

# U.S. Customs and Border Protection



## DEPARTMENT OF THE TREASURY

19 CFR PART 12

CBP DEC. 22-15

RIN 1515-AE74

### EXTENSION AND AMENDMENT OF IMPORT RESTRICTIONS ON ARCHAEOLOGICAL AND ETHNOLOGICAL MATERIAL FROM CYPRUS

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

**ACTION:** Final rule.

**SUMMARY:** U.S. Customs and Border Protection (CBP) regulations to reflect an extension and amendment of import restrictions on Pre-Classical and Classical archaeological objects, and Byzantine and Post-Byzantine ecclesiastical and ritual ethnological materials of the Republic of Cyprus. To fulfill the terms of the new agreement, titled “Agreement Between the Government of the United States of America and the Government of the Republic of Cyprus Concerning the Imposition of Import Restrictions on Categories of Archaeological and Ethnological Material of the Republic of Cyprus”, the Designated List, which was last described in CBP-Dec. 12-13, is amended in this document to reflect additional categories of archaeological material from an extended date range from the end of the Classical Period to A.D. 1770 and additional categories of ethnological material including architectural material, documents and manuscripts, traditional clothing, and emblems of the state.

**DATES:** Effective July 14, 2022.

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## SUPPLEMENTARY INFORMATION:

### Background

Pursuant to the Convention on Cultural Property Implementation Act, Public Law 97-446, 19 U.S.C. 2601 *et seq.*, which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)), the United States entered into a bilateral agreement with the Republic of Cyprus (“Cyprus”) on July 16, 2002, concerning the imposition of import restrictions on certain archaeological materials representing the Pre-Classical and Classical periods of Cyprus, ranging in date from approximately the 8th Millennium B.C. to approximately A.D. 330 (“the 2002 Agreement”).

On July 19, 2002, the former U.S. Customs Service (U.S. Customs and Border Protection’s predecessor agency) published Treasury Decision (T.D.) 02-37 in the **Federal Register** (67 FR 47447), which amended § 12.104g(a) of title 19 of the Code of Federal Regulations (19 CFR 12.104g(a)) to reflect the imposition of these restrictions and included a list designating the types of archaeological and ethnological material covered by the restrictions.

Import restrictions listed at 19 CFR 12.104g(a) are effective for no more than five years beginning on the date on which the agreement enters into force with respect to the United States. This period may be extended for additional periods of no more than five years if it is determined that the factors which justified the agreement still pertain and no cause for suspension of the agreement exists. *See* 19 CFR 12.104g(a).

Since the initial final rule was published on July 19, 2002, the import restrictions were subsequently extended and/or amended five (5) times. First, on August 17, 2006, the Republic of Cyprus and the United States amended the 2002 Agreement (covering Pre-Classical and Classical archeological materials) to include Byzantine ecclesiastical and ritual ethnological materials dating from approximately the 4th century A.D. through approximately the 15th century A.D. that had been (and, at that time, were still) protected pursuant to an emergency action which was published in the **Federal Register** (64 FR 17529) on April 12, 1999. The amendment of the 2002 Agreement to cover both the archaeological materials and the ethnological materials was reflected in CBP Dec. 06-22, which was published in the **Federal Register** (71 FR 51724) on August 31, 2006. CBP Dec. 06-22 contained the list of Byzantine ecclesiastical and ritual ethno-

logical materials from Cyprus previously protected pursuant to the emergency action and announced that import restrictions, as of August 31, 2006, were imposed on this cultural property pursuant to the amended Agreement (19 U.S.C. 2603(c)(4)). Thus, as of that date, the import restrictions covering materials described in CBP Dec. 06–22 were set to be effective through July 15, 2007.

Second, on July 13, 2007, following the exchange of diplomatic notes, CBP published a final rule (CBP Dec. 07–52) in the **Federal Register** (72 FR 38470) to extend the import restrictions for an additional five-year period.

Third, on July 13, 2012, following the exchange of diplomatic notes, CBP published a final rule (CBP Dec. 12–13) in the **Federal Register** (77 FR 41266) amending CBP regulations to reflect the extension of import restrictions for an additional five-year period and also to cover Post-Byzantine ecclesiastical and ritual ethnological materials of Cyprus ranging from approximately A.D. 1500 to approximately A.D. 1850.

Fourth, on August 1, 2012, CBP published a correcting amendment to CBP Dec. 12–13 in the **Federal Register** (77 FR 45479), because the amended Designated List and the regulatory text in the July 13, 2012 document contained language which was inadvertently inconsistent with the remainder of the document as to the historical period that the import restrictions cover for ecclesiastical and ritual ethnological materials from Cyprus.

