

**United States Court of Appeals
for the Federal Circuit**

ARP MATERIALS, INC.,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2021-2176

Appeal from the United States Court of International
Trade in No. 1:20-cv-00144-MMB, Judge M. Miller Baker.

THE HARRISON STEEL CASTINGS COMPANY,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2021-2177

Appeal from the United States Court of International
Trade in No. 1:20-cv-00147-MMB, Judge M. Miller Baker.

Decided: September 6, 2022

CHRISTOPHER M. KANE, Simon Gluck & Kane LLP, New York, NY, argued for plaintiffs-appellants. Also represented by MARIANA DEL RIO KOSTENWEIN, DANIEL J. GLUCK.

SOSUN BAE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, LOREN MISHA PREHEIM; VALERIE SORENSEN-CLARK, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, New York, NY.

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

HUGHES, *Circuit Judge*.

Importers ARP Materials, Inc. and The Harrison Steel Castings Company seek refunds of estimated duties they deposited with the United States Customs and Border Protection for tariffs that the United States Trade Representative retroactively rescinded. The United States Court of International Trade dismissed the importers' amended complaints for lack of jurisdiction. ARP and Harrison appeal. The jurisdictional provision on which the importers rely, 28 U.S.C. § 1581(i), may not be invoked when jurisdiction under another subsection of § 1581 could have been available and would have provided an adequate remedy if timely invoked. We affirm the court's dismissals because jurisdiction would have been available under § 1581(a) had the importers timely protested Customs' classification decisions and because failure to invoke an available remedy

within the timeframe prescribed does not render the remedy manifestly inadequate.

I

A

Section 301 of the Trade Act of 1974 authorizes the Office of the United States Trade Representative (USTR) to investigate and enforce domestic rights under trade agreements and to respond to certain foreign trade practices. 19 U.S.C. § 2411. Under this authority, USTR began investigating certain Chinese trade practices in August 2017. It found that some of China’s trade practices “related to intellectual property, innovation, and technology were unreasonable or discriminatory, and burden[ed] or restrict[ed] U.S. commerce.” U.S. Gov’t Accountability Off., GAO-21-506, Report to Congressional Requesters: U.S.–China Trade 3 (2021). “To help obtain the elimination of” those trade practices, USTR, “at the direction of the President, placed additional tariffs on certain products from China starting in July 2018.” *Id.* at 1. USTR issued four lists of product categories subject to the new tariffs. *Id.* at 4. Relevant to this appeal, USTR imposed a 25% tariff on List 2 product categories in August 2018 and a 10% tariff on List 3 product categories in September 2018. *Id.*

“[T]o mitigate the potential harm of these tariffs on U.S. companies and workers,” USTR established, “for the first and only time,” an opportunity for domestic stakeholders “to request to exclude particular products from the additional tariffs.” *Id.* at 1, 6; *see also* 83 Fed. Reg. 40,823, 40,824 (Aug. 16, 2018) (for List 2); 84 Fed. Reg. 20,459, 20,460 (May 9, 2019) (for List 3). USTR informed importers that any exclusion granted would “apply to the particular product covered by the exclusion” rather than the “particular producer[] or exporter[]” who requested the exclusion. *ARP Materials, Inc. v. United States*, 520 F. Supp. 3d 1341, 1349 (Ct. Int’l Trade 2021) (*Decision*). These exclusions were thus “product-specific,” meaning that “the grant of an

exclusion in response to one importer's application could apply to like products imported by other entities." *Id.*; see also 84 Fed. Reg. 37,381, 37,381 (July 31, 2019) ("[T]he exclusions are available for any product that meets the description in the Annex, regardless of whether the importer filed an exclusion request."). These exclusions were applied retroactively to the effective date of each tariff—August 23, 2018 for List 2¹ and September 24, 2018 for List 3.² See 84 Fed. Reg. at 37,381; 84 Fed. Reg. 38,717, 38,717 (Aug. 7, 2019).

USTR declared that Customs "w[ould] issue instructions on entry guidance and implementation," and it instructed importers to reach out to Customs directly. 84 Fed. Reg. at 37,381. It further provided contact information for importers to do so—for answers to any specific questions importers might have about "[C]ustoms classification or implementation of the product exclusions." *Id.*; see also *Decision* at 1349 ("Just as . . . USTR's initial imposition of [§] 301 duties was not self-executing as to any entry of goods and instead depended upon Customs' classification of the entry as subject to such duties, . . . USTR's retroactive exclusions were not self-executing as to the eligible goods.").

On May 22, 2019, Customs published instructions detailing how importers could obtain refunds of previously paid § 301 tariffs on eligible imports. See U.S. Customs & Border Prot., CSMS No. 19000260, Section 301 Products Excluded from Duties - Liquidation Extension Request (2019). For entries covered by granted product exclusions, Customs instructed importers as follows:

¹ ARP's relevant merchandise was classified under List 2. *Decision* at 1350.

² Harrison's relevant merchandise was classified under List 3. *Decision* at 1352.

Once a product exclusion is granted by USTR, an Importer of Record (IOR) may request an administrative refund by filing a Post Summary Correction (PSC) for unliquidated entries that are covered by the exclusion. If an entry is liquidated prior to the filing of a PSC, a party may file a protest.

Id. For entries covered by pending product exclusion requests, Customs provided these instructions:

As the IOR, *if you* have a pending product exclusion request with USTR, or *are importing a product that is covered by such a pending exclusion request, and you are concerned that a corresponding entry may liquidate before USTR renders a decision on the exclusion request, you can:*

(1) *request an extension of the liquidation deadline, and file a PSC no later than 15 days before the extended date of liquidation; and/or*

(2) file a protest within the 180 day period following liquidation. When filing a protest, the protestant should identify the pending product exclusion decision from USTR as a basis for the protest. Upon receiving USTR's decision on the product exclusion, the protestant should submit the exclusion information to [Customs], as additional information pursuant to 19 C.F.R. [§] 174.28.

If a protest is filed, [Customs] will postpone making a determination on protests that include a claim identifying a pending product exclusion. Once USTR completes the exclusion process, [i.e., rules on the product exclusion request,] [Customs] will process these protests pursuant to USTR's exclusion determination. That is, [Customs] will refrain

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