under the authority of GRIs 1 and 6, the “Rooibos Tea” from South Africa is classified under subheading 1211.90.9280, HTSUSA, which provides for “Plants and parts of plants (including seeds and fruits), of a kind used primarily for perfumery, in pharmacy or for insecticidal, fungicidal or similar purposes, fresh, chilled, frozen or dried, whether or not cut, crushed or powdered: Other: Other: Fresh or dried: Other: Herbal teas and herbal infusions (single species, unmixed).” The general rate of duty is free.

**EFFECT ON OTHER RULINGS:**

NY N296408, dated May 16, 2018, is hereby MODIFIED.

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

*Sincerely,*

*For*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*



**VESSEL ENTRANCE OR CLEARANCE STATEMENT**

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

**ACTION:** 60-Day Notice and request for comments; revision of an existing collection of information.

**SUMMARY:** The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

**DATES:** Comments are encouraged and must be submitted (no later than January 14, 2022) to be assured of consideration.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0019 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP\_PRA@cbp.dhs.gov*.

Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, telephone number 202-325-0056, or via email [CBP\\_PRA@cbp.dhs.gov](mailto:CBP_PRA@cbp.dhs.gov). Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at <https://www.cbp.gov/>.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

### **Overview of This Information Collection**

**Title:** Vessel Entrance or Clearance Statement.

**OMB Number:** 1651-0019.

**Form Number:** CBP Form 1300.

**Current Actions:** Revision of an existing collection of information.

**Type of Review:** Revision.

**Affected Public:** Businesses.

**Abstract:** CBP Form 1300, Vessel Entrance or Clearance Statement, was developed through agreement by the United Nations Intergovernmental Maritime Organization (IMO) in conjunction with the United States and various other countries. The form was developed as a single form to replace the numerous other forms used by various countries for the entrance and clearance of vessels. CBP Form 1300 is authorized by 19 U.S.C. 1431, 1433, and 1434, and provided for by 19 CFR 4. This form is accessible at <http://www.cbp.gov/newsroom/publications/forms?title=1300&=Apply>.

This form is, currently, physically submitted and is anticipated to be electronically submitted as part of CBP's efforts to automate maritime forms through the Vessel Entrance and Clearance System (VECS), which will reduce the need for paper submission of any vessel entrance or clearance requirements under the above referenced statutes and regulations. VECS will still collect and maintain the same data as CBP Form 1300, but will automate the capture of data to reduce or eliminate redundancy with other data collected by CBP.

## **Proposed Changes**

### *1. New ACE Account Type*

CBP is adding a new ACE Account type for Vessel Agencies: Vessel Agency Account. The new account type within ACE will operate as a portal to the Vessel Entrance and Clearance System (VECS), which will run as its own separate system.

Vessel Agents will be required to provide identifying information such as, their name, their employer identification number (EIN), company address, and their phone numbers, which will be requested at the time Vessel Agents apply for the new ACE account type.

After creating an ACE account, Vessel Agencies, Vessel Operating Common Carriers (VOCCs), and their designees maybe able to use the new Vessel Entrance and Clearance System (VECS) as part of a forthcoming pilot program to test the functionality of VECS, and will be able to file vessel entrance, clearance, and related data to CBP electronically.

### *2. VECS Public Pilot*

VECS will automate and digitize the collection and processing of the data and filing requirements for which the CBP Form 1300 is used. CBP plans to run an initial public pilot to test the system. All users who obtained a Vessel Agency Account through the ACE Portal

will be automatically enrolled into the VECS public pilot. Initially, the pilot will begin at one of several ports where VECS is being internally tested. CBP will provide training to each CBP port and the Vessel Agency personnel at each port, prior to beginning/expanding the public pilot in another port.

The VECS public pilot will expand to other internal CBP testing ports based on knowledge and familiarity with the system. The VECS public pilot will then, based on pilot results, expand to additional ports, in an effort to progressively test and implement the system nationwide. There will be no change to CBP Form 1300 and CBP Form 1300 will continue to be accepted.

*Type of Information Collection:* Vessel Entrance or Clearance Statement (CBP Form 1300).

**Estimated Number of Respondents:** 2,624.

**Estimated Number of Annual Responses per Respondent:** 72.

**Estimated Number of Total Annual Responses:** 188,928.

**Estimated Time per Response:** 30 minutes (0.5 hours).

**Estimated Total Annual Burden Hours:** 94,464.

Dated: November 9, 2021.

SETH D. RENKEMA,  
Branch Chief,  
Economic Impact Analysis Branch,  
U.S. Customs and Border Protection.

[Published in the Federal Register, November 15, 2021 (85 FR 63036)]

## APPLICATION TO USE AUTOMATED COMMERCIAL ENVIRONMENT (ACE)

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

**ACTION:** 60-Day Notice and request for comments; revision of an existing collection of information.

**SUMMARY:** The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

**DATES:** Comments are encouraged and must be submitted (no later than January 14, 2022) to be assured of consideration.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0105 in the subject line and the agency name. Please use the following method to submit comments:

Email. *Submit comments to: CBP\_PRA@cbp.dhs.gov.*

Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, telephone number 202–325–0056 or via email *CBP\_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

### **Overview of This Information Collection**

**Title:** Application to use Automated Commercial Environment.

**OMB Number:** 1651–0105.

**Form Number:** N/A.

**Current Actions:** Revision of an existing collection of information.

**Type of Review:** Revision.

**Affected Public:** Businesses.

**Abstract:** The Automated Commercial Environment (ACE) is a trade data processing system that is replacing the Automated Commercial System (ACS), the current import system for U.S. Customs and Border Protection (CBP) operations. ACE is authorized by Executive Order 13659 which mandates implementation of a Single Window through which businesses will transmit data required by participating agencies for the importation or exportation of cargo. *See* 79 FR 10655 (February 25, 2014). ACE supports government agencies and the trade community with border-related missions with respect to moving goods across the border efficiently and securely. Once ACE is fully implemented, all related CBP trade functions and the trade community will be supported from a single common user interface.

To establish an ACE Portal account, participants submit information such as their name, their employer identification number (EIN) or social security number (SSN), and if applicable, a statement certifying their capability to connect to the internet. This information is submitted through the ACE Secure Data Portal which is accessible at: <http://www.cbp.gov/trade/automated>.

*Please Note:* A CBP-assigned number may be provided in lieu of your SSN. If you have an EIN, that number will automatically be used and no CBP number will be assigned. A CBP-assigned number is for CBP use only.

There is a standalone capability for electronically filing protests in ACE. This capability is available for participants who have not established ACE Portal Accounts for other trade activities, but desire to file protests electronically. A protest is a procedure whereby a private party may administratively challenge a CBP decision regarding imported merchandise and certain other CBP decisions. Trade members can establish a protest filer account in ACE through a separate application and the submission of specific data elements. *See* 81 FR 57928 (August 24, 2016).

### *Proposed Changes*

#### 1. New ACE Account Type

CBP is creating a new ACE Account type for ACE Import Trade Carriers and their designees. This new account type: Vessel Agency,

enables users the ability to file vessel entrance, clearance, and related data to CBP electronically through the new Vessel Entrance and Clearance System (VECS).

The ACE Account Application will be changed to collect identifying information such as their name, their employer identification number (EIN), their company address, and their phone numbers, to be used to setup their Vessel Agency accounts. Users who create a Vessel Agency Account are automatically enrolled into the VECS public pilot.

## 2. Removing ACE Account Types

In a separate action, unrelated to the Vessel Agency account type creation, CBP will also be removing account types “Cartman”, “Claimant”, and “Lighterman” from the ACE Account Application. These account types were never used and are being removed due to that lack of use.

*Type of Information Collection:* Application to ACE (Import).

**Estimated Number of Respondents:** 21,571.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 21,571.

**Estimated Time per Response:** 20 minutes (0.33 hours).

**Estimated Total Annual Burden Hours:** 7,118.

*Type of Information Collection:* Application to ACE (Export).

**Estimated Number of Respondents:** 9,000.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 9,000.

**Estimated Time per Response:** 4 minutes (0.066 hours).

**Estimated Total Annual Burden Hours:** 594.

*Type of Information Collection:* Application to Establish an ACE Protest Filer Account.

**Estimated Number of Respondents:** 3,750.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 3,750.

**Estimated Time per Response:** 4 minutes (0.066 hours).

**Estimated Total Annual Burden Hours:** 248.

Dated: November 9, 2021.

SETH D. RENKEMA,

*Branch Chief,*

*Economic Impact Analysis Branch,  
U.S. Customs and Border Protection.*

## ELECTRONIC VISA UPDATE SYSTEM (EVUS)

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

**ACTION:** 60-Day notice and request for comments; revision of an existing collection of information.

**SUMMARY:** The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

**DATES:** Comments are encouraged and must be submitted (no later than January 18, 2022) to be assured of consideration.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0139 in the subject line and the agency name. Please use the following method to submit comments:

*Email:* Submit comments to: *CBP\_PRA@cbp.dhs.gov*.

Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email *CBP\_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at *https://www.cbp.gov/*.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the

proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

### Overview of This Information Collection

**Title:** Electronic Visa Update System (EVUS).

**OMB Number:** 1651–0139.

**Form Number:** N/A.

**Current Actions:** Revision of an existing information collection.

**Type of Review:** Revision.

**Affected Public:** Individuals.

**Abstract:** DHS developed the Electronic Visa Update System (EVUS) to assure robust screening of foreign nationals prior to travel to the United States. EVUS provides for robust traveler screening and verification to better identify foreign nationals who may be inadmissible to the United States. This results in enhanced national security, improved public safety, and a reduced number of delays upon arrival in the United States, all while facilitating legitimate travel.

Initially, the program is limited to nonimmigrant aliens presenting passports issued by the People's Republic of China (PRC) containing unrestricted, maximum validity B–1 (business visitor), B–2 (visitor for pleasure), or combination B–1/B–2 visas, generally valid for 10 years. PRC membership in EVUS became possible on November 12, 2014, when, in a reciprocal agreement, the U.S. Department of State expanded the validity of U.S. visitor visas issued to PRC nationals from one to ten years.

To ensure compliance with the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Public Law 114–113, 129 Stat. 2242, CBP will continuously update the application question with the list of nationals ineligible from traveling to the United States, as designated in accordance with section 217(a)(12) of the Immigration and Nationality Act, as amended (8 U.S.C. 1187(a)(12)).

*Recent Changes*

On May 31, 2019, the Department of State updated its immigrant and nonimmigrant visa application forms to request additional information, specifically social media identifiers, from most U.S. visa applicants worldwide. As a result, DHS is changing the EVUS application social media data field from optional to mandatory. National security is the top priority when adjudicating EVUS applications, and every prospective traveler to the United States undergoes extensive security screening. CBP is continually working to find mechanisms to improve our screening processes to protect U.S. visitors while supporting legitimate travel to the United States. DHS already requests information on contacts, travel history, and family members from all EVUS applicants. Changing the social medial field to mandatory in the EVUS application will enhance our vetting capabilities and assist in confirming applicants' identities. While the field is mandatory, applicants will still have the ability to select "none".

*Type of Information Collection:* EVUS.

**Estimated Number of Respondents:** 3,595,904.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 3,595,904.

**Estimated Time per Response:** 25 minutes.

**Estimated Total Annual Burden Hours:** 1,499,492.

Dated: November 15, 2021.

SETH D. RENKEMA,  
*Branch Chief,*  
*Economic Impact Analysis Branch,*  
*U.S. Customs and Border Protection.*

[Published in the Federal Register, November 18, 2021 (85 FR 64507)]

**ARRIVAL AND DEPARTURE RECORD, NONIMMIGRANT  
VISA WAIVER ARRIVAL/DEPARTURE, ELECTRONIC  
SYSTEM FOR TRAVEL AUTHORIZATION (ESTA)**

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

**ACTION:** 60-Day notice and request for comments; revision of an existing collection of information.

**SUMMARY:** The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information

collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

**DATES:** Comments are encouraged and must be submitted (no later than January 18, 2022) to be assured of consideration.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0111 in the subject line and the agency name. Please use the following method to submit comments:

*Email:* Submit comments to: [CBP\\_PRA@cbp.dhs.gov](mailto:CBP_PRA@cbp.dhs.gov).

Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email [CBP\\_PRA@cbp.dhs.gov](mailto:CBP_PRA@cbp.dhs.gov). Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at <https://www.cbp.gov/>.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted

will be summarized and included in the request for approval. All comments will become a matter of public record.

### **Overview of This Information Collection**

**Title:** Arrival and Departure Record, Nonimmigrant Visa Waiver Arrival/Departure, Electronic System for Travel Authorization (ESTA).

**OMB Number:** 1651-0111.

**Form Number:** CBP Forms I-94 and I-94W.

**Current Actions:** Revision of an existing information collection.

**Type of Review:** Revision.

**Affected Public:** Individuals.

**Abstract:** Forms I-94 (Arrival/Departure Record) and I-94W (Nonimmigrant Visa Waiver Arrival/Departure Record) are used to document a traveler's admission into the United States. These forms are filled out by non-immigrants and are used to collect information on citizenship, residency, passport, and contact information. The data elements collected on these forms enable the Department of Homeland Security (DHS) to perform its mission related to the screening of noncitizen visitors for potential risks to national security and the determination of admissibility to the United States.

The Electronic System for Travel Authorization (ESTA) applies to non-immigrants seeking to travel to the United States under the Visa Waiver Program (VWP) and requires that VWP travelers provide information electronically to CBP before embarking on travel to the United States without a visa. Travelers who are entering the United States under the VWP in the air or sea environment, and who have a travel authorization obtained through ESTA, are not required to complete the paper Form I-94W. I-94 is provided for by 8 CFR 235.1(h), ESTA is provided for by 8 CFR 217.5.

On December 18, 2015, the President signed into law the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015 ("VWP Improvement Act") as part of the Consolidated Appropriations Act, 2016, Public Law 114-113, 129 Stat. 2242. To meet the requirements of this new act, the Department of Homeland Security (DHS, or the Department) strengthened the security of the VWP through enhancements to the ESTA applications and to the Form I-94W, Form I-94 is not affected by this change. Many of the provisions of the new law became effective on the date of enactment of the VWP Improvement Act. The VWP Improvement Act generally makes certain nationals of VWP countries ineligible (with some exceptions) from traveling to the United States under the VWP. To ensure com-

pliance with the VWP Improvement Act, CBP will continuously update the application question with the list of nationals ineligible from traveling to the United States, as designated in accordance with section 217(a)(12) of the Immigration and Nationality Act, as amended (8 U.S.C. 1187(a)(12)).

### *Recent Changes*

1. *Mandatory Social Media Collection:* On May 31, 2019, the Department of State updated its immigrant and nonimmigrant visa application forms to request additional information, including social media identifiers, from most U.S. visa applicants worldwide. In keeping with this change, CBP is amending the ESTA application to change social media collection from optional to mandatory. National security is CBP's top priority when adjudicating ESTA applications, and every prospective traveler to the United States undergoes extensive security screening. CBP is continually working to find mechanisms to improve our screening processes to protect U.S. citizens, while supporting legitimate travel to the United States. CBP already requests certain contact information, travel history and family member information from all ESTA applicants. Making social media a mandatory field in the ESTA application will enhance our vetting processes and assist in confirming applicants' identities. While the completion of the field is mandatory, applicants can still select "none".

2. *Biometric Information Collection:* CBP will begin collecting biometric data for identity confirmation on ESTA applications. ESTA applicants will be prompted to take a selfie or "live" photo to conduct a "liveness" test to determine if the ESTA application is interfacing with a physically present human being and not an inanimate object, or if it is a photo of someone other than the lawful passport holder. Respondents will be able to scan their passport biographic page, in order to submit biographic information, including passport photograph.

3. *ESTA Mobile Application (App):* CBP will implement the ESTA Mobile Application to provide an additional and more convenient option for intending VWP travelers to obtain an ESTA. The Mobile App will collect biometric data for confirmation of identity. This is another enhancement that will assist in preventing persons intending to travel to the United States under the VWP by fraud.

This new function will be accessible via mobile devices, *i.e.*, mobile phones, tablets. The portability of mobile devices will facilitate applying for an ESTA application, because an ESTA applicant will not be limited to applying on a desktop computer. The first phase will

enable Android devices to use the ESTA App, and the second phase will follow with iOS. No implementation date has been set for iOS implementation.

The Mobile App will be very similar to the already established ESTA application website at <https://esta.cbp.dhs.gov>, but with Near Field Communication (NFC).

*The NFC:*

- Allows users to scan the passport e-Chip (embedded in the passport) to extract passenger data.
- A Mobile Device with NFC capability is required to scan the Passport e-Chip when applying for a new application using the ESTA Mobile App.
- Data on the e-Chip enables the NFC Scan.
- If the mobile device does not have NFC capability, the user can submit an ESTA application via the established website.