Fifth and lastly, on July 14, 2017, following the exchange of diplomatic notes, CBP published a final rule (CBP Dec. 17–07) in the **Federal Register** (82 FR 32452) to extend the import restrictions for an additional five-year period through July 15, 2022.

On September 13, 2021, the United States Department of State proposed in the **Federal Register** (86 FR 50931) to extend and amend the agreement between the United States and Cyprus concerning the import restrictions on certain categories of archaeological and ethnological material from Cyprus. On April, 1, 2022, after consultation with and recommendations by the Cultural Property Advisory Committee, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, determined that: (1) the cultural heritage of Cyprus continues to be in jeopardy from pillage of certain archeological and ethnological material currently covered and that the import restrictions should be extended for an additional five years; and (2) the cultural heritage of Cyprus is in jeopardy from pillage of additional categories of archaeological material dating from the end of the Classical Period to A.D. 1770 and additional categories of ethnological material including architectural material, documents and manuscripts, traditional clothing, and emblems of the state, and that import restrictions on such types of archaeological and ethnological material should be imposed. Pursuant to the new agreement, the existing import restrictions will re-

main in effect for an additional five years through July 13, 2027, along with the imposition of additional import restrictions on new categories of archaeological and ethnological material, which will also be effective for a five-year period through July 13, 2027.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions and amending the Designated List of cultural property described in CBP Dec. 12–13 with the addition of new categories of archaeological and ethnological material. The restrictions on the importation of archaeological material and ethnological material continue to be in effect through July 13, 2027. Importation of such material from Cyprus continues to be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

The Designated List and additional information may also be found at the following website address: <https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions> by selecting the material for “Cyprus.”

### **Designated List of Archaeological and Ethnological Material of Cyrus**

The Designated List contained in CBP Dec. 12–13, which describes the types of articles to which the import restrictions apply, is amended to reflect the inclusion of additional categories of archaeological and ethnological material in the Designated List. In order to clarify certain provisions of the Designated List contained in CBP Dec. 12–13, the amendment also includes minor revisions to the language and numbering of the Designated List. For the reader’s convenience, CBP is reproducing the Designated List contained in CBP Dec. 12–13 in its entirety, with the changes, below.

The Designated List includes archaeological material from Cyprus ranging in date from approximately the 11th millennium B.C. to A.D. 1770, and ethnological material from Cyprus ranging in date from approximately the 4th century A.D. to A.D. 1878.

### **Categories of Archaeological and Ethnological Material**

#### **I. Archaeological Material**

A. Ceramic

B. Stone

C. Metal

D. Glass, Faience, and Enamel

E. Ivory, Bone, Shell, Wood, and Other Organics

## II. Ethnological Material

A. Ecclesiastical Ritual and Ceremonial Objects

B. Emblems of the State

C. Structural and Decorative Architectural Material

D. Documents and Manuscripts

E. Traditional Clothing and Textiles

## I. Archaeological Material

Archaeological material includes categories of objects ranging in date from approximately the 11th millennium B.C. to A.D. 1770.

### A. *Ceramic*

#### 1. Vessels.

a. Neolithic and Chalcolithic (c. 8800–2300 B.C.)—Bowls and jars, including spouted vessels. Varieties include Combed ware, Black Lustrous ware, Red Lustrous ware, and Red-on-White painted ware. Approximately 10–24 cm in height.

b. Early Bronze Age (c. 2300–1850 B.C.)—Forms are hand-made and include bowls, jugs, juglets, jars, and specialized forms, such as askoi, pyxides, gourd-shape, multiple-body vessels, and vessels with figurines attached. Cut-away spouts, multiple spouts, basket handles, and round bases commonly occur. Incised, punctured, molded, and applied ornament, as well as polishing and slip, are included in the range of decorative techniques. Approximately 13–60 cm in height.

c. Middle Bronze Age (c. 1850–1550 B.C.)—Forms are hand-made and include bowls, jugs, juglets, jars, zoomorphic askoi, bottles, amphorae, and amphoriskoi. Some have multiple spouts and basket or ribbon handles. Decorative techniques include red and brown paint, incised or applied decoration, and polishing. Varieties include Red Polished ware, White Painted ware, Black Slip ware, Red Slip ware, and Red-on-Black ware. Approximately 4–25 cm in height.

d. Late Bronze Age (c. 1550–1050 B.C.)—Forms include bowls, jars, lamps, jugs and juglets, tankards, rhyta, bottles, kraters, alabastra, stemmed cups, cups, stirrup jars, amphorae, and amphoriskoi. A wide variety of spouts, handles, and bases are common. Zoomorphic vessels also occur. Decorative techniques include painted design in red or brown, polishing, and punctured or incised decoration. Varieties include White Slip, Base Ring ware, White Shaved ware, Red Lustrous ware, Bichrome Wheel-made ware, and Proto-White Painted ware.

Some examples of local or imported Mycenaean Late Helladic III have also been found. Approximately 5–50 cm in height.

e. Cypro-Geometric I–III (c. 1050–750 B.C.)—Forms include bowls, lamps, jugs, juglets, jars, cups, skyphoi, amphorae, amphoriskos, and tripods. A variety of spouts, handles and base forms are used. Decorative techniques include paint in dark brown and red, ribbing, polish, and applied projections. Varieties include White Painted I–III wares, Black Slip I–III wares, Bichrome II–III wares, and Black-on-Red ware. Approximately 7–30 cm in height.

f. Cypro-Archaic I–II (c. 750–475 B.C.)—Forms include bowls, lamps, plates, jugs and juglets, cups, kraters, amphoriskoi, oinochoai, and amphorae. Many of the forms are painted with bands, lines, concentric circles, and other geometric and floral patterns. Animal designs occur in the Free Field style. Molded decoration in the form of female figurines may also be applied. Red and dark brown paint is used on Bichrome ware. Black paint on a red polished surface is common on Black-on-Red ware. Other varieties include Bichrome Red, Polychrome Red, and Plain White. Approximately 12–45 cm in height.

g. Cypro-Classical I–II (c. 475–325 B.C.)—Forms include bowls, shallow dishes, lamps, jugs and juglets, oinochoai, and amphorae. The use of painted decoration in red and brown, as well as blue/green and black continues. Some vessels have molded female figurines applied. Decorative designs include floral and geometric patterns. Burnishing also occurs. Varieties include Polychrome Red, Black-on-Red, Polychrome Red, Stroke Burnished, and White Painted wares. Approximately 6–40 cm in height.

h. Hellenistic (c. 325 B.C.–50 B.C.)—Forms include bowls, dishes, cups, unguentaria, lamps, jugs and juglets, pyxides, amphorae, pithoi, and cooking pots. Most of the ceramic vessels of the period are undecorated. Those that are decorated use red, brown, or white paint in simple geometric patterns. Ribbing is also a common decorative technique. Some floral patterns are also used. Varieties include Glazed Painted ware and Glazed ware. Imports include Eastern Sigillata and “Megarian” mould-made relief bowls. Approximately 5–25 cm in height.

i. Roman (c. 50 B.C.–A.D. 330)—Forms include bowls, dishes, cups, lamps, jugs and juglets, unguentaria, amphorae, and cooking pots. Decorative techniques include incision, embossing, molded decoration, grooved decoration, and paint. Varieties include Terra Sigillata and Glazed and Green Glazed wares. Approximately 5–55 cm in height.

j. Byzantine and Medieval Frankish, Lusignan, and Venetian (c. A.D. 330–1570)—Forms include undecorated plain wares, utilitarian, tableware, serving and storage jars, lamps, special shapes such as pilgrim flasks, and can be matte painted or glazed, including incised “sgraffito” and stamped with elaborate polychrome decorations using floral, geometric, human, and animal motifs.

k. Ottoman (c. A.D. 1570–1770)—Early examples include green and turquoise vessels that may be in the vessel shapes mentioned above. In addition, this type includes inkstands, chalices, lamps, rose water flasks, censers, incense cases, kitchenware, and tableware. Sizes and shapes are varied; colors include blue-white, red, blue, yellow, purple, and green and may include floral or other painted or inscribed decorations.

## 2. Sculpture.

### a. Terracotta Figurines (Small Statuettes).

i. Neolithic to Late Bronze Age (c. 8800–1050 B.C.)—Figurines are small, hand-made, and schematic in form. Most represent female figures, often standing and sometimes seated and giving birth or cradling an infant. Features and attributes are marked with incisions or paint. Figurines occur in Red-on-White ware, Red Polished ware, Red-Drab Polished ware, and Base Ring ware. Approximately 10–25 cm in height.

ii. Cypro-Geometric to Cypro-Archaic (c. 1050–475 B.C.)—Figurines show a greater diversity of form than earlier figurines. Female figurines are still common, but forms also include male horse-and-rider figurines; warrior figures; animals such as birds, bulls and pigs; tubular figurines; boat models; and human masks. In the Cypro-Archaic period, terra cotta models illustrate a variety of daily activities, including the process of making pottery and grinding grain. Other examples include musicians and men in chariots. Approximately 7–19 cm in height.

iii. Cypro-Classical to Roman (c. 475 B.C.–A.D. 330)—Figurines mirror the classical tradition of Greece and Roman. Types include draped women, nude youths, and winged figures. Approximately 9–20 cm in height.