After determining if the mobile device has NFC capability:

- The applicant takes a selfie or “live” photo (another person may also take a photo of the applicant).
- The Mobile App will do a “liveness” test to determine that it is interfacing with a physically present human being and not an inanimate object, or if it is a photo of someone other than the lawful passport holder.
- If the passport photo does not match the “liveness” photo, a “Third Party Acknowledgement” screen will display, which requires confirmation.
- The applicant proceeds by completing the data fields the same as with the established ESTA application.
- When the applicant completes the application, he/she can review his/her responses.

The payment process will be the same as the established ESTA application, and the cost of each ESTA application will continue to be 14 USD, except in the case of a denial, the fee is 4 USD.

*Type of Information Collection:* I-94.

**Estimated Number of Respondents:** 4,387,550.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 4,387,550.

**Estimated Time per Response:** 0.133 hours.

**Estimated Total Annual Burden Hours:** 583,544.

*Type of Information Collection:* I-94 Website.

**Estimated Number of Respondents:** 3,858,782.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 3,858,782.

**Estimated Time per Response:** 0.066 hours.

**Estimated Total Annual Burden Hours:** 254,679.

*Type of Information Collection:* I- 94W.

**Estimated Number of Respondents:** 941,291.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 941,291.

**Estimated Time per Response:** 0.2667 hours.

**Estimated Total Annual Burden Hours:** 251,042.

*Type of Information Collection:* ESTA Website Application.

**Estimated Number of Respondents:** 15,000,000.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 15,000,000.

**Estimated Time per Response:** 0.3833 hours.

**Estimated Total Annual Burden Hours:** 5,941,150.

*Type of Information Collection:* ESTA Mobile Application (App).

**Estimated Number of Respondents:** 500,000.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 500,000.

**Estimated Time per Response:** 0.2142 hours.

**Estimated Total Annual Burden Hours:** 1,071,429.

Dated: November 15, 2021.

SETH D. RENKEMA,

*Branch Chief,*

*Economic Impact Analysis Branch,  
U.S. Customs and Border Protection.*

[Published in the Federal Register, November 18, 2021 (85 FR 64508)]

# U.S. Court of International Trade

Slip Op. 21–154

SOLAR ENERGY INDUSTRIES ASSOCIATION, NEXTERA ENERGY, INC., INVENERGY RENEWABLES LLC, and EDF RENEWABLES, INC., Plaintiffs, v. UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, and TROY A. MILLER, IN HIS OFFICIAL CAPACITY AS ACTING COMMISSIONER OF UNITED STATES CUSTOMS AND BORDER PROTECTION, Defendants.

Before: Gary S. Katzmman, Judge  
Court No. 20–03941

[The court denies Defendants’ motion to dismiss and grants Plaintiffs’ motion for summary judgment.]

Dated: November 16, 2021

*Matthew R. Nicely and Daniel M. Witkowski*, Akin, Gump, Strauss, Hauer & Feld LLP, of Washington, D.C., argued for Plaintiffs Solar Energy Industries Association and NextEra Energy, Inc. With them on the briefs were *James E. Tysse, Devin S. Sikes* and *Julia K. Eppard*.

*Amanda Shafer Berman*, and *John Brew*, Crowell & Moring LLP, of Washington, D.C. and New York, N.Y., argued for Plaintiff Invenergy Renewables LLC. With them on the briefs were *Larry F. Eisenstat* and *Frances Hadfield*.

*Christine M. Streatfeild* and *Kevin M. O’Brien*, Baker & McKenzie LLP, of Washington, D.C., argued for Plaintiff EDF Renewables, Inc.

*Stephen C. Tosini*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendants United States, United States Customs and Border Protection, and Troy A. Miller, in his Official Capacity as Acting Commissioner of United States Customs and Border Protection. With him on the briefs were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director, and *Joshua E. Kurland*, Trial Attorney.

## OPINION

### **Katzmann, Judge:**

Solar modules consist of cells that convert sunlight into electricity on both the front and the back of the cells.<sup>1</sup> The court has on five occasions addressed ongoing litigation involving efforts by the President to withdraw an exclusion from safeguard duties on imported solar modules, duties which the President had imposed by proclamation to protect the domestic industry from serious injury suffered due to increased imports.<sup>2</sup> Flowing from a new complaint, the case now

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

<sup>2</sup> Prelim. Inj. Order and Op., *Invenergy Renewables LLC v. United States*, 43 CIT \_\_, 422 F. Supp. 3d 1255 (2019) (“*Invenergy P*”); Order and Op. Den. Mot. to Show Cause, *id.*, 44 CIT

before the court principally involves the most recent effort by the President in 2020, invoking Section 204 of the Trade Act of 1974 (“Trade Act”) — a separate track not adjudicated in the previous litigation — to withdraw an exclusion from safeguard duties on imported solar modules. That section provides that if certain conditions are met, the President is authorized to “reduce, modify, or terminate” previously instituted safeguard measures. Plaintiffs Solar Energy Industries Association (“SEIA”), NextEra Energy, Inc. (“NextEra”), Invenergy Renewables LLC (“Invenergy”), and EDF Renewables, Inc. (“EDF-R”)<sup>3</sup> have initiated this suit to challenge Presidential Proclamation 10101, which withdrew the exclusion of bifacial solar panels from Section 201 safeguards on imported crystalline silicon photovoltaic (“CSPV”) solar panels. *Proclamation 10101: To Further Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products)*, 85 Fed. Reg. 65,639 (Oct. 16, 2020) (“*Proclamation 10101*”); Complaint at 1, Dec. 29, 2020, ECF No. 2 (“*Compl.*”). Named as Defendants are the United States, United States Customs and Border Protection (“CPB”), and Troy A. Miller, in his Official Capacity as Acting CBP Commissioner (collectively “the Government.”)

This case raises a number of questions regarding the interface of *Proclamation 10101* with Sections 201–204 of the Trade Act. For example: (1) Do three letters (reflecting a majority of the domestic industry production) which seek the modification of safeguards constitute a petition as required by statute? (2) Is the requirement that a petition be submitted to the President satisfied by submission to the United States Trade Representative (“USTR”)? (3) Does the Proclamation’s withdrawal of the exclusion for bifacial modules violate the statutory temporal restrictions which must be met before new presi-

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\_\_\_, 427 F. Supp. 3d 1402 (2020) (“*Invenergy II*”); Order and Op. Den. Mot. to Dissolve Prelim Inj., Mot. to Dismiss and Granting Mot. to Suppl. Compl., *id.*, 44 CIT \_\_\_, 450 F. Supp. 3d 1347 (2020) (“*Invenergy III*”); Order and Op. Den. Mot. to Dissolve Prelim Inj., Mot. to Stay, Granting Mot. to Modify Prelim. Inj., Mot. to Complete Administrative R., and Vacating USTR Decision, *id.*, 44 CIT \_\_\_, 476 F. Supp. 3d 1323 (2020) (“*Invenergy IV*”); Order and Op. Den. Mot. to Modify Prelim. Inj., *id.*, 44 CIT \_\_\_, 482 F. Supp. 3d 1344 (2020) (“*Invenergy V*”).

<sup>3</sup> Per the complaint, SEIA “is the national trade association for the U.S. solar industry, with hundreds of member companies . . . throughout the solar value chain, including importers, manufacturers, distributors, installers, and project developers[;]” “NextEra is one of the largest electric power and energy infrastructure companies in North America and a leader in the renewable energy industry[;]” Invenergy Renewables, LLC, “is the world’s leading independent and privately-held renewable energy company” [and] “develops, owns and operates large-scale renewable and other clean energy generation facilities around the world[;]” and EDF Renewables, Inc. “has more than 30 years of expertise in the renewable energy industry,” with a focus on “wind, solar, energy storage and offshore wind.” *Compl.*, ¶¶ 7–9.

dential action may be taken? (4) Was *Proclamation 10101* issued in violation of the requirement that the President determine that an action will “provide greater economic and social benefits than costs”? (5) Can the word “modify” in Section 204(b)(1)(B) be read to permit increased restrictions on trade? The court concludes that with respect to the first four questions, the answer is “Yes.” With respect to the fifth question, the answer is “No.”

Plaintiffs allege that *Proclamation 10101* violates Sections 201, 203 and 204 of the Trade Act and seek both a declaratory judgment that the proclamation is unlawful and the injunction of its enforcement. Compl. at 16–21. The Government has moved to dismiss Plaintiffs’ complaint; Plaintiffs oppose this motion and have moved separately for summary judgment. The Government in turn opposes Plaintiffs’ motion. The court concludes that the various procedural challenges posed by Plaintiffs to *Proclamation 10101* are unpersuasive. However, the court also concludes that because Section 204(b)(1)(B) permits only trade-liberalizing modifications to existing safeguard measures, *Proclamation 10101*’s withdrawal of the exclusion of bifacial solar panels and increase of the safeguard duties on CSPV modules constituted both a clear misconstruction of the statute and action outside the President’s delegated authority. The court now grants Plaintiffs’ motion for summary judgment and denies the Government’s motion to dismiss.

## BACKGROUND

### *I. Legal & Regulatory Framework*

Section 201 of the Trade Act of 1974 authorizes the executive branch to implement discretionary protective measures (“safeguards”) to protect a domestic industry from the harm associated with an increase in imports from foreign competitors, and Sections 202 through 204 lay out the procedures for issuing such safeguards. 19 U.S.C. §§ 2251–54. Relevant here, Section 202 provides that upon petition from domestic entities or industries, the International Trade Commission (“ITC”) may make an affirmative determination that imports have seriously injured, or threaten serious injury to, domestic industry. 19 U.S.C. § 2252. Once such a determination has been made, Section 203 permits the President to authorize safeguard measures to temporarily protect domestic industry from the identified harm. 19 U.S.C. § 2253.

For the duration of any safeguard measure, Section 204 provides that the ITC shall monitor “developments with respect to the domestic industry, including the progress and specific efforts made by

workers and firms in the domestic industry to make a positive adjustment to import competition.” 19 U.S.C § 2254(a)(1). If a safeguard duty is imposed for longer than three years, the ITC “shall submit a report on the results of the monitoring . . . to the President and to the Congress not later than the date that is the mid-point of the initial period, and of each such extension, during which the action is in effect.” 19 U.S.C § 2254(a)(2).

Upon receipt of this report, the President is authorized to reduce, modify, or terminate the safeguard measures according to either 19 U.S.C. § 2254(b)(1)(A) or 19 U.S.C. § 2254(b)(1)(B). The statute specifically provides that:

- (1) Action taken under [Section 203] may be reduced, modified, or terminated by the President (but not before the President receives the report required under subsection (a)(2)(A)) if the President—
  - (A) after taking into account any report or advice submitted by the Commission under subsection (a) and after seeking the advice of the Secretary of Commerce and the Secretary of Labor, determines, on the basis that either—
    - (i) the domestic industry has not made adequate efforts to make a positive adjustment to import competition, or
    - (ii) the effectiveness of the action taken under [Section 203] of this title has been impaired by changed economic circumstances, that changed circumstances warrant such reduction, or termination;
  - (B) determines, after a majority of the representatives of the domestic industry submits to the President a petition requesting such reduction, modification, or termination on such basis, that the domestic industry has made a positive adjustment to import competition.

19 U.S.C. § 2254(b)(1).

Safeguard measures have a maximum duration of four years, unless extended for another maximum of four years based upon a new determination by the ITC. 19 U.S.C. § 2253(e)(1). In addition, measures resulting in the increase or imposition of duties on an article, the institution of a tariff-rate quota with respect to an article, the imposition or modification of qualitative import restrictions on an article, or limitations on the import of an article subject to international agreements face a two-year “cooling-off period,” during which further action is restricted. 19 U.S.C. § 2253(e)(7)(A). Once termi-

nated, such safeguard measures may not be re-imposed, nor may additional such measures be enacted on the same article, for at least two years following the date of termination. *Id.*

## ***II. Factual Background & Procedural History***

On January 23, 2018, President Trump issued Presidential Proclamation 9693, which imposed a safeguard measure under Section 203(a)(3) of the Trade Act on certain CSPV products. *Proclamation 9693: To Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products) and for Other Purposes*, 83 Fed. Reg. 3,541 (Jan. 23, 2018) (“*Proclamation 9693*”). *Proclamation 9693* imposed a duty on CSPV modules for a four-year period beginning on February 7, 2018. *Id.*

On February 14, 2018, USTR published a notice detailing the procedures to request a product exclusion. *Procedures to Consider Additional Requests for Exclusion of Particular Products from the Solar Products Safeguard Measure*, 83 Fed. Reg. 6,670 (USTR Feb. 14, 2018). Pursuant to these procedures, on June 13, 2019, USTR granted a number of requested exclusions from the safeguard measures declared by *Proclamation 9693*, including an exclusion for bifacial solar panels. *Exclusion of Particular Products from the Solar Products Safeguard Measure*, 84 Fed. Reg. 27,684 (USTR Jun. 13, 2019).

USTR attempted to withdraw the exclusion of bifacial solar panels on October 9, 2019 and again on April 17, 2020. *Withdrawal of Bifacial Solar Panels Exclusion to the Solar Products Safeguard Measure*, 84 Fed. Reg. 54,244 (USTR Oct. 9, 2019) (“*First Withdrawal*”); *Determination on the Exclusion of Bifacial Solar Panels From the Safeguard Measure on Solar Products*, 85 Fed. Reg. 21,497 (USTR Apr. 17, 2020) (“*Second Withdrawal*”). Each withdrawal was issued on the basis that “[s]ince publication of [the exclusion] notice, the U.S. Trade Representative has evaluated this exclusion further and . . . determined it will undermine the objectives of the safeguard measure,” *First Withdrawal*, 84 Fed. Reg. at 54,244; with the *Second Withdrawal* noting that bifacial solar panel imports are directly substitutable for domestically-produced monofacial solar panels, and concluding that because “[c]ompetition from low-priced imports prevented domestic producers from selling significant quantities of solar panels in the utility segment during the ITC’s original investigation period . . . low-priced imports of bifacial solar panels due to the exclusion are likely to have a similar effect under current market conditions,” 85 Fed. Reg. at 21,498.

Both attempted withdrawals were challenged before the court in *Invenergy Renewables LLC v. United States*, with consumers, purchasers, and importers of utility-grade bifacial solar panels “argu[ing] that the importation of bifacial solar panels does not harm domestic producers because domestic producers do not produce utility-scale bifacial solar panels; [and] thus oppos[ing] safeguard duties that they contend increase the cost of these bifacial solar panels.” *Invenergy I*, 422 F. Supp. 3d at 1264. Both withdrawals were ultimately enjoined. *See id.* at 1294; *Invenergy IV*, 476 F. Supp. 3d at 1356–57. Following the court’s expansion of its preliminary injunction to include the *Second Withdrawal* in *Invenergy IV*, President Trump issued *Proclamation 10101* on October 16, 2020. *Proclamation 10101* again withdrew the exclusion, thereby re-imposing safeguard duties on bifacial modules, and further increased the safeguard duties on CSPV modules declared under *Proclamation 9693* from 15% to 18%.<sup>4</sup> 85 Fed. Reg. at 65,640–42.

Plaintiffs sought to incorporate *Proclamation 10101* into the ongoing *Invenergy* litigation, and into the court’s previously issued PI enjoining USTR from withdrawing the exclusion. *See Invenergy V*, 482 F. Supp. 3d at 1351. The court denied both leave to amend and expansion of the PI, finding that Plaintiffs’ *Proclamation 10101* claims “involve actions undertaken by the President, a party not implicated in Plaintiffs’ complaints or supplemental complaints [in the *Invenergy* litigation] and seek relief against the President not contemplated by Plaintiffs’ prior pleadings” — in other words, that “the core issues are different.” *Id.* at 1353. In the wake of the court’s denial, this action was filed in a separate complaint on December 29, 2020. Compl.

The Government filed a motion to dismiss the action on March 1, 2021. Defs.’ Mot. to Dismiss, March 1, 2021, ECF No. 17 (“Defs.’ Br.”). Plaintiffs filed a cross-motion for summary judgment and a response to the Government’s motion to dismiss on May 7, 2021. Pls.’ Resp. to Defs.’ Mot. to Dismiss and Cross-Mot. for Summ. J., ECF No. 28 (“Pls.’ Resp.”). The Government filed its reply to Plaintiffs’ motion for summary judgment on June 11, 2021. Defs.’ Reply in Supp. of Mot. to Dismiss and Resp. to Pls.’ Mot. for Summ. J., ECF No. 30 (“Defs.’ Reply”). On June 25, 2021, Plaintiffs filed their own reply in support of their cross-motion for summary judgment. Pls.’ Reply in Support of Cross-Mot. for Summ. J., ECF No. 32 (“Pls.’ Reply”). In response to a request by the court, the parties filed written responses prior to

<sup>4</sup> The parties agree that this is the first instance of the President employing 19 U.S.C. § 2254(b)(1)(B) to withdraw an exclusion. *See* Oral Argument, July 13, 2021, ECF No. 38; Pls.’ Resp. to Oral Arg. Questions at 7, Jul. 9, 2021, ECF No. 36.

argument. Defs.’ Resp. to the Ct.’s Questions, Jul. 9, 2021, ECF No. 35; Pls.’ Resp. to Oral Arg. Questions. Oral argument was held July 13, 2021 and the parties filed supplemental briefs on the issues discussed at oral argument thereafter. Oral Arg., ECF No. 38; Defs.’ Suppl. Br., Jul. 20, 2021, ECF No. 39; Defs.’ Transpacific Br., Jul. 20, 2021, ECF No. 40; Pls.’ Transpacific Br., Jul. 20, 2021, ECF No. 41; Pls.’ Suppl. Br., Jul. 20, 2021, ECF No. 42.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(i), which provides that the court “shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of the law of the United States providing for . . . [the] administration and enforcement” of tariffs and duties. The court may review Presidential action pursuant to Section 201, insofar as it gives rise to a controversy involving international trade and foreign affairs, for a “clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.” See *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985).

## DISCUSSION

Plaintiffs raise four overarching claims. First, Plaintiffs argue that *Proclamation 10101* violates the procedural requirements of Section 204(b)(1)(B) of the Trade Act with respect to the nature and contents of the petition the President must receive prior to taking action. Second, Plaintiffs claim that *Proclamation 10101* violates the requirements of Section 203(e)(7) of the Trade Act by imposing a new safeguard measure on bifacial modules less than two years after the previous measure — namely, the duties imposed by *Proclamation 9693* — expired. Third, Plaintiffs argue that *Proclamation 10101* violates the requirements of Section 201 of the Trade Act because the President failed to weigh the social and economic costs and benefits of the modifications prior to issuing the proclamation. Finally, Plaintiffs argue that *Proclamation 10101* violates the substantive requirements of Section 204(b)(1)(B) of the Trade Act by increasing safeguard measures under the aegis of that provision.

The court addresses each of these arguments in turn and concludes that while the Government prevails on the questions of procedural compliance — the form, contents, and timing of the petition, as well as the President’s assessment of costs and benefits — *Proclamation 10101* ultimately fails to comply with the substantive requirements of

Section 204(b)(1)(B) of the Trade Act. Accordingly, the court grants Plaintiffs' motion for summary judgment and denies the Government's motion to dismiss.

***I. Proclamation 10101 Does Not Violate the Procedural Requirements of § 204(b)(1)(B) of the Trade Act***

Plaintiffs identify five procedural requirements within Section 204(b)(1)(B). Four of these requirements pertain to features of the petition submitted by the domestic industry: first, "the petition must be submitted by 'a majority of the representatives of the domestic industry'"; second, it must be submitted to the President; third, "by the use of the language 'such reduction, modification, or termination,' the petition must request the reduction, modification, or termination that the President ultimately adopts" and fourth, "by the use of the language 'on such basis,' the petition must request the reduction, modification or termination on the basis that 'the domestic industry has made a positive adjustment to import competition.'" Pls.' Resp. at 13–14 (quoting 19 U.S.C. § 2254(b)(1)(B)). The final requirement Plaintiffs identify is that the President must find that the industry "has made a positive adjustment to import competition." *Id.*; 19 U.S.C. § 2254(b)(1)(B).

Plaintiffs' arguments that *Proclamation 10101* significantly violated the procedural requirements of Section 204 are unpersuasive. The court concludes that: (1) the letters submitted to the Trade Representative are, taken collectively, sufficient to constitute a petition to the President; (2) submission to USTR was sufficient to satisfy the requirements of the statute; (3) the petition adequately complied with the statute's requirement that "such reduction, modification, or termination" be requested by the "majority of the representatives of the domestic industry"; (4) the petition in this case did not significantly violate 204(b)(1)(B)'s "on such basis" requirement; and (5) the President's finding that the domestic industry "has begun to make" a positive adjustment to import competition again does not significantly violate the statutory requirement that the President find the domestic industry "has made," a positive adjustment to import competition. 19 U.S.C. § 204(b)(1)(B).

As a preliminary matter, the parties dispute the jurisdiction of the court over the above questions. Plaintiffs contend that they are requesting judicial inquiry into whether the President satisfied the statutory predicates for action under the safeguard statute, and that the challenge to *Proclamation 10101* is therefore within the authority of the court. Pls.' Resp. at 17–21; see *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018) (holding that courts may set aside Presidential action if the President "acts beyond his statu-

tory authority”). The Government, meanwhile, frames the inquiry as a requested review of Presidential fact-finding, which would be outside the scope of judicial review. Defs.’ Reply at 10–12; see *Florsheim Shoe Co., Div. of Interco, Inc. v. United States*, 744 F.2d 787, 796 (Fed. Cir. 1985) (“After it is decided that the President has congressional authority for his action, ‘his motives, his reasoning, his finding of facts requiring the action, and his judgment, are immune from judicial scrutiny.” (quoting *United States Cane Sugar Refiners’ Ass’n v. Block*, 683 F.2d 399, 404 (C.C.P.A. 1982))).

Plaintiffs’ view prevails. It has been established by the Federal Circuit that courts may consider whether “the President has violated an explicit statutory mandate.” *Motion Sys. Corp. v. Bush*, 437 F.3d 1356, 1361 (Fed. Cir. 2006) (en banc). Such analysis has been undertaken where the disputed Presidential action constitutes an exercise of delegated authority without complete discretion, including where the President has acted to institute safeguard measures under the Trade Act. See, e.g., *Maple Leaf Fish Co.*, 762 F.2d at 89; see also, e.g. *Corus Group PLC v. Int’l Trade Com’n*, 352 F.3d 1351, 1358–59 (Fed. Cir. 2003). Here as well, the court may consider whether the President’s action constituted a “clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.” *Silfab*, 892 F.3d at 1346 (citing *Maple Leaf Fish Co.*, 762 F.2d at 89).

Even so, the law is clear that claims alleging violation of the President’s statutory mandate face an extraordinarily high bar for success. The court in *Silfab Solar, Inc. v. United States*, for example, determined that even where procedural violations are alleged with respect to the agency recommendations underlying Presidential action, the President may nevertheless act to approve those recommendations without judicial intrusion. *Silfab*, 892 F.3d at 1347 (rejecting challenge to Presidential action under Section 201 following alleged procedural violations by the ITC under Section 202). *Silfab* also made clear that the failure of the President to comply with statutory requirements generally, so long as those requirements are not conditions precedent to the action challenged before the court, provides no basis for overturning the challenged action. *Id.* Similarly, in *Maple Leaf Fish Co. v. United States*, the court determined that reliance on an allegedly flawed ITC report nevertheless did not invalidate the resultant Presidential action. These cases illustrate that more is required for a successful challenge to Presidential safeguards than simple noncompliance, and Plaintiffs’ challenges must be weighed against that benchmark here.

### ***A. The Petition***

With respect to the petition, Plaintiffs allege that the three letters which constitute the purported petition do not satisfy the requirements of Section 204(b)(1)(B) because (1) they were not a petition to the President within the meaning of the statute; (2) they only contained requests from three companies for a change in the duty rate and from five companies for the withdrawal of the exclusion, and thus were not a petition by a majority of the representatives of the domestic industry for the same modification instituted by the President; and (3) they failed to allege that the domestic industry has made a positive adjustment to import competition, “much less [to] identify such positive adjustment as the basis for their request to modify the safeguard measure.” Pls.’ Resp. at 16. The Government responds that (1) the statute does not define “petition,” and the President therefore “lawfully accepted the domestic industry’s communications as ‘a petition’ under the statute;” (2) the petition constituted a request from the majority of the industry by production volume and collectively requested the relief granted by the President; and (3) the statute does not require petitioners to assert that the industry has made a positive adjustment to import competition. Defs.’ Reply at 8, 14–21. The court addresses each of these arguments in turn.

#### ***1. The Letters Submitted to USTR Constituted a Petition***

With respect to the requirement that a petition be submitted to the President, Plaintiffs’ overarching argument is that “an amalgamation of three letters submitted to USTR” by Auxin Solar, SolarTech Universal, Mission Solar Energy, LG Electronics USA, Inc., and Hanwha Q CELLS cannot constitute a petition. Pls.’ Resp. at 14. Plaintiffs object to both the form and timing of the alleged petition.

First, Plaintiffs argue that that the earliest of the three letters, submitted to USTR in July 2019, cannot serve as the basis for Presidential action in any case because it was submitted prior to the issuance of the ITC’s midterm report. Pls.’ Resp. at 15. This argument is without merit, as 19 U.S.C. § 2254(b)(1) requires only that the President must receive the ITC report before taking action and does not require any particular timing with respect to industry petitions. The court therefore rejects Plaintiffs’ timing argument.

Next, Plaintiffs argue that “multiple documents” do not constitute “a petition’ in the singular,” and therefore the three letters comprising the alleged petition fail to satisfy the text of the statute. Pls.’ Resp. at 14. However, as the Government notes, the statute provides no requirement for the form a petition must take. Defs.’ Reply at 12.

Furthermore, the United States Code provides that “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise -- words importing the singular include and apply to several persons, parties, or things.” 1 U.S.C. § 1; Defs.’ Reply at 13. There is no indication in the statute that a petition must constitute a single document. The court therefore determines that the letters submitted in this case were reasonably construed as a petition under the meaning of Section 204(b)(1)(B).

## ***2. Submission of the Letters to USTR was Not a Procedural Violation***

In addition to disputing that the letters in this case constitute a petition, Plaintiffs argue that any petition in fact submitted fails to satisfy Section 204(b)(1)(B) because it was submitted to USTR and not to the President. Pls.’ Resp. at 14. The court rejects this argument for two reasons. First, the statute does not require, or even suggest, that the President may not exercise discretion in determining the appropriate method of submission. By contrast, where Congress has intended strict requirements with respect to petitions under the safeguard statute, those requirements have generally been explicit. For example, Section 202 of the Trade Act requires that a petition under that section be “filed with the Commission” and additional documents “submit[ted] to the Commission and the [USTR]” within a set period, and further prescribes specific language that must be included in the petition. 19 U.S.C. § 2252(a)(1), (3)–(4). No such detailed requirements are found under Section 204(b)(1)(B). Accordingly, the court declines to read such inflexibility into the statute. *See Jama v. Immigration and Customs Enft*, 543 U.S. 335, 341 (2005) (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.”).

Furthermore, the petitions were submitted to USTR, and USTR is the agency which “act[s] as the principal spokesperson of the President on international trade.”<sup>5</sup> 19 U.S.C. § 2171(c)(1)(E). With respect to safeguard duties specifically, the statute contemplates the close relationship between the President and USTR; requiring that “the interagency trade organization established under 1872(a),” of which USTR is chair, “make a recommendation to the President as to what action the President should take” prior to the institution of any

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<sup>5</sup> See About Us, Office of the U.S. Trade Representative, <https://ustr.gov/about-us> (last visited Nov. 9, 2021).

safeguards. 19 U.S.C. § 2253(a)(1)(C); 19 U.S.C. § 1872(a)(3)(A). Given the close relationship of USTR and the President in the context of trade regulation and of safeguards specifically, the court finds that filing the petitions with USTR reasonably satisfied Section 204(b)(1)(B)'s requirement that the petitions be submitted to the President.

### ***3. The Petition Constituted a Request from the Majority of the Representatives of the Domestic Industry for the Relief Granted by the President***

Plaintiffs next argue that even if the three letters submitted to USTR constitute a valid petition, the withdrawal was requested by at most six out of twenty of the “representatives of the domestic industry,” which is less than a majority and therefore in violation of the statute. Pls.’ Resp. at 16–17. The Government counters that it is appropriate to look to production volume to determine if a majority of domestic industry representatives have submitted a petition, and that by this measure a majority of the domestic industry has requested both the withdrawal of the exclusion and the increased duty rate imposed by *Proclamation 10101*. Defs.’ Reply at 15–18. Plaintiffs, in turn, respond that this conflates “a majority of the representatives” — the language of the statute — with “representatives of the majority.” Pls.’ Reply at 7. The latter language, according to Plaintiffs, might permit measuring the majority by production volume, but “majority of the representatives’ reflects a majority of particular individuals.” *Id.*

The language of the statute belies Plaintiffs’ interpretation. Section 202(c)(6)(A)(i) defines “domestic industry” with respect to a specific article as “the producers as a whole of the like or directly competitive article or those producers whose collective production of the like or directly competitive article constitutes a major proportion of the total domestic production of such article.” 19 U.S.C. § 2252(c)(6)(A)(i). Clearly, the statute permits definition of domestic industry on the basis of production volume. *Id.* Section 204(b)(1)(B) may accordingly be read to require (prior to any safeguard adjustments) a petition by “a majority of the representatives of” the producers who are responsible for a “major proportion” of domestic production, and a finding by the President that the same producers have positively adjusted to import competition. 19 U.S.C. § 2254(b)(1)(B). In short, Section 204(b)(1)(B) implicitly contemplates the submission of a petition by those producers responsible for the majority of production volume. *Id.*

Nor does context support a reading of 204(b)(1)(B) that focuses on a numerical majority of representatives, rather than a proportional

majority of manufacturers. First, the statute requires that a “majority . . . submits” a petition, not that a majority of the representatives *submit* a petition. *Id.* Second, it is clear from the statute’s follow-on requirement that the President determine that the domestic industry as a whole has positively adjusted to competition that 204(b)(1)(B) is intended to permit changes to a safeguard measure where a specific domestic industry has *overall* adapted to competition — not when a certain number of producers have requested modification. *Id.* Requiring that a *numerical* majority of industry representatives petition for modification, regardless of the associated production volume, would therefore not support the ultimate aim of 204(b)(1)(B) as there is no indication that such a numerical majority would reflect industry-wide adaptation. Accordingly, the court concludes that the statute should not be read to exclusively require petition by a majority of representatives.

Having thus determined that production volume is an appropriate metric for the assessment of a petition, the court concludes that a majority of the domestic industry requested the modifications. Auxin, Hanwha Q CELLS, and LG requested the modification of the tariff rate in the fourth year of the solar safeguard measure, and according to the confidential filings submitted to the court, these representatives constitute a majority of the domestic industry by production volume. *See* ITC Pub. 5021 at III-14 III-15 (Table III-4). Similarly, Auxin, Hanwha Q CELLS, Heliene, Mission, and Solar Tech requested withdrawal of the bifacial exclusion, and these domestic producers, too, constitute a majority of production during the relevant period. *Id.* Thus, the court finds no basis to conclude that a majority of the domestic industry representatives failed to request the relief granted by the President.

#### ***4. Proclamation 10101 Did Not Clearly Misconstrue the Language of Section 204(b)(1)(B)***

Finally, the parties dispute whether the petition submitted by the domestic industry must request relief on the basis that the domestic industry has made a positive adjustment to import competition. Plaintiffs’ argument hinges on the statute’s inclusion of “on such basis,” which they contend should be read to require that petitioners must request reduction, modification, or termination of the safeguard measure on the basis that the domestic industry has made a positive adjustment to competition. *Pls.’ Resp.* at 14–15. The Government argues that the statute must instead be interpreted to require the President to determine the domestic industry has made a positive

adjustment to competition on the basis of either the petition or the ITC midterm review report referenced earlier in Section 204. Defs.' Suppl. Br. at 7. As the President in fact relied on the ITC report, the Government contends that the court must defer to his reasonable interpretation of the statute and accept that "on such basis" refers to the ITC report. *Id.*

The question before the court is not merely one of statutory interpretation. Rather, as noted above, the court may only set aside Presidential action where such action constitutes a "clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Maple Leaf Fish Co.*, 762 F.2d at 89. Accordingly, the appropriate inquiry is not how the court would interpret the statute, but whether the President's interpretation of the statute was a "clear misconstruction" warranting judicial intervention.

The court concludes that it was not. As the Government notes, the President's determination of positive adjustment on the basis of the ITC report is at least plausibly supported by the statutes as a whole. First, "such" is typically read to "refer[] *back* to something indicated *earlier* in the text," which disfavors Plaintiffs' view that the basis referred to is the industry's positive adjustment. Defs.' Reply at 21–22. Second, a determination made on the basis of the ITC report would reflect "the views of an independent body based on information and argument provided by all market participants," and would therefore align with the Section 204(b)(1)(B)'s overall aim of permitting the adjustment of safeguard measures when the industry as a whole begins to adapt to competition. Defs.' Suppl. Br. at 7. The President's reading of the statute is not the only possible interpretation of "on such basis." Nevertheless, neither is it so implausible as to amount to a clear misconstruction.