b. Large Scale Terracotta Figurines—Dating to the Cypro-Archaic period (c. 750–475 B.C.), full figures about half life-size, are commonly found in sanctuaries. Illustrated examples include the head of a woman decorated with rosettes and a bearded male with spiral-decorated helmet. Approximately 50–150 cm in height.

c. Funerary Statuettes—Dating to the Cypro-Classical period (c. 475–325 B.C.), these illustrate both male and female figures draped, often seated, as expressions of mourning. Approximately 25–50 cm in height.

d. Architectural Elements—Baked clay (terracotta) elements used to decorate buildings, these elements include tiles, acroteria, antefixes, painted and relief plaques, metopes, cornices, roof tiles, pipes, and revetments, as well as wall and floor decorations in plaster. This category also includes wall brackets and wall-mounted lamps.

3. Inscriptions—Writing on clay either fired or unfired from the Late Bronze Age to the Ottoman period. These include inscribed tablets, weights, clay balls, inscribed handles, sling bullets, or parts of ceramic vessels.

4. Seals—Dating from the Neolithic (7500 B.C.) through the Ottoman period, conical seals, scarabs, cylinder seals, and bread stamps are incised with geometric decoration, pictorial scenes, and inscriptions. Approximately 2–12 cm in height.

5. Loom Weights and Spindle Whorls—From the early Bronze Age through the Ottoman period, shapes include conical, pyramidal, disc or rings. These can be stamped, incised, or glazed.

6. Sarcophagi—From the Archaic to the Medieval period. Some have figural scenes painted on them, others have figural scenes carved in relief, and some just have decorative moldings. Approximate date: c. 700 B.C. to A.D. 1500.

7. Pipes—Clay smoking pipes from the Medieval and Ottoman periods, including partial pipes such as stems and bowls.

## *B. Stone*

1. Vessels—Ground stone vessels occur from the Epipaleolithic to the Ottoman period (c. 11,000 B.C.–A.D. 1770). Early vessels are from various stones including diabase, basalt, limestone, alabaster, marble, or other stone. Most are bowl-shaped; some are trough-shaped with spouts and handles. Neolithic vessels often have incised or perforated decoration. Late Bronze Age vessels include amphoriskoi and kraters with handles. Sometimes these have incised decoration. Alabaster was also used for stone vessels in the Late Bronze Age and Hellenistic period. In the latter period, stone vessels are produced in the same shapes as ceramic vessels: amphorae, unguentaria, etc. Approximately 10–30 cm in height.

### 2. Sculpture.

a. Neolithic to Late Bronze Age (c. 8800–1250 B.C.)—Forms include small scale human heads, fiddle-shaped human figures, steatopygous female figures, anthropomorphic cruciform figurines with incised



decoration, and animal figures. Diabase, limestone, and picrolite are commonly used in these periods. Approximately 5–30 cm in height.

b. Cypro-Geometric to Cypro-Classical (c. 1050–325 B.C.)—Small scale to life-size human figures, whole and fragments, in limestone and marble, are similar to the Classical tradition in local styles. Examples include the limestone head of a youth in Neo-Cypriote style, votive female figures in Proto-Cypriot style, a kouros in Archaic Greek style, statues and statuettes representing Classical gods such as Zeus and Aphrodite, as well as portrait heads of the Greek and Roman periods. Approximately 10–200 cm in height.

c. Later Period Statuary (c. 325 B.C.–A.D. 1770)—Both large and small, in marble, limestone, sandstone, and other stone. Subject matter includes human, animal, and mythological figures and groups of figures in the round, in relief, or as inlay, as well as floral, vegetal and abstract elements, including fragments of statues.

3. Architectural Elements—Sculpted stone building elements occur from the 12th century B.C. through the Ottoman period. These include columns and column capitals, relief decoration, chancel panels, window frames, revetments, offering tables, coats of arms, and gargoyles. These include parts from funerary, religious, domestic, or administrative buildings or structures in different kinds of stone (*e.g.*, limestone and marble).

4. Seals—Dating from the Neolithic (7500 B.C.) through the Ottoman period, conical seals, scarabs, cylinder seals, and bread stamps are incised with geometric decoration, pictorial scenes, and inscriptions. Approximately 2–12 cm in height.

5. Amulets, Pendants, and Beads—Dating from the Epipaleolithic up to A.D. 1770 and made from different types of stone (*e.g.*, picrolite). Approximately 4–5 cm in length.

6. Inscriptions—Inscribed stone materials date from the 6th century B.C. through A.D. 1770. Funerary and votive plaques and stelae