Even in the event that the correct referent of "such basis" under Section 204(b)(1)(B) is, as Plaintiffs contend, "that the domestic industry has made a positive adjustment to import competition," there is likely no basis to set aside *Proclamation 10101*. Plaintiffs argue that the correct interpretation of "such basis" requires that the petition submitted to the president include a request for modification on the basis of positive adjustment. Pls.' Resp. at 16. Failure to satisfy such a requirement would therefore be an interpretive error by the representatives of domestic industry, rather than the President — and would result in a flawed petition. As discussed above, the Federal Circuit has previously recognized that, where there is nothing in the statute that "prohibit[s] the President from approving recommenda-

tions that are procedurally flawed,” procedural inadequacies in recommendations provided to the President do not provide a basis for rejecting the resultant Presidential action. *See Silfab*, 892 F.3d at 1347 (quoting *Dalton v. Specter*, 511 U.S. 462, 476). Indeed, “a recommendation does not cease to be made ‘under’ [the relevant] section . . . simply because the recommendation is assertedly contrary to the substantive requirements of that provision.” *Id.* (quoting *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1341 (Fed. Cir. 2010)). Even under Plaintiffs’ interpretation of the statute, as in *Silfab*, there is no requirement in Section 204 precluding the President’s acceptance of a flawed petition. Accordingly, even if the appropriate referent of “on such basis” under Section 204(b)(1)(B) were “the domestic industry has made a positive adjustment to import competition,” the failure of petitioners to comply with this requirement would not render *Proclamation 10101* unlawful.

### ***B. The President’s Determination.***

Finally, Plaintiffs allege that the President failed to comply with the procedural requirements of Section 204(b)(1)(B) by determining in *Proclamation 10101* that the domestic industry “has begun to make” a positive adjustment to import competition, rather than “has made” such a positive adjustment. Pls.’ Resp. at 21–23. The Government rejects Plaintiffs’ argument that there is a meaningful distinction between “has made” and “has begun to make” which would invalidate the President’s action under Section 204. Defs.’ Reply at 22–24.

The court agrees with the Government. The phrase “has made a positive adjustment” in the statute is broad enough to include the finding that the domestic industry “has begun to make a positive adjustment” contained in the proclamation. For their argument to succeed, Plaintiffs must demonstrate a “clear misconstruction of the governing statute,” *Silfab*, 892 F.3d at 1346, and the distinction between “has made” and “has begun to make” is too narrow to rise to the level of a clear misconstruction. Accordingly, the court rejects Plaintiffs’ arguments with respect to the President’s procedural compliance with the statute.

## ***II. Proclamation 10101 Does Not Violate Section 203(e)(7) of the Trade Act***

Plaintiffs next argue that *Proclamation 10101* violates the timing provisions of Section 203(e)(7) of the Trade Act. Section 203(e)(7) prohibits new safeguard duties from being imposed on an article for at least “a period of 2 years beginning on the date on which the previous action terminates” imposed on that article was terminated.

19 U.S.C. § 2253(e)(7)(A)(ii).<sup>6</sup> Plaintiffs contend that *Proclamation 10101* violates this section because (1) bifacial solar panels are “articles” for the purposes of Section 203, and (2) the exclusion granted by USTR constitutes the termination of a safeguard duty such that any re-imposition of duties on bifacial solar panels through withdrawal of that exclusion would violate the prohibition on new safeguard measures. Pls.’ Resp. at 35. The Government argues that CSPV products generally are the “article” at issue in Section 203, and that the exclusion “did not ‘terminate’ the safeguard measure as to bifacial products” but rather “modif[ie]d the HTS provisions” created by *Proclamation 9693* to exclude a specific product from the safeguard measure. Defs.’ Resp. to the Court’s Questions at 8.

The court concludes that the relevant article for purposes of Section 203’s cooling-off period is CSPV products generally, and not bifacial solar panels specifically. The word “article” in this section refers back to its use in Section 201, which establishes the President’s authority to impose safeguard duties “[i]f the [ITC] determines . . . that an article is being imported in the United States in such increased quantities as to be a substantial cause of serious injury.” 19 U.S.C. § 2251(a). Here, the ITC determined that “crystalline silicon photovoltaic cells . . . are being imported into the United States in such increased quantities as to be a substantial cause of injury to the domestic industry producing an article like or directly competitive with the imported article.” *Crystalline Silicon Photovoltaic Cells (Whether or not Partially or Fully Assembled into Other Products)*, Investigation No. TA-201–75, USITC Pub. 4739 (Nov. 2017) at 1. It is clear that the ITC considered the imported “article” at issue here to be all CSPV products, and not bifacial products specifically. Accordingly,

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<sup>6</sup> 19 U.S.C. § 2253(e)(7) provides:

- (A) If an article was the subject of an action under subparagraph (A), (B), (C), or (E) of subsection (a)(3), no new action may be taken under any of those subparagraphs with respect to such article for—
- (i) a period beginning on the date on which the previous action terminates that is equal to the period in which the previous action was in effect, or
  - (ii) a period of 2 years beginning on the date on which the previous action terminates, whichever is greater.
- (B) Notwithstanding subparagraph (A), if the previous action under subparagraph (A), (B), (C), or (E) of subsection (a)(3) with respect to an article was in effect for a period of 180 days or less, the President may take a new action under any of those subparagraphs with respect to such article if—
- (i) at least 1 year has elapsed since the previous action went into effect; and
  - (ii) an action described in any of those subparagraphs has not been taken with respect to such article more than twice in the 5-year period immediately preceding the date on which the new action with respect to such article first becomes effective.

the court finds that Section 203(c)(7)'s cooling-off period does not apply to bifacial panels specifically, but rather to CSPV products as a whole.<sup>7</sup>

The court further concludes that the exclusion of bifacial solar panels is not a “termination” for the purposes of Section 203(e)(7). The President in *Proclamation 9693* authorized USTR to “exclude . . . particular product[s] from the safeguard measure” and to “modify or terminate any such determination.” *Proclamation 9693*, 83 Fed. Reg. at 3,544. The President did not, however, delegate the authority to terminate the safeguard measure, which is the action that would trigger the limitations of Section 203(e)(7). Accordingly, no action that would trigger Section 203(e)(7)'s cooling-off period — i.e., a termination of a safeguard measure — was undertaken through the issuance of the exclusion. Furthermore, interpreting the exclusion of bifacial panels as a termination of the safeguard measure with respect to a specific “article” would run counter to Congressional intent. First, as set out above, bifacial solar panels are not an article for purposes of Section 203. Second, as the Government notes, viewing a withdrawn exclusion as a termination subject to Section 203's two-year limitation on new safeguards would require a separate cooling-off period with respect to every excluded “article,” which would in turn give rise to repeated “mini-ITC investigations into separate subsets of the original ‘article’” as each excluded product became eligible for the re-imposition of safeguards. Defs.' Br. at 22. The Government asserts that “Congress did not intend such a piecemeal approach to the protections of the safeguard statute,” and the court agrees. *Id.* For the reasons set forth above, the court therefore concludes that *Proclamation 10101*'s withdrawal of the exclusion was not in violation of Section 203(7)(e).

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<sup>7</sup> Plaintiffs further argue that bifacial solar panels constitute an article for the purposes of 203(e)(7), and that failing to consider bifacial panels (rather than CSPV panels generally) a qualifying article would “allow safeguard duties to be immediately re-imposed on products following the termination of a safeguard measure as long as the domestic industry slightly modifies the definition of the article for which relief is sought.” Pls.' Resp. at 35. Such a loophole, Plaintiffs contend, runs counter to the purpose of the statute. Pls.' Br. at 36. However, as Defendants expressly acknowledge in their responses to the court's questions before oral argument, “imposition of a safeguard measure against any subsequent entry of an overlapping product before the cooling-off period has passed would result [in] a ‘new action . . . taken . . . with respect to such article’” and accordingly would be in violation of Section 203. Defs.' Resp. to the Court's Questions at 7–8 (quoting 19 U.S.C. § 2253(e)(7)(A)). As Plaintiffs' basis for deeming bifacial solar panels an article for purposes of the cooling-off period has therefore been mooted, the court declines to further address Plaintiffs' argument here.

### ***III. Proclamation 10101 Does Not Violate Section 201 of the Trade Act***

The parties also dispute whether action taken under Section 201 of the Trade Act requires the President to weigh the economic and social benefits of the alterations in *Proclamation 10101* against the costs. Section 201(a) imposes a requirement that the President weigh the costs and benefits of a safeguard measure before imposing it:

If the United States International Trade Commission (hereinafter referred to in this part as the “Commission”) determines under [Section 202(b)] of this title that an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article, the President, in accordance with this part, shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.

19 U.S.C. § 2251(a). The Government argues that the President’s initial explicit weighing of the economic and social costs in *Proclamation 9693* is sufficient to comply with the requirements of the statute,<sup>8</sup> and maintains that the weighing of economic and social costs is only expressly required under Section 201(a) and Section 203(a)(2) — which govern the initial implementation of safeguard duties — and not under Section 204, which governs the alterations at issue here. Defs.’ Br. at 22–24. Therefore, according to the Government, “there is no statutory basis for appending additional requirements onto Section 204 determinations.” Defs.’ Reply at 33.

Plaintiffs, however, contend that this determination must be made for *Proclamation 10101* as well. First, Plaintiffs argue that *Proclamation 9693* weighed the costs and benefits of a different tariff rate: 15% in the fourth year, rather than 18%. Pls.’ Resp. at 39–42. Second, Plaintiffs argue that all changes to safeguard duties require the President to weigh social and economic costs and benefits. *Id.* at 40. They maintain that the President acknowledged as much in *Proclamation 9693*, which read in part that changes could be made “to facilitate efforts by the domestic industry to make a positive adjustment to import competition and to provide greater economic and

<sup>8</sup> The relevant portion of the proclamation reads, “I have determined that this safeguard measure will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.” *Proclamation 9693*, 83 Fed. Reg. at 3,542.

social benefits than costs.” *Id.* at 40–41 (quoting *Proclamation 9693*, 83 Fed. Reg. at 3,542). Furthermore, Plaintiffs argue that Section 201 of the Trade Act, which contains the requirement to weigh social and economic costs and benefits, provides “the overarching rule for safeguard duties,” and therefore “sets the parameters for all actions taken pursuant to the entire safeguard statute,” including the amendment of safeguard measures. Pls.’ Reply at 21. They claim that the Government’s interpretation of Section 204 “would create an exception . . . that would swallow the rule,” and therefore should be rejected. *Id.* (citing *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951) (rejecting statutory interpretation under which “the exception swallows the proviso and destroys its practical effectiveness)).

The court concludes that the President was required to weigh the costs and benefits of his alterations to the safeguards imposed by *Proclamation 9693*, and further concludes that the President met this requirement. On the first issue, the court agrees with Plaintiffs that failing to apply Section 201’s requirement to weigh costs and benefits throughout the safeguard statute risks permitting absurd results, wherein “the President could impose a safeguard duty of one percent on certain CSPV products under Section 201 (after concluding that the costs of doing so did not outweigh the benefits), but then use Section 204 to increase the safeguard duty to 50 percent . . . without ever considering whether the benefits of doing so exceed the costs.” Pls.’ Resp. at 41. Such a scenario would allow any Section 204 exception to swallow the Section 201 rule and would thus “destroy its practical effectiveness.” *Schwegmann* 341 U.S. at 389. Accordingly, it is appropriate to read a baseline requirement to weigh social and economic costs and benefits into the statute as a whole.

With respect to the second issue, the court finds that the President considered, in compliance with the statute, the costs and benefits of his alterations to the safeguards imposed by *Proclamation 9693*. In *Proclamation 10101* the President determined that “that the exclusion of bifacial panels from application of the safeguard tariff has impaired and is likely to continue to impair the effectiveness of the action I proclaimed in *Proclamation 9693*,” and that “the exclusion of bifacial panels from application of the safeguard tariffs has impaired the effectiveness of the 4-year action I proclaimed in *Proclamation 9693*, and that to achieve the full remedial effect envisaged for that action, it is necessary to adjust the duty rate of the safeguard tariff for the fourth year of the safeguard measure to 18 percent.” 85 Fed. Reg. at 65,640. By determining that the bifacial exclusion “impaired” the action taken under *Proclamation 9693*, which was itself deemed necessary to “facilitate efforts by the domestic industry to make a posi-

tive adjustment to import competition and provide greater economic and social benefits than costs,” the President weighed the necessity of *Proclamation 10101*’s alterations. *Id.*; see *Proclamation 9693*, 83 Fed. Reg. at 3,542. Furthermore, by referring back to the purpose of the safeguards issued by *Proclamation 9693* and thus to that proclamation’s express consideration of the economic and social costs and benefits of the safeguard measures, the President evinced his general consideration of the costs and benefits of the changes. As there is no requirement in either Section 201(a) or Section 204(b)(1)(B) that the President set forth his analysis in specific detail, the court concludes that the assessment of costs and benefits apparent here satisfies the statutory requirement.

#### ***IV. Proclamation 10101 Violates the Substantive Requirements of § 204(b)(1)(B) of the Trade Act***

Finally, Plaintiffs argue that *Proclamation 10101* fails to comply substantively with Section 204(b)(1)(B) because it restricts, rather than liberalizes, trade. As set out above, Section 204(b) provides for the “reduction, modification, and termination” of a safeguard action, and specifically states that:

(1) Action taken under [Section 203] may be reduced, modified, or terminated by the President . . . if the President—

[ . . . ]

(B) determines, after a majority of the representatives of the domestic industry submits to the President a petition requesting such reduction, modification, or termination on such basis, that the domestic industry has made a positive adjustment to import competition.

19 U.S.C. § 2254(b)(1). The court concludes that, by interpreting “modification” to permit the expansion or upward adjustment of safeguard measures, *Proclamation 10101* clearly misconstrues the meaning of the statute. Accordingly, *Proclamation 10101*’s withdrawal of the exclusion must be set aside as a “clear misconstruction of the governing statute,” resulting in “action outside delegated authority.” *Silfab*, 892 F.3d at 1346 (quoting *Maple Leaf Fish Co.*, 762 F.2d at 89).

Plaintiffs contend that only trade-liberalizing modifications are permitted under 204(b)(1)(B) because “[i]t runs counter to logic and congressional intent to *increase* trade restrictions when ‘the domestic industry has made a positive adjustment to import competition.’” *Pls.* Resp. at 25 (emphasis in original). Plaintiffs further contend that in the Uruguay Round Agreement on Safeguards, Congress sought to implement existing United States law, and the fact that the resultant

agreement only permits trade liberalizing modifications reflects the congressional intent that Section 204(b)(1)(B) also only permit trade liberalizing modifications. *Id.* at 27–28. Plaintiffs note that “[t]he [Statement of Administrative Action] further explains that ‘[t]he Uruguay Round Agreement on Safeguards (the Agreement) incorporates many concepts taken directly from section 201. These include criteria regarding . . . degressivity (progressive liberalization of safeguard restrictions).’” *Id.* (citing H.R. Rep. No. 103–316, 286, as reprinted in 1994 U.S.C.C.A.N. 4040, 4262). Accordingly, Plaintiffs argue, *Proclamation 10101* should be set aside.

The Government claims that Section 204(b)(1)(B) is not limited to trade liberalizing measures, and in fact permits the President to increase safeguard duties. In support of their position they argue that, because safeguards may be reduced, modified, or terminated by the President under Section 204, reading modification to permit only “actions that reduce safeguard protections would make ‘modification’ coterminous with . . . ‘reduction’, and therefore render ‘modification’ superfluous.” *Defs.’ Br.* at 13. The Government also cites to legislative history in support of their argument, noting that “an earlier Senate amendment stated that, upon receipt of the ‘ITC monitoring report, the President may reduce, modify (but not increase), or terminate any action . . . .’” *Id.* at 14–15. The Government argues that the omission of the parenthetical “but not increase” in the final version of the act indicates that Congress intended to permit increases because “[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.” *Russello v. United States*, 464 U.S. 16, 23–24 (1983); see *id.* Accordingly, the Government argues, *Proclamation 10101* is lawful under 204(b)(1)(B).

The question underlying this dispute is the meaning of “modify” as used in 204(b)(1)(B). How that question is resolved is informed by basic principles of statutory interpretation. See generally, Robert A. Katzmann, *JUDGING STATUTES* (2014). The court begins with the principle that statutory language should be interpreted “in accord with the ordinary public meaning of its terms at the time of its enactment.” *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). An appeal to the dictionary is therefore illustrative. In its verb form — as it is used in 204(b)(1) — “modify” is defined as “to make less extreme.” See “Modify,” Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/modify> (last visited Nov. 9, 2021) Similarly, in its noun form — as it is used in the section title, and in 204(b)(1)(B) — “modification” is defined as “the limiting of a statement.” See “Modification,” Merriam-Webster Dictionary,

<https://www.merriam-webster.com/dictionary/modification> (last visited Nov. 9, 2021). Secondly, “modification” is defined as “the making of a limited change in something.” *Id.* The definition of the verb (as well as the first definition of the noun) favors Plaintiffs’ interpretation: that the statute’s provision for modification permits only changes that limit or moderate the existing safeguard measures. On the other hand, the second definition of “modification” favors the Government’s interpretation: that both trade-liberalizing and trade-restricting changes to existing safeguard duties are authorized by the statute. Defs.’ Resp. to the Court’s Questions at 3.

Accordingly, the court turns next to the statute as a whole. Courts may look “to the broader structure of the [statute] to determine the meaning” of specific language. *King v. Burwell*, 576 U.S. 473, 492 (2015). Where, as here, the terminology of the statute is ambiguous, it is all the more important to read disputed provisions “in their context and with a view to their place in the overall statutory scheme.” *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 311 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

Safeguard measures are intended to “facilitate efforts by the domestic industry to make a positive adjustment to import competition” while providing “greater economic and social benefits than costs.” 19 U.S.C. § 2251(a). As Plaintiffs correctly note, “to strike that balance, the statute contains an intricate framework of investigations, consultations, reports, [and] weighing of factors.” Pls.’ Resp. at 26. This framework includes specific instructions for the investigation of alleged harms by the ITC, including the assessment of enumerated factors favoring a finding of serious injury and the holding of public hearings on both the risk of injury and proposed adjustment plans. 19 U.S.C. § 2252(b), (e). In order to ultimately authorize any safeguard measures, the President must also comply with a variety of interpretive and substantive requirements, as well as specific deadlines for both further investigation and the proclamation of relief. *See generally*, 19 U.S.C. § 2253. The measures implemented go on to face both ongoing review and strict time limitations. 19 U.S.C. § 2253(e)(7); 2253(a).

Interpreting Section 204(b)(1)(B) to permit both trade-restricting and trade-liberalizing modifications would run counter to this detailed statutory scheme. Under such a view of the statute, the President would be permitted to increase safeguard measures without complying with the statutory requirements necessary to initially impose those safeguards. Adjustment of safeguard measures under 204(b)(1)(B) requires only that the President consider a midterm

report by the ITC on the “developments with respect to the domestic industry, including the progress and specific efforts . . . to make a positive adjustment to import competition.” U.S.C. § 2254(a)(1)–(3), (b). There is no indication in the statute that Congress intended Section 204 to provide a loophole for the institution of harsher safeguards without the standard procedural restrictions. Conversely, there is every indication that the section was intended to provide an escape hatch from those safeguards where domestic industry has adequately adapted to import competition. Section 204(b)(1)(A), for example, contemplates that safeguards might be reduced or terminated where “the domestic industry has not made adequate efforts” to adjust to competition, or where “the effectiveness of the action . . . has been impaired by changed economic circumstances” which “warrant . . . reduction, or termination.” 19 U.S.C. § 2254(b)(1)(A)(i)–(ii). The court therefore concludes that 204(b)(1)(B) must be read to authorize only trade-liberalizing modifications to safeguard measures, because interpreting the statute to permit trade-restricting modifications would undermine the broader statutory scheme. See *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”) (citations omitted).

In light of the above, the court need not consider the legislative history arguments advanced by either side. See *Bostock*, 140 S. Ct. at 1749 (“Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.”) (quoting *Milner v. Department of Navy*, 562 U.S. 562, 574 (2011)). Even in the event, however, that the court did proceed to consideration of the legislative history Plaintiffs still prevail, as that history is not decisive. For example, it is easy to imagine a scenario where a trade-liberalizing modification would require an “increase” of sorts (the President might increase a previously instituted quota) and the Government’s arguments to the contrary are not dispositive.<sup>9</sup>

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<sup>9</sup> In support of its legislative history argument, the Government points primarily to the fact that “(but not increase)” was included in an earlier version of the statute in support of their position. Defs.’ Reply at 28–29. And indeed, as already noted earlier in this opinion, “[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.” *Russello*, 464 U.S. at 23–24 (citations omitted). This presumption, however, is not irrebuttable, and Plaintiffs offer convincing alternative explanations.

Procedurally, Plaintiffs suggest the “but not increase” language was dropped as “a by-product of combining different provisions addressing different situations using different language into a single provision.” Pls.’ Resp. to Oral Arg. Questions at 1–2. The “but not increase” language did not disappear during deliberations within a single house of Congress, but rather as a result of combining a similar provision from the Senate with one from

Because Section 204(b)(1)(B) permits only trade-liberalizing modifications to existing safeguard measures, the court concludes that *Proclamation 10101*'s withdrawal of the exclusion of bifacial solar panels and increase of the safeguard duties on CSPV modules constituted both a clear misconstruction the statute and action outside the President's delegated authority. 85 Fed. Reg. at 65,640–42; *Maple Leaf Fish Co.*, 762 F.2d at 89. This conclusion is rooted in the statutory scheme. That is not to say that, in another context, in a different statute, “modify” could not be read differently, or indeed as the Government argues. To be sure, Congress is free to revise the statute now before the court to permit upward modifications. Nevertheless, in this context, and without such revision of the law, the Government's argument cannot succeed. Accordingly, the court grants Plaintiffs' motion for summary judgment and finds that the proclamation must be set aside.

## CONCLUSION

Ultimately, while *Proclamation 10101* complied with the procedural requirements of the safeguard statute, it nevertheless clearly misconstrued the reach of Section 204(b)(1)(B) of the Trade Act, and thus constituted an action outside the President's delegated authority. Neither the statute nor the statutory scheme supports interpreting Section 204(b)(1)(B) to permit increased restrictions on trade. Accordingly, the court grants Plaintiff's motion for summary judgment, and sets aside *Proclamation 10101* on the basis that trade-restricting modifications are not permitted under the authority granted to the President by Section 204(b)(1)(B). The Government is

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the House. See H.R. Rep. No. 100576, 687–88 (1988), as reprinted in 1988 U.S.C.C.A.N. 1547, 1720–21. This indicates that the deleted language may not carry the presumptive meaning argued for by the Government.

Practically, moreover, the “but not increase” language may have been deleted from the final version of the statute in order to give the President flexibility to make trade-liberalizing increases to existing safeguard duties. An increase in a quota, for example, would be a trade-liberalizing modification permitted under the operative language of Section 204(b)(1)(B) that would perhaps have been barred had the “but not increase” language not been deleted.

Furthermore, there is legislative history supporting Plaintiffs' view that “modify” should be read to permit only trade-liberalizing changes. In particular, the Uruguay Round Agreement on Safeguards, a multilateral treaty negotiated in the 1980s which only permits trade liberalizing modifications, was explicitly negotiated to reflect existing United States law. See H.R. Rep. No. 103–316, 286 (1994), as reprinted in 1994 U.S.C.C.A.N. at 4262 (“The Uruguay Round Agreement on Safeguards (the Agreement) incorporates many concepts taken directly from section 201. These include criteria regarding . . . degressivity (progressive liberalization of safeguard restrictions).”) As such, the limitations on trade-restricting action incorporated in the Uruguay Round Agreement seem to reflect Congress's intent that the originating statute, including Section 204(b)(1)(B), also only permit trade-liberalizing modifications. Accordingly, even the legislative history supports Plaintiffs' view that “modify” only permits trade-liberalizing changes to safeguard measures.

enjoined from enforcing *Proclamation 10101*, including by modifying the Harmonized Tariff Schedule of the United States, and Plaintiff shall be refunded all safeguard duties collected pursuant to *Proclamation 10101*, with interest.

**SO ORDERED.**

Dated: November 16, 2021  
New York, New York

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

Slip Op. 21–155

INVENERGY RENEWABLES LLC, Plaintiff, and SOLAR ENERGY INDUSTRIES ASSOCIATION, CLEARWAY ENERGY GROUP LLC, EDF RENEWABLES, INC. and AES DISTRIBUTED ENERGY, INC., Plaintiff-Intervenors, v. UNITED STATES OF AMERICA, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, UNITED STATES TRADE REPRESENTATIVE KATHERINE TAI, U.S. CUSTOMS AND BORDER PROTECTION, and ACTING COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION TROY A. MILLER, Defendants.

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

[The court grants Plaintiffs’ motion for judgment on the agency record and vacates the *Second Withdrawal*.]

Dated: November 17, 2021

*Amanda Shafer Berman* and *John Brew*, Crowell & Moring LLP, of Washington, D.C. and New York, N.Y., argued for Plaintiff Invenergy Renewables LLC and Plaintiff-Intervenors Clearway Energy Group LLC and AES Distributed Energy, Inc. With them on the joint briefs were *Larry Eisenstat* and *Frances Hadfield*.

*Matthew R. Nicely* and *Daniel M. Witkowski*, Akin, Gump, Strauss, Hauer & Feld LLP, of Washington, D.C., argued for Plaintiff-Intervenor Solar Energy Industries Association.

*Christine M. Streatfeild* and *Kevin M. O’Brien*, Baker & McKenzie LLP, of Washington, D.C., argued for Plaintiff-Intervenor EDF Renewables, Inc.

*Stephen C. Tosini*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendants United States of America, Office of the United States Trade Representative, United States Trade Representative Katherine Tai, U.S. Customs and Border Protection, and Acting Commissioner of U.S. Customs and Border Protection Troy A. Miller. With him on the briefs were *Bryan M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director.

**OPINION**

**Katzmann, Judge:**

The court returns to a dispute regarding the United States and the Office of the United States Trade Representative’s (“USTR”) with-

drawal of the previously granted exclusion from safeguard duties on imported bifacial solar modules, duties which in 2018 the President imposed by proclamation to protect domestic industry.<sup>1</sup> See *Proclamation 9693: To Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products) and for Other Purposes*, 83 Fed. Reg. 3,541 (Jan. 23, 2018) (“*Proclamation 9693*”). After lengthy preliminary disputes, Plaintiff Invenergy Renewables LLC (“Invenergy”), a renewable energy company, joined by Plaintiff-Intervenors Solar Energy Industries Association (“SEIA”), Clearway Energy Group LLP (“Clearway”), EDF Renewables, Inc. (“EDF-R”), and AES Distributed Energy, Inc. (“AES DE”) (collectively, “Plaintiffs”), filed a motion for judgment on the agency record challenging the *Determination on the Exclusion of Bifacial Solar Panels From the Safeguard Measure on Solar Products*, 85 Fed. Reg. 21,497 (USTR Apr. 17, 2020) (“*Second Withdrawal*”), by Defendants the United States, USTR, U.S. Trade Representative Katherine Tai, U.S. Customs and Border Protection (“CBP”), and CBP Acting Commissioner Troy A. Miller (collectively, “the Government”).<sup>2</sup> Specifically, Plaintiffs contend that the *Second Withdrawal* should be vacated as a decision issued without statutory authority and without compliance with the requirements of the Administrative Procedure Act (“APA”). Pls.’ Mot. for J. on the Administrative R., Feb. 5, 2021, ECF No. 302 (“Pls.’ Br.”). The Government requests that the court uphold the *Second Withdrawal* as in accordance with the Trade Act of 1974, the APA, and otherwise supported by record evidence. Defs.’ Corr. Resp. to Pls.’ Mot. for J. on the Administrative R., June. 15, 2021, ECF No. 322 (“Defs.’ Br.”). The court grants Plaintiffs’ motion and vacates the *Second Withdrawal*.

## BACKGROUND

The court presumes familiarity with its previous opinions — (1) *Invenergy Renewables LLC v. United States*, 43 CIT \_\_\_, 422 F. Supp. 3d 1255 (2019) (*Invenergy I*); (2) *id.*, 44 CIT \_\_\_, 427 F. Supp. 3d 1402 (2020) (*Invenergy II*); (3) *id.*, 44 CIT \_\_\_, 450 F. Supp. 3d 1347 (2020) (*Invenergy III*); (4) *id.*, 44 CIT \_\_\_, 476 F. Supp. 3d 1323 (2020) (*Invenergy IV*); and (5) *id.*, 44 CIT \_\_\_, 482 F. Supp. 3d 1344 (2020) (*Invenergy V*) — each of which provide additional information on the

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

<sup>2</sup> Per CIT Rule 25(d), named officials have been substituted to reflect the current officeholders.

factual and legal background of this case.<sup>3</sup> Information pertinent to this decision follows.

As the court has noted:

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

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

### ***I. The Safeguard Statute***

Through the Trade Act of 1974, Congress provided a process by which the executive branch could implement temporary safeguard measures to protect a domestic industry from the harm associated with an increase in imports from foreign competitors. Trade Act of 1974 §§ 201–04, 19 U.S.C. §§ 2251–54 (“Safeguard Statute”). Section 202 of that the Safeguard Statute dictates that, upon petitions from domestic entities or industries, the International Trade Commission (“ITC”) may make an affirmative determination that serious injury or a threat of serious injury to that industry exists. 19 U.S.C. § 2252. Under Section 203, the President may then authorize discretionary measures, known as “safeguards,” to provide a domestic industry temporary relief from serious injury. 19 U.S.C. § 2253. The statute vests the President with decision-making authority based on consideration of ten factors. 19 U.S.C. § 2253(a)(2). Safeguard measures have a maximum duration of four years, unless extended for another maximum of four years based upon a new determination by the ITC.

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<sup>3</sup> Most recently, the court has also issued a related opinion addressing the issuance of Presidential Proclamation 10101, *Proclamation 10101: To Further Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products)*, 85 Fed. Reg. 65,639 (Oct. 16, 2020) (“*Proclamation 10101*”), and that Proclamation’s effort to withdraw the exclusion of bifacial solar panels from safeguards imposed by *Proclamation 9693*. See *Solar Energy Indus. Ass’n v. United States*, 45 CIT \_\_, Slip Op. 21–154 (Nov. 16, 2021).

19 U.S.C. § 2253(e)(1). The statute also outlines certain limits on the President's ability to act under this statute, including to limit new actions after the termination of safeguard measures regarding certain articles. *See* 19 U.S.C. § 2253(e). Further, the safeguard statute mandates that the President "shall by regulation provide for the efficient and fair administration of all actions taken for the purpose of providing import relief." 19 U.S.C. § 2253(g)(1). Finally, Section 204 outlines the process by which the President may modify safeguard measures. 19 U.S.C. § 2254.

## ***II. The President's Safeguard Action and Delegation to USTR***

In May 2017, pursuant to 19 U.S.C. § 2252(a), Suniva, Inc. ("Suniva"), a domestic solar cell producer, filed an amended petition with the ITC alleging that certain solar panel cells "are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products) at 6, Inv. No. TA-201-75, USITC Pub. 4739 (Nov. 2017) ("ITC Report"). The ITC then instituted an investigation pursuant to 19 U.S.C. § 2252. *Id.*; *Procedures to Consider Additional Requests for Exclusion of Particular Products From the Solar Products Safeguard Measure*, 83 Fed. Reg. 6,670 (USTR Feb. 14, 2018) ("*Exclusion Procedures*") (citing 19 U.S.C. § 2252). The scope of its investigation covered certain crystalline silicon photovoltaic ("CSPV") cells,

whether or not partially or fully assembled into other products, of a thickness equal to or greater than 20 micrometers, having a p/n junction (or variant thereof) formed by any means, whether or not the cell has undergone other processing, including, but not limited to cleaning, etching, coating, and addition of materials (including, but not limited to metallization and conductor patterns) to collect and forward the electricity that is generated by the cell. The scope of the investigation also included photovoltaic cells that contain crystalline silicon in addition to other materials, such as passivated emitter rear contact cells, heterojunction with intrinsic thin layer cells, and other so-called "hybrid" cells ("certain CSPV cells").

*Exclusion Procedures*, 83 Fed. Reg. at 6,670. The ITC reached an affirmative determination that certain CSPV cells "are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat of serious injury, to the domestic industry producing a like or directly competitive article,"

*Proclamation 9693*, 83 Fed. Reg. at 3,541, and referred its findings and recommendations to the President on November 13, 2017. ITC Report at 1, 7.

Pursuant to Section 203 of the Safeguard Statute, in 2018 President Trump issued a proclamation, imposing temporary safeguard duties of 30% on certain CSPV cells, to decrease by 5% each year until 2022, at which point the safeguard duties end. *See generally, Proclamation 9693*. The safeguard duties applied to the bifacial solar panels used by Invenergy. Pls.' Br. at 8. The President implemented these duties by modifying Chapter 99 of the Harmonized Tariff Schedule of the United States ("HTSUS"). *Proclamation 9693*, 83 Fed. Reg. at Annex I. The President also instructed USTR to publish within thirty days "procedures for requests for exclusion of a particular product" from the safeguard duties in the Federal Register and authorized USTR to make such exclusions after consultation with the Secretaries of Commerce and Energy and publishing a notice in the Federal Register. *Id.* at 3,543–44. The safeguard duties went into effect on February 7, 2018. *Id.* at 3,545–49.

USTR then published procedures for exclusion requests in the Federal Register in February 2018. *Exclusion Procedures*, 83 Fed. Reg. at 6,670–73. The notice summarized the scope of the ITC's investigation, the scope of the products covered by *Proclamation 9693*, and the procedure to request the exclusion of certain solar products. *Id.* USTR invited "interested persons to submit comments identifying a particular product for exclusion from the safeguard measure and providing reasons why the product should be excluded." *Id.* at 6,671. The notice did not provide a method for withdrawal, or otherwise indicate that the exclusions could be withdrawn during the four-year safeguard period. *Id.*

Three solar companies, Pine Gate Renewables, Sunpreme, Inc., and SolarWorld Industries GmbH, submitted requests for USTR to exclude the bifacial solar panels at issue here. Complete Public Administrative Record at 4 (Pine Gate Renewables exclusion request), 48 (SolarWorld exclusion request), 55 (Sunpreme exclusion request) ("Complete P.R."); *see also* Complete P.R. 418–19 (July 3, 2018 USTR memo identifying the three bifacial panel exclusion requests). USTR received forty-eight product exclusion requests and 213 comments responding to these requests. *Exclusion of Particular Products From the Solar Products Safeguard Measure*, 84 Fed. Reg. 27,684 (USTR June 13, 2019) ("*Exclusion*"). After a sixteen-month notice-and-comment process through which USTR considered requests for exclusions "[b]ased on an evaluation of the factors set out in the February 14 notice," USTR decided to exclude bifacial solar panels from safe-

guard duties. *Id.* The *Exclusion* did not indicate that it would apply temporarily, would require renewal, or could be withdrawn. *Id.*

Shortly after USTR granted the exclusion request for bifacial solar panels, on June 26, 2019, Suniva, First Solar Inc., and Hanwha Q Cells USA, Inc. (“Q Cells”) wrote to USTR to ask it to reconsider its decision, arguing that the *Exclusion* would, “in a very short period of time, undermine the relief afforded by the Section 201 tariffs as imposed by the President on January 23, 2018.” Invenergy’s Compl. Ex. H, Oct. 21, 2019, ECF No. 13 (Letter from Suniva, First Solar, and Q Cells to Ambassador Gerrish, Deputy U.S. Trade Representative (June 26, 2019)). The letter referenced a meeting between the parties less than a week prior and included eighteen attachments for USTR’s consideration. *Id.* On October 3, 2019, based on alleged rumors that USTR was considering rescinding the *Exclusion*, Invenergy’s CEO and thirteen other solar industry executives wrote to USTR expressing their desire to be heard should USTR plan to take any additional actions regarding the *Exclusion*. Invenergy’s Mem. In Supp. of Pls.’ Mot. for PI at 5–6, Nov. 1, 2019, ECF No. 57; Defs.’ Mot. to Dismiss and Resp. to Invenergy’s Mot. for PI at 9, Nov. 8, 2019, ECF No. 112; Invenergy’s Compl. Ex. J (Letter to USTR re: Solar Safeguard Bifacial Module Exclusion).

Thus, only four months after issuing the *Exclusion*, USTR published the *Withdrawal of Bifacial Solar Panels Exclusion to the Solar Products Safeguard Measure*, 84 Fed. Reg. 54,244 (USTR Oct. 9, 2019) (“*First Withdrawal*”), announcing its decision to withdraw the exclusion for bifacial solar panels, effective October 28, 2019. The *First Withdrawal* explained that, “[s]ince publication of [the *Exclusion*] notice, the U.S. Trade Representative has evaluated this exclusion further and, after consultation with the Secretaries of Commerce and Energy, determined it will undermine the objectives of the safeguard measure.” *Id.* Absent intervening court action, the *First Withdrawal* would have reinstated safeguard duties on certain bifacial solar panels.

### ***III. Litigation History and Subsequent Developments***

#### ***A. First Withdrawal***

Plaintiff Invenergy initiated this case in response to the *First Withdrawal*. Summons, Oct. 21, 2019, ECF No. 1; Invenergy’s Compl., Oct. 21, 2019, ECF No. 13.<sup>4</sup> The Government subsequently moved for,

<sup>4</sup> After the initiation of this litigation, several parties moved to intervene as either Plaintiff-Intervenor or Defendant-Intervenor. The court granted each of these motions, although some were the subject of opposition. See *Invenergy I*, 422 F. Supp. 3d at 1271–80, *Invenergy*

and the court allowed, USTR to delay the effective date of the *First Withdrawal* to November 8, 2019. Mot. for Leave to Defer Implementation of Withdrawal of Exclusion From Section 201 Duties Until Nov. 8, 2019, Oct. 25, 2019, ECF No. 23; Order, Oct. 25, 2019, ECF No. 29. The court issued a temporary restraining order, Nov. 7, 2019, ECF No. 68, and later a preliminary injunction (“PI”), to enjoin USTR from reinstating safeguard duties on certain bifacial solar panels through implementation of the *First Withdrawal*, *Invenergy I*, 422 F. Supp. 3d at 1294. The court in *Invenergy I* found that USTR made the decision with only nineteen days’ notice to the public, without an opportunity for affected or interested parties to comment, and without reasoned explanation on a developed public record. *Id.* at 1286–88. The court enjoined USTR from amending the HTSUS to reflect withdrawal of the *Exclusion*, “until entry of final judgment as to Plaintiffs’ claims against Defendants in this case.” *Id.* at 1295. In so ruling, the court held that the *First Withdrawal* of the *Exclusion* by the Government likely violated the APA on two grounds: (1) it was a rulemaking without notice and comment, *id.* at 1286–87; and (2) it was likely an arbitrary and capricious agency decision, *id.* at 1287–88.

On January 24, 2020, the Government filed a status report notifying the court and the other parties of USTR’s publication of “a notice in the Federal Register, requesting interested party comment regarding whether to withdraw the [*June 2019 Exclusion*] from the safeguard measure pursuant to section 201 of the Trade Act of 1974, 19 U.S.C. § 2251, *et seq.*, for bifacial solar panels contained in [the *June 2019 Exclusion*].” Defs.’ Status Report at 1, ECF No. 131. USTR published the notice in the Federal Register three days later, thereby initiating the comment period. *Procedures to Consider Retention or Withdrawal of the Exclusion of Bifacial Solar Panels From the Safeguard Measure on Solar Products*, 85 Fed. Reg. 4,756–58 (USTR Jan. 27, 2020) (“*January 2020 Notice*”). The *January 2020 Notice* acknowledged the court’s PI “enjoining the U.S. Trade Representative from withdrawing the exclusion on bifacial solar panels from the safeguard measure,” and noted that “[i]f the U.S. Trade Representative determines after receipt of comments pursuant to this notice that it would be appropriate to withdraw the bifacial exclusion or take some other action with respect to the exclusion, the U.S. Trade Representative will request that the [c]ourt lift the injunction.” *Id.* at 4,756.

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*III*, 450 F. Supp. 3d at 1356–57. After the court issued its decision in *Invenergy V*, Defendant-Intervenors Hanwha Q Cells and Auxin Solar were voluntarily dismissed from this action. Order of Dismissal, Mar. 15, 2021, ECF No. 309.

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

### **B. Second Withdrawal**

On April 14, 2020, the Government filed another status report to inform the court of the issuance of USTR's *Second Withdrawal*. Defs.' Status Report, ECF No. 155. The *Second Withdrawal* withdraws the *Exclusion* of bifacial solar panels from safeguard duties — the same conclusion as the *First Withdrawal*. In that status report, the Government explained that "[i]n response to the [c]ourt's preliminary conclusion that repealing the withdrawal of the exclusion 'requires rulemaking subject to . . . APA notice and comment,' USTR 'opened a public docket,' and received 15 comments regarding the bifacial exclusion and 49 subsequent comments responding to the initial comments." *Id.* at 2 (citations omitted). Further, the Government explained that USTR "based the [*Second Withdrawal*] on the comments and evidence received." *Id.* There, USTR published what it characterized as nine findings in support of its decision to withdraw the *Exclusion*:

1. Global capacity to produce bifacial solar panels is likely to increase significantly over the next three years.
2. As bifacial solar panel production currently is low in the United States, and the vast majority of bifacial solar panel capacity is foreign, allowing import of bifacial solar panels free of safeguard tariffs disincentivizes U.S. producers from converting existing monofacial production to bifacial production or opening new bifacial production.

3. Imports of bifacial solar panels were rising even before the bifacial exclusion and continued to increase after the exclusion.
4. Demand both globally and domestically for bifacial solar panels is likely to increase significantly for at least the next three years.
5. The cost of producing bifacial solar panels is not more than 10 percent higher than the cost of producing monofacial panels.
6. Bifacial solar panels and monofacial solar panels are substitutes from the perspective of utilities planning solar generating facilities in locations where both are cost competitive with conventional forms of energy.
7. Bifacial solar panels are expected to offer a 5 to 10 percent improvement in energy output over a same-size monofacial panel, and removing the safeguard tariff will enable their sale for prices below those of monofacial panels, which will depress prices for monofacial panels.
8. The proposed TRQ for bifacial solar panels would allow importation of massive quantities of bifacial solar panels and therefore would duplicate the negative effects of the bifacial exclusion.
9. Competition from low-priced imports prevented domestic producers from selling significant quantities of solar panels in the utility segment during the ITC's original investigation period, and low-priced imports of bifacial solar panels due to the exclusion are likely to have a similar effect under current market conditions.

*Second Withdrawal*, 85 Fed. Reg. at 21,498.

Based on this new decision by USTR, the Government filed its first motion to dissolve the PI. Defs.' Mot. to Dissolve PI, Apr. 16, 2020, ECF No. 156. The Government argued that the *Second Withdrawal* "cured the sole reason for which the injunctive relief was granted." *Id.* at 1. Plaintiffs argued that the *Second Withdrawal* was an arbitrary and capricious decision and thus did not cure the second likely APA violation previously identified by the court. *See, e.g.,* Invenergy, Clearway, and AES DE's Resp. in Opp'n to Defs.' Mot. to Dissolve Prelim. Inj., May 7, 2020, ECF No. 163. Shortly thereafter, Plaintiffs filed motions to supplement their complaints to include the *Second Withdrawal*. Pls.' Mot. for Leave to File Suppl. Compls., May 8, 2020, ECF No. 170.

Prior to holding oral argument on those motions, the court issued questions to the parties for written answers. Ct.'s Letter re: Questions for Oral Arg., May 8, 2020, ECF No. 169. In responding to these questions, the Government attached two memoranda to its responses to the court's questions. Mem. from then-DUSTR Jeffrey D. Gerrish and then-General Counsel Joseph Barloon to then-USTR Robert Lighthizer, Apr. 13, 2020, Attach. 1 to Defs.' Resp. to Ct.'s Questions, ECF No. 172-1 ("Lighthizer Decision Memorandum"); Mem. from then-DUSTR Jeffrey D. Gerrish and then-General Counsel Joseph Barloon to then-USTR Robert Lighthizer, Apr. 10, 2020, Attach. 2 to Defs.' Resp. to Ct.'s Questions, ECF No. 172-2 ("Gerrish Memorandum"), (collectively, "USTR Memoranda"). The USTR Memoranda consist of then-Deputy U.S. Trade Representative Jeffrey D. Gerrish's and U.S. Trade Representative then-General Counsel Joseph Barloon's analysis of USTR's authority to withdraw an exclusion, their analysis of comments received pursuant to the *January 2020 Notice*, and a recommended decision, initialed by then-U.S. Trade Representative Robert Lighthizer. *Id.* Neither memo was ever published in the Federal Register or otherwise made available to the interested public. Furthermore, the *Second Withdrawal* made no mention or reference to any other decision documents that would alert the public to the existence of or relevance of the Gerrish Memo to USTR's final decision in the *Second Withdrawal*. The court subsequently issued its decision in *Invenergy III*, in which it decided multiple outstanding motions. 450 F. Supp. 3d 1347. First, the court denied the Government's motion to dismiss for failure to join an indispensable party. *Id.* at 1356-57. Second, the court granted Plaintiffs' motion to supplement their complaints to include the *Second Withdrawal*. *Id.* at 1357-58. Third, the court denied the Government's motion to vacate the *First Withdrawal* and dismiss the case as moot because the Government had not shown that the *First Withdrawal* was moot nor did the court have the authority to vacate the *First Withdrawal* without a decision on the merits. *Id.* at 1358-60. Finally, the court denied the Government's first motion to dissolve the PI because the Government had not proved sufficiently changed circumstances. *Id.* at 1360-64. Thus, the litigation continued on the basis of USTR's decisions to withdraw the *Exclusion* through the *First Withdrawal* and *Second Withdrawal*. The Government appealed the denial of its first motion to dissolve the PI on August 5, 2020. *Invenergy III*, appeal docketed No. 2020-2130 (Fed. Cir. Aug. 5, 2020), ECF No. 240.

As the litigation proceeded, on June 5, 2020, the Government filed the administrative record. Public Administrative Record, ECF No.

196 (“P.R.”). Plaintiffs subsequently moved to complete the agency record. Pls.’ Mot. to Complete A.R., June 19, 2020, ECF No. 201. Further, in response to *Invenergy III*, on June 12, 2020, USTR published the *Rescission of the First Withdrawal of the Bifacial Solar Panels Exclusion From the Safeguard Measure on Solar Products*, in which it “expressly rescind[ed] the [First Withdrawal].” 85 Fed. Reg. 35,975 (USTR June 12, 2020) (“June 2020 Rescission”). That same day, the Government made its second motion to dissolve the PI. Defs.’ Mot. to Dissolve PI, June 12, 2020, ECF No. 198. Plaintiffs responded and made a cross-motion to modify the PI. Pls.’ Resp. to Defs.’ Mot. to Dissolve PI and Cross-Mot. to Modify PI, June 29, 2020, ECF No. 206. After the court set a date for oral argument on those motions, the Government filed its above-mentioned appeal.

The court decided *Invenergy IV* on October 15, 2020. 476 F. Supp. 3d 1323. Noting the Government’s *June 2020 Rescission* and subsequent abandonment of its defense of the *First Withdrawal*, the court held that the *First Withdrawal* was unlawful on the merits and vacated the agency decision accordingly. *Id.* at 1340. There, the court incorporated its analysis in *Invenergy I*, decided that each of its preliminary conclusions apply to the merits of the *First Withdrawal*, and vacated the *First Withdrawal* pursuant to 5 U.S.C. § 706(2) of the APA as an agency action that is not in accordance with the law. *Id.* Furthermore, the court modified the PI to incorporate the *Second Withdrawal* in order to avoid the “very inequity to the Plaintiffs the PI sought to prevent” and to “to give effect to its purpose — to shield Plaintiffs from the effects of an agency decision that was undertaken in violation of the APA.” *Id.* at 1342. However, the court noted that its conclusion was preliminary, based on a limited record, and reserved judgment of the merits until properly presented to the court. *Id.* at 1357.

Concurrent to the court’s decision in *Invenergy IV*, President Trump announced his decision to withdraw by proclamation the *Exclusion* and his decision to increase duties on certain CSPV cells in year four of the safeguard measure from those duties previously announced. *Proclamation 10101*. In response, Plaintiffs filed motions to again supplement their complaints to include *Proclamation 10101* and further filed motions to enjoin its enforcement. Pls.’ Mot. for Leave to File Second Suppl. Compls., Oct. 17, 2020, ECF No. 257; Pls.’ Emergency Appl./Mot. for Prelim. Inj. Modification or in the Alternative TRO, Oct. 20, 2020, ECF No. 263. The court temporarily restrained *Proclamation 10101* from entering into force so that it could decide Plaintiffs’ motions. Order Granting Mot. for TRO, Oct. 24, 2020, ECF No. 270; Order Extending TRO, Nov. 6, 2020, ECF No. 283. On

November 19, 2020, the court decided *Invenergy V*, in which it denied both of Plaintiffs' motions. 482 F. Supp. 3d 1344. Rather, the court concluded that Plaintiffs' challenges to *Proclamation 10101* did not demonstrate sufficient changed circumstances to warrant modification of the PI and that *Proclamation 10101* was sufficiently distinct so as not to require supplementation of Plaintiffs' complaints. *Id.* at 1354.<sup>5</sup>

On December 3, 2020, the Government filed the completed administrative record. Complete P.R. Plaintiffs then filed their motion for judgment on the agency record challenging the *Second Withdrawal*. Pls.' Br. The Government filed its response on March 12, 2021. Defs.' Br.<sup>6</sup> Plaintiffs then replied in support of their motion. Pls.' Reply in Supp. of Mot. for J. on the Administrative R., Apr. 9, 2021, ECF No. 312; *see also* Pls.' Suppl. Reply in Supp. of Mot. for J. on the Administrative R., June 22, 2021, ECF No. 323. Oral argument on Plaintiffs' motion was held on July 13, 2021. Oral Arg., ECF No. 326. Prior to oral argument, the court issued and the parties responded to questions regarding the case. Ct.'s Letter re: Questions for Oral Arg., June 2, 2021, ECF No. 314; Pls.' Resps. To Ct.'s Questions Regarding Mot. For J. on the Administrative Record, June 11, 2021, ECF No. 319 ("Pls.' OAQ Resps."); Defs.' Resp. to Ct.'s Questions of June 2, 2021, June 11, 2021, ECF No. 318 ("Defs.' OAQ Resps."). As directed by the court, the parties also filed briefs following oral argument. Pls.' Post-Arg. Br. In Supp. of Mot. For J. on the Administrative R., July 20, 2021, ECF No. 330; Defs.' Suppl. Br., July 20, 2021, ECF No. 327.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(i), which provides that the court "shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue" of tariffs and duties.

<sup>5</sup> On December 29, 2020, Plaintiffs filed a separate challenge to *Proclamation 10101*. Compl., *SEIA v. United States*, No. 20–3941, (CIT Dec. 29, 2020), ECF No. 2. That case was subsequently assigned to this court and is currently under advisement. Order of Assignment, *SEIA*, No. 203941, (CIT Feb. 10, 2021), ECF No. 15.

<sup>6</sup> The Government's response submitted on March 12, 2021 omitted certain portions of that brief. *See* Defs.' Resp. to Pls.' Mot. for J. on the Administrative R., Mar. 12, 2021, ECF No. 307. On June 9, 2021, the Government moved to file a corrected response brief that included the omitted portions. Mot. for Errata to Corr. Resp. Br., June 9, 2021, ECF No. 316. The court granted that motion and also ordered that Plaintiffs could file a supplemental reply to the corrected brief. Order, June 10, 2021, ECF No. 317. Plaintiffs filed a joint supplemental reply brief on June 22, 2021. Pls.' Suppl. Reply in Supp. of Mot. for J. on the Administrative R., ECF No. 323.

The APA requires the courts “hold unlawful and set aside agency action, findings, and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). To survive review under the arbitrary and capricious standard, the agency must have “examined ‘the relevant data’ and articulated ‘a satisfactory explanation’ for [its] decision, ‘including a rational connection between the facts found and the choice made.’” *Dept of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”)); see also *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (noting that agencies must provide adequate reasons for their decisions). Because this case involves a delegation of Presidential statutory authority to an agency, the court also considers the President’s delegation of authority for a “clear misconstruction of the governing statute, a significant procedural violation, or action outside [statutorily] delegated authority.” *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985).

## DISCUSSION

After five preliminary opinions on Plaintiffs’ challenges to withdrawals of the exclusion for imports of bifacial solar cells from the imposition of safeguard duties, the court at last addresses and enters judgment on Plaintiffs’ challenges. The court concludes that (1) USTR has no statutory authority to withdraw the *Exclusion*; and (2) that, in any event, the *Second Withdrawal* was an arbitrary and capricious agency decision. The court accordingly grants Plaintiffs’ motion and vacates the *Second Withdrawal*.

### ***I. USTR Had No Statutory Authority to Withdraw an Exclusion Once Granted.***

A threshold requirement to any agency action is statutory or other authority to act. Accordingly, Plaintiffs challenge the *Second Withdrawal* as outside of USTR’s authority. Plaintiffs contend that USTR lack authority to withdraw an exclusion because (1) the statute does not allow exclusions to be withdrawn, Pls.’ Br. at 61–64; 72; (2) the President through *Proclamation 9693* did not delegate USTR the authority to withdraw exclusions, Pls.’ Br. at 69–73; and (3) USTR had no inherent authority to reconsider its decision to grant an exclusion, Pls.’ Br. at 73–75. First, Plaintiffs argue that either USTR’s *Second Withdrawal* was not authorized under Sections 201 and 203 because it exceeded the procedural and substantive limitations on Presidential action under those sections, Pls.’ Br. at 62–64, 67–69; or

the *Second Withdrawal* was an unlawful modification of the safeguard measure not in accordance with Section 204, Pls.' Br. at 65–67. Furthermore, Plaintiffs contend that the President's delegation of authority to USTR in *Proclamation 9693* did not include authority to withdraw exclusions, rather the delegation was limited to granting exclusions according to USTR's *Exclusion Procedures* issued in accordance with the President's directive. Pls.' Br. at 69–73. Finally, Plaintiffs argue that USTR had no inherent authority to reconsider its exclusion decisions because the statute does not permit re-imposition of duties or modifications to the safeguard measure outside its modification procedures. Pls.' Br. at 74–75.

The Government contests each of these points and argues that USTR acted within its delegated authority and in accordance with the statute in issuing the *Second Withdrawal*. Defs.' Br. at 53–56. The Government contends that USTR was not required to comply with the same requirements as the President in acting to withdraw an exclusion. Defs.' Br. at 54–55. Further, the Government argues that the *Second Withdrawal* did not constitute a modification of the safeguard action for purposes of Section 204, but that USTR may nevertheless modify a safeguard action through discrete exclusions and withdrawals of those exclusions. Defs.' Br. at 54. The Government also claims that the President granted USTR the authority to modify exclusion decisions and the President's directive to issue the *Exclusion Procedures* did not reach to modifications of exclusions.<sup>7</sup> Defs.' Br. at 54, 56. Finally, the Government relies on the inherent authority of agencies to reconsider their decisions as a basis of authority for the *Second Withdrawal*. Defs.' Br. at 55.

In determining the scope of USTR's authority regarding safeguard exclusions, the court first looks to the safeguard statute. *See Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019) (observing that an agency only has the authority that has been delegated to it). The court notes that the trade power is constitutionally lodged with Congress exclusively, and that Congress can delegate that authority, cabined by “intelligible principles” to the President. *See generally Universal Steel Prods. Inc. v. United States*, 44 CIT \_\_, \_\_, 495 F. Supp. 3d 1336, 1359 (2021) (Katzmann, J., concurrence) (“If nothing else, precedent affirms that in enacting such statutes, Congress can restrict the actions of the President in the delegation of its power of trade to the Executive; indeed, the constitutionality of that

<sup>7</sup> The court notes the Government's claim that “USTR was not obligated to follow the same procedures in issuing the [*Second Withdrawal*] that it followed in its February 2018 exclusion procedures.” Defs.' Br. at 56. Because the court previously and conclusively rejected a similar argument in *Invenergy I*, 422 F. Supp. 3d at 1283–86, it need not revisit this issue here.

legislation is informed by restraints on that power.”); *Am. Inst. for Int’l Steel, Inc. v. United States*, 43 CIT \_\_, \_\_, 376 F. Supp. 3d 1335, 1346–53 (2019) (Katzmann, J., *dubitante*) (reviewing cases involving challenges to trade legislation raising the question of unconstitutional delegation of legislative power). Thus, the President’s own authority to act, and any subsequent delegation of his authority to USTR, is constrained by Congress’s directives on the initiation and implementation of safeguard measures. As a whole, these measures are intended to “facilitate efforts by the domestic industry to make a positive adjustment to import competition” while providing “greater economic and social benefits than costs.” 19 U.S.C. § 2251(a).

The President issued *Proclamation 9693* pursuant to Section 203. As noted, Section 203 authorizes the President to take safeguard measures when certain prerequisites are met and further prescribes limitations on those safeguard measures. 19 U.S.C. § 2253. Specifically, Section 203 limits the duration, nature, and extent of the safeguard measure. 19 U.S.C. § 2253(e). Relevant here, Section 203 requires that, where the safeguard measure taken is to impose or increase duties on an article that “has an effective period of more than 1 year[, the duties] shall be phased down at regular intervals during the period in which the action is in effect.” *Id.* § 2253(e)(5). Furthermore, Section 203 states that the President may implement regulations to “provide for the efficient and fair administration of all actions taken for the purpose of providing import relief under this part.” *Id.* § 2253(g)(1); *see also id.* § 2253(g)(3) (“Regulations prescribed under this subsection shall, to the extent practicable and *consistent with efficient and fair administration*, insure against inequitable sharing of imports by a relatively small number of larger importers.” (emphasis added)).

Importantly, Section 203 requires that the President, in implementing a safeguard measure, must set a bar for duties imposed, gradually phase down those duties from their initial peak, and, in accordance with those principles, efficiently and fairly implement the safeguard measure.<sup>8</sup> This is the relevant authority given to the President by Congress and as such it confines the scope of the authority that the President could have delegated to USTR in *Proclamation 9693* issued

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<sup>8</sup> Although not essential to the court’s analysis where, as here, the text itself is clear, the legislative history further reflects Congress’s intent to provide for the gradual reduction of tariffs. Congress has acknowledged that the safeguard statute contains “criteria regarding . . . degressivity (progressive liberalization of safeguard restrictions),” and has explicitly incorporated the statute’s focus on degressivity into international agreements on safeguard measures. *See* H.R. Rep. No. 103–316, 286, *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4262. The statute’s goal of gradually reducing safeguards is thus well-established.

pursuant to Section 203. The court notes that *Proclamation 9693* is not challenged here or by any other party to date. Thus, to the extent that the court examines the President's interpretation of Section 203 as expressed in *Proclamation 9693*, it is only to discern the scope of the authority delegated to USTR, as the President can only delegate authority that he already possessed under the safeguard statute. For the reasons outlined below, the court concludes that USTR exceeded this statutory authority in withdrawing the *Exclusion*.

The Government contends that agencies have inherent authority to reconsider their decisions, and therefore USTR had inherent authority to withdraw its decision to exclude bifacial solar panels from the safeguard measure. Defs.' Br. at 55–56. The court agrees with the Government's contention that caselaw supports an agency's inherent authority to reconsider its decisions. See, e.g., *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1361–62 & n.7 (Fed. Cir. 2008) (“TKS”). However, as the Federal Circuit in the TKS decision explained:

The power to reconsider is inherent in the power to decide. For this reason, the courts have uniformly concluded that administrative agencies possess inherent authority to reconsider their decisions, subject to certain limitations, regardless of whether they possess explicit statutory authority to do so. . . . An agency's inherent authority to reconsider its decisions is not without limitation, however. An agency cannot, for example, exercise its inherent authority in a manner that is contrary to a statute. Thus, an agency obviously lacks power to reconsider where a statute forbids the exercise of such power. Similarly, in situations where a statute does expressly provide for reconsideration of decisions, the agency is obligated to follow the procedures for reconsideration set forth in the statute. The agency must also give notice to the parties of its intent to reconsider, and such reconsideration must occur within a reasonable time. Finally, an agency may not reconsider in a manner that would be arbitrary, capricious, or an abuse of discretion. These limitations on the exercise of inherent power are uncontroversial . . . .

*Id.* at 1360–61 (first citing *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980); then citing *Macktal v. Chao*, 286 F.3d 822, 825 (5th Cir. 2002); then citing *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972); then citing *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 329 (1961); and then citing 5 U.S.C. § 706(2)(a)).

Because the court concludes that Section 203 only allows the President to set safeguard duties at a high mark that then phases down,

the court also concludes that the statute does not permit USTR to withdraw the grant of an exclusion where that withdrawal would result in the imposition of higher duties on the affected goods. A withdrawal of an exclusion is not a phasing down of the imposition of duties as the statute directs. 19 U.S.C. § 2253(e)(5). The Government, by contrast, claims that “[w]ithdrawal of an exclusion is not an increase in the rate of duty for products subject to the safeguard measure,” but rather is “merely a reversion to the rate of duty mandated by the President in *Proclamation 9693*.” Defs.’ Br. at 54. However, a reversion to a higher rate of duty is still an increase in the rate of duty for the sub-set of bifacial products covered by the *Exclusion* even if it does not increase duties for the entire range of products covered by the safeguard measure. In direct opposition to the mandate of the statute that duties be phased down, a reversion to a higher duty undoes the drastic phasing down of safeguard duties (to zero) accomplished by granting the exclusion. 19 U.S.C. § 2253(e)(5). Thus, the statute does not allow such yo-yoing of duties within a scheme that is tightly limited by Congress in terms of the substance and duration of safeguard actions that can be taken by the President.

Furthermore, Section 203 requires that regulations that implement safeguard measures, such as the *Exclusion Procedures* and resulting *Exclusion*, be “efficient[ly] and fair[ly] administ[ered]”. 19 U.S.C. § 2253(g)(1). Against the backdrop of a statute that as a whole contemplates a phasing down of safeguard relief and only lasts four year (eight years if extended), importers had no notice that an exclusion once granted would — or even could — be subject to being withdrawn. Pls.’ Br. at 71–72. Plaintiffs note that this absence of notice stands in direct contrast to other exclusions granted by USTR from duties imposed pursuant to Section 301 that were subject to renewal, 19 U.S.C. §§ 2411–2420, for unreasonable or discriminatory trade practices, and temporary exclusions granted by the Department of Commerce from national security duties imposed pursuant to Section 232, 19 U.S.C. § 1862. *Id.*; Pls.’ Suppl. Reply at 4. Notice is a fundamental fairness requirement. Furthermore, notice is a limit identified by the Federal Circuit on an agency’s ability to reconsider its decision. *TKS*, 529 F.3d at 1361. Therefore, the *Second Withdrawal* runs afoul of the fair implementation requirement of the statute and inherent to an agency’s ability to reconsider any decision.<sup>9</sup>

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<sup>9</sup> The parties spend a considerable part of their briefing arguing whether, in *Proclamation 9693*, the President intended to delegate to USTR the authority to modify exclusion decisions. The court need not reach those arguments as it concludes the statute does not provide the President the authority to withdraw exclusions from safeguard measures.

In short, the court concludes that in deciding to withdraw the *Exclusion* for bifacial solar panels, USTR exceeded both the authority granted to the President in Section 203 and the authority delegated by the President to USTR in *Proclamation 9693*. Thus, the *Second Withdrawal* does not comply with the safeguard statute and must be vacated.<sup>10</sup> Whether Section 203 should be revised is a matter for the Congress and not for the court.

## ***II. The Second Withdrawal was Arbitrary and Capricious in Violation of APA Requirements.***

Without regard to the court's determination in Section I, above, there exists a second, independent basis for vacating the *Second Withdrawal* — USTR's failure to comply with the requirements set forth in the APA. In modifying the PI to enjoin the *Second Withdrawal* in *Invenergy IV*, the court preliminary concluded that Plaintiffs had "show[n] that the *Second Withdrawal* was likely arbitrary and capricious." *Invenergy IV*, 476 F. Supp. 3d at 1343. In moving for judgment on the agency record, Plaintiffs similarly challenge the *Second Withdrawal's* compliance with several APA requirements. The court now addresses the merits of these claims after, on multiple occasions, addressing certain of these claims preliminarily. At the start, the court adopts its previous conclusion that its review of the agency's decision for compliance with the substantive requirements of the APA is limited to the *Second Withdrawal* as published in the Federal Register, which included no reference to the analysis provided in USTR's internal memoranda. *Id.* at 1343–48.<sup>11</sup> The court adopts and expands (1) its preliminary conclusion that USTR's decision inadequately responded to comments by interested parties; and (2) its preliminary conclusion that USTR's decision inadequately explained its policy change. *See Invenergy IV*, 476 F. Supp. 3d at 1349–52.

<sup>10</sup> The court has considered and does not find persuasive Plaintiffs' other statutory arguments regarding USTR's authority. *See* Pls.' Br. at 65–69.

<sup>11</sup> As detailed above, *supra*, and addressed in *Invenergy IV*, two internal memoranda came to light in the course of this litigation, specifically in response to written questions issued to all parties by the court. USTR Memoranda. While the Government has consistently relied upon the USTR Memoranda as USTR's explanation of its decision, *see, e.g.*, Defs.' Br., the court previously held that, because neither memorandum was published, those documents could not be considered part of USTR's final rulemaking decision. The court's conclusion rested, in part, upon the Supreme Court's decision in *Dep't of Homeland Sec'y v. Regents of the Univ. of Cal.*, in which the Court reiterated the APA's requirements that "[a]n agency must defend its actions based on the reasons it gave when it acted," including a contemporaneous and public reasoned explanation. 140 S. Ct. 1891, 1909 (2020) ("*Regents*"); *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). The court also rejected the Government's argument that the error was not prejudicial to interested parties. *Invenergy IV*, 476 F. Supp. 3d at 1346–47. Because nothing has changed with respect to the publication of the USTR Memoranda since the court made this preliminary conclusion and because the Government makes no new arguments that would change the court's opinion, it now adopts that conclusion as part of its analysis of Plaintiffs' dispositive motion.

### ***A. USTR’s Statement of Basis and Purpose, Including Response to Significant Comments***

As part of its hard look review of agency action under the APA, the court must determine whether an agency adequately “incorporate[d] in the rules adopted a concise general statement of their basis and purpose,” 5 U.S.C. § 553(c). See *Invenergy I*, 422 F. Supp. 3d at 1286 (“Because the *Exclusion* process constituted rulemaking, so too must the *Withdrawal*”); *Invenergy IV*, 476 F. Supp. 3d at 1344 & n.5 (citing Catherine Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 *Duke L.J.* 2125, 2181 (2009)). This statement allows a reviewing court “to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them the way it did.” *State of S.C. ex rel Tindal v. Block*, 717 F.2d 874, 886 (4th Cir. 1983) (quoting *Gen. Tel. Co. v. United States*, 449 F.3d 846, 862 (5th Cir. 1971)). Further, “[t]he purpose of requiring a statement of the basis and purpose is to enable courts, which have the duty to exercise review, to be aware of the legal and factual framework underlying the agency’s actions.” *Am. Standard, Inc. v. United States*, 602 F.2d 256, 269 (Ct. Cl. 1979) (citing *Sec. Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (“*Chenery*”); *Nat’l Welfare Rights Org. v. Mathews*, supra, 533 F.2d 637, 649 (1976)). “Inextricably intertwined with the basis and purpose requirement of 5 U.S.C. § 553(c) is the agency’s need to respond, in a reasoned manner, to any comments received by the agency that raise significant issues with respect to a proposed rule” *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 692 (Fed. Cir. 2000) (overruled on other grounds by *Nat’l Org. of Veterans Advocs., Inc. v. Sec’y of Veterans Affs.*, 981 F.3d 1360 (2020)) (citation omitted). However, “the agency need not respond to each comment, and the detail of the agency’s response depends upon the subject matter of the regulation and the comments received.” *Id.* “Significant comments are those ‘which, if true, raise points relevant to the agency’s decision and which, if adopted, would require a change in an agency’s proposed rule.’” *City of Portland v. E.P.A.* 507 F.3d 706, 715 (D.C. Cir 2017) (quoting *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35 n.58 (1977)).

Plaintiffs identify two problems with the *Second Withdrawal* in connection with this requirement: first, that USTR provided no basis for its conclusions, Pls.’ Br. at 19–23; and second, that USTR did not respond to significant comments from interested parties, Pls.’ Br. at 33–46. The Government responds that USTR adequately explained its decision to withdraw the *Exclusion*, Defs.’ Br. at 24–8, 29–30; and that, while USTR did not need to address every comment received, it addressed significant comments raised in both the *Second Withdrawal* and in the USTR Memoranda, Defs.’ Br. at 28–50.

First, the court adopts its previous conclusion that USTR provided no more than conclusory statements in the *Second Withdrawal* that did not meet the basis and purpose requirement of the APA. *Invenergy IV*, 476 F. Supp. 3d at 1350. As the court earlier explained, the facts relied upon by USTR in reaching the conclusions of the *Second Withdrawal* are indiscernible in light of record evidence that appears to contradict those conclusions with respect to the substitutability of bifacial and monofacial solar panels. *Id.*; see also *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993) (rejecting an explanation of an agency decision that lacked an explanation of data relied upon). Furthermore, the court notes that Plaintiffs' repeatedly expressed concerns about USTR's statutory authority to withdraw an exclusion both in this litigation and before USTR. See, e.g., SEIA's Compl.; *Invenergy's Mot. for PI*; Pls.' Resp. to Mot. to Show Cause. Nevertheless, USTR's perceived statutory basis for the *Second Withdrawal* is not apparent to the court. *Invenergy IV*, 476 F. Supp. 3d at 1350. While USTR did cite its authority under *Proclamation 9693*, USTR did not explain how it concluded that *Proclamation 9693* — which, as discussed above, only plainly indicates an authority to grant exclusions — also allowed USTR to withdraw exclusions once granted. See 85 Fed. Reg. at 21,498.<sup>12</sup> Therefore, the court concludes that USTR's conclusory statements did not constitute an adequate statement of basis and purpose so as to allow the court to review the “the legal and factual framework underlying the agency's action[],” *Am. Standard*, 602 F.2d at 269; see also *In re Sang Su Lee*, 277 F.3d 1338, 1344 (Fed. Cir. 2002) (“Conclusory statements such as those here provided do not fulfill the agency's obligation” to reach reasoned decisions).

Similarly, the court agrees with Plaintiffs that USTR did not address significant comments as required by the APA's basis and purpose requirement.<sup>13</sup> Previously, the court noted that the *Second Withdrawal* did not include USTR's response to Plaintiffs' comments on significant issues or to detracting evidence on the following: (1)

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<sup>12</sup> Plaintiffs also claim that USTR failed to include the required “reference to the legal authority” for its rulemaking pursuant to 5 U.S.C. § 553(b)(2). However, the APA imposes that requirement in connection with the adequacy of the notice of a proposed rulemaking. As Plaintiffs concede, their harm stems from the *Second Withdrawal* and not from any deficiency with the *January 2020 Notice*. Pls.' OAQ Resps. at 8–10. Because the court addresses this issue in the context of USTR's compliance with other APA requirements and in the context of the legal question of USTR's authority, it declines to further address this challenge.

<sup>13</sup> The court addresses only those comments raised by Plaintiffs before USTR and not those comments raised by individuals and entities not before the court in this litigation. See Pls.' Br. at 40–46; see, e.g., *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

USTR's authority to withdraw a previously granted exclusion; and (2) the substitutability of bifacial solar panels and monofacial solar panels. *Invenergy IV*, 476 F. Supp. 3d at 1350–52. The court incorporates those conclusions here.

Furthermore, Plaintiffs contend that USTR erred by not addressing significant comments on the economic and other costs of withdrawing the *Exclusion*, Pls.' Br. at 40. Plaintiffs cite several comments submitted to USTR on the issue of costs associated with withdrawing the *Exclusion*, for example comments concerning job losses, P.R. 67, 1632, 715–16, planned solar projects and the communities where those projects are located, P.R. 64–65, and overall solar industry impacts, P.R. 715–16. Plaintiffs also contend that USTR “failed to respond to comments regarding the lack of domestic production of bifacial solar modules, which commenters explained necessitates continued access to reasonably-priced bifacial panels manufactured abroad.” Pls.' Br. at 46–47. Plaintiffs explain that their comments showed in detail the domestic industry's lack of production of or plan to produce utility grade bifacial solar panels. Pls.' Br. at 47 (citing P.R. 54–56, 696, 703–08, 1611–15, 1918–24, 2477–79). Thus, they contend that, contrary to USTR's conclusions, there would be no harm to the domestic industry in allowing the continued exclusion of utility grade bifacial solar panels from safeguard tariffs. *See* Pls.' Br at 47–48.

In the *Second Withdrawal*, USTR stated that “[a]s bifacial solar panel production currently is low in the United States, and the vast majority of bifacial solar panel capacity is foreign, allowing import of bifacial solar panels free of safeguard tariffs disincentivizes U.S. producers” from increasing bifacial production. 85 Fed. Reg. at 21,498. However, USTR did not address the impact that withdrawing the *Exclusion* would have on the solar energy industry given low domestic production and the resulting need for bifacial solar imports. Nor did USTR address the economic and social impacts that the added tariff burden would have. This issue was plainly significant in that the statute itself identifies it as a central consideration to the imposition of safeguard measures. *See* 19 U.S.C. § 2253 (“the President shall take into account . . . the short- and long-term economic and social costs . . . relative to their short- and long-term economic and social benefits and other considerations relative to the position of the domestic industry in the United States economy”); *Catholic Legal Immigr. Network, Inc. v. Exec. Office for Immigr. Rev.*, 513 F. Supp. 3d 154, 173 (holding an agency decision to be arbitrary and capricious where the agency did not address the decision's impact on legal service providers of services relevant to the applicable statute). USTR itself recognized the significance of this issue by requesting comment

on that issue in its January 2020 *Notice*. 85 Fed. Reg. at 4,756. Thus, it is clear that USTR failed to respond to comments on this significant issue.

In short, USTR did not provide a reasoned explanation or basis and purpose for its *Second Withdrawal* so that the court could review its conclusions. It also failed to address significant comments raised by Plaintiffs that if adopted may have changed USTR's decision to withdraw the *Exclusion*.

### ***B. USTR's Consideration and Explanation of Its Policy Change***

Separate from the court's conclusion that USTR did not adequately respond to significant comments, the second part of the court's hard-look review is the APA's prohibition on "agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706. The court previously preliminarily found fault with USTR's lack of an adequate explanation of "its change in position as set forth in long-established caselaw on what is required of an agency when it changes its position." *Invenergy IV*, 476 F. Supp. 3d at 1351 (citing *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 517 (2009)). The court noted that "USTR fail[ed] to explain what information it received or what facts changed since the issuance of the *June 2019 Exclusion* that led it to believe that withdrawal was the more appropriate action, thus its decision was not adequately reasoned in this respect." *Id.* (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016)).

As Plaintiffs summarize, the *Second Withdrawal* provided no justification for deviation from the facts underlying the *Exclusion*: "1) that the economic and social benefits outweigh its costs . . . ; 2) that bifacial panels are physically distinct, differentiated and functionally different, with a higher energy yield that enables special use cases for project feasibility; and 3) that the domestic industry does not have the capacity to supply U.S. demand for bifacial panels, and is not likely to any time in the future." Pls.' Reply at 13 (citations, alterations, and quotations omitted). Further, the court notes Plaintiffs' contentions that USTR granted the *Exclusion* based on a record that showed the Department of Energy recommended a bifacial exclusion because of the limited availability of domestically produced bifacial panels that would have a "medium competitive impact." Pls.' Br. at 30 (quoting Complete P.R. 541–43). This argument, made based on Plaintiffs' access to the full administrative record, *see Invenergy IV*, 476 F. Supp. 3d at 1354–56, further supports the conclusion that USTR did not adequately explain its complete about-face on the propriety of the exclusion of bifacial solar panels. Thus, the court determines that

USTR erred by not explaining the basis for its policy change based on its preliminary findings and Plaintiffs' additional contentions.

Plaintiffs also argue that the *Second Withdrawal* arbitrarily and capriciously omitted USTR's consideration of alternatives to its policy reversal. Pls.' Br. at 48–49. Plaintiffs explain that, in their comments in response to USTR's *January 2020 Notice*, they suggested that USTR could narrow the *Exclusion* to utility grade bifacial modules, P.R. 52, 694, 1609; impose a requirement in line with international standards for verifying that imports under the *Exclusion* were truly bifacial modules, P.R. 697, 1609; or impose a tariff rate quota (“TRQ”) on imports of bifacial panels imported under the *Exclusion*, P.R. 698. Pls.' Br. at 50. Plaintiffs contend that USTR “failed to even mention [the first two] proposed alternatives, let alone consider them.” Pls.' Br. at 51. As to the TRQ, Plaintiffs contend that USTR's lone reference to this proposal was conclusory and illogical. Pls.' Br. at 52. Finally, Plaintiffs argue that USTR also neglected to consider reliance interests engendered by the issuance of the *Exclusion*. Pls.' Br. at 16.

The Government acknowledges that “agencies should consider alternatives raised by commenters pursuant to notice and comment procedures.” Defs.' OAQ Resps. at 7. However, the Government notes that the *Second Withdrawal* addressed the TRQ proposed by Plaintiffs and rejected it. *Id.*; Defs.' Br. at 42–43. The Government does not address Plaintiffs' reliance argument.

The court concludes that USTR did not adequately address important and “conspicuous issues” to its decision, specifically alternatives “within the ambit of the existing policy” and reliance on the previous policy. *Regents*, 140 S. Ct. at 1913, 1916 (citations omitted). USTR's failure to even mention two of the proposed alternatives dictates the conclusion that the *Second Withdrawal* was arbitrary and capricious. *Id.* (“The rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits . . . That omission alone renders Acting Secretary Duke's decision arbitrary and capricious.”). This failure is particularly marked where USTR itself requested comment on several alternatives to a complete withdrawal of the *Exclusion*, including narrowing the definition of bifacial solar panels excluded or otherwise altering the *Exclusion*. *January 2020 Notice*, 85 Fed. Reg. at 4,756. Thus, the *Second Withdrawal* was an arbitrary and capricious agency decision.<sup>14</sup>

<sup>14</sup> The USTR Memoranda did not address significant evidence submitted by Plaintiffs regarding the need for at least a utility grade bifacial panel exclusion, Plaintiffs' proposed alternatives to outright rescission of the *Exclusion*, and USTR's authority in light of statutory limitations on safeguard actions: all significant issues upon which USTR specifically sought comment. See USTR Memoranda; Pls.' Br. n. 14 (citing P.R. 712, 707, 959–60, 1925–27, 2480, 2482–85) (noting evidence submitted to USTR not discussed in the Gerrish

Finally, contrary to the Government's contentions, Defs.' Br. at 26, regardless of whether any party raised USTR's need to comply with basic APA requirements, USTR "retain[ed] a duty to examine key assumptions . . . and . . . justify [those] assumption[s] even if no one objects to it during the comment period." *Nat. Res. Def. Council v. E.P.A.*, 755 F.3d 1010, 1023 (D.C. Cir. 2014). Furthermore, the court declines to require Plaintiffs to have exhausted arguments that USTR comply with basic APA requirements when the applicability of those requirements had already been confirmed by this court — the same court with continuing jurisdiction over this dispute. See *Invenergy I*, 422 F. Supp. 3d at 1281–86; *Invenergy II*, 427 F. Supp. 3d at 1407. To do so would require every party in every instance to remind agencies of basic procedural requirements in every rulemaking, even where there is no indication that an agency intends to skirt those requirements. Such a result should be avoided.

In sum, the court concludes that the Second Withdrawal did not comply with basic APA requirements to provide an adequate explanation to facilitate judicial review and to reach a reasoned decision. Because of these errors, the court must vacate the Second Withdrawal.<sup>15</sup>

### ***III. Vacatur of the Second Withdrawal is the Proper Remedy.***

Finally, the court addresses the parties' dispute about the proper remedy for its conclusion that the *Second Withdrawal* was not in accordance with the statute and violated the APA. Plaintiffs request that the court vacate the *Second Withdrawal*. Pls.' Br. at 76. While the Government concedes that vacatur is the appropriate remedy for a decision that the *Second Withdrawal* is not in accordance with the statute, it also argues that, should the court only find that USTR failed to adequately explain its decision, the court should remand the decision to USTR for further explanation. Defs.' Br. at 50–51 (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

Memo); Pls.' Reply at 7; accord Defs.' Br. at 42–43. Similarly, the USTR Memoranda also did not engage with Plaintiffs' comments regarding the economic and social impacts of withdrawing the *Exclusion*, rather it merely concluded that the impact on "job losses" was "unclear." Gerrish Memo at 7. This conclusion was also based on consideration of the "perspective of utilities planning solar generating facilities" rather than those that had already planned facilities on the basis of the *Exclusion*, including solar energy producers such as Invenergy. See Gerrish Memo at 7–8; Pls.' Br. at 8. As Plaintiffs explain, planning utility grade solar energy facilities takes years of planning to obtain necessary equipment, permits, land space, financing, and coordination with other energy providers, Invenergy's Mem. In Supp. of Pls.' Mot. for PI at 38, Nov. 1, 2019, ECF No. 57. *Regents*, 140 S. Ct. 1891, 1913, 1916. Thus, publication of the USTR Memoranda would not rectify the arbitrary and capricious nature of the *Second Withdrawal*.

<sup>15</sup> Having concluded that the *Second Withdrawal* suffers from a statutory authority defect and these APA defects, the court need not reach Plaintiffs remaining claims that the *Second Withdrawal* was not supported by the record evidence. See Pls.' Br. at 53–60.

The court agrees with Plaintiffs that vacatur is the proper remedy. First, the court's conclusion that USTR lacks statutory or delegated authority to withdraw an exclusion requires vacatur, as all parties agree. See *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 896 F.3d 520, 536 (D.C. Cir. 2018) (holding that where an agency does not comply with the statute, vacatur is the proper remedy); Pls.' Br. at 75–76; Defs.' Br. at 50. Furthermore, the court's conclusion that the decision was arbitrary and capricious provides an independent reason to vacate the *Second Withdrawal*. See 5 U.S.C. § 706(2) (requiring that courts shall “hold unlawful and set aside” agency action that is found to be “without observance of procedure required by law”). While the court agrees with the Government that remand is the usual remedy for inadequately explained decisions, *Fla. Power & Light*, 470 U.S. at 744; *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *Pollinator Stewardship Council v. U.S.E.P.A.*, 806 F.3d 520, 532 (9th Cir. 2015), the court nonetheless concludes that remand would be ineffective to remedy the arbitrary and capricious nature of the *Second Withdrawal*. In *Regents*, for example, the Supreme Court found that memoranda which were issued subsequent to an agency's decision, and which relied upon bases not included in the agency's original decision, could not provide adequate grounds for upholding that decision. 140 S. Ct. at 1909–10. Rather, “[a]n agency must defend its actions based on the reasons it gave when it acted.” *Id.* Thus, on remand, USTR would be limited to relying upon the reasoning stated in either the *Second Withdrawal* or the USTR Memoranda, both of which omitted any mention of certain significant issues. Moreover, because the President intervened through *Proclamation 10101*, the court concludes that remand would not be fruitful or appropriate.

The court thus decides that vacatur without remand is the proper remedy and will enter judgment accordingly.

### CONCLUSION

In sum, the court concludes that the *Second Withdrawal* of the exclusion from safeguard duties on imported bifacial solar modules must be vacated for lack of statutory authority and as arbitrary and capricious. The court reiterates that from the start, this case has not been about the choice between one policy and another regarding imports of solar panels. Nor has it been about whether the statutory scheme should be modified. Those are not matters that fall within the purview of the court, and the court takes no view on the merits of the vigorously contested trade policies advocated by the parties or on the merits of legislative revision. Rather, what are before the court are

issues of statutory authority and time-honored processes that must be observed for the administration of justice. Ultimately, for the reasons stated, the actions challenged here cannot be upheld.

Accordingly, the *Second Withdrawal* is vacated and Plaintiffs' motion for judgment on the administrative record is granted. Defendants are further enjoined from enforcing the *Second Withdrawal*, whether through modification to the Harmonized Tariff Schedule of the United States or enforcement of duties.

**SO ORDERED.**

Dated: November 17, 2021  
New York, New York

*/s/ Gary S. Katzmann*

GARY S. KATZMANN, JUDGE

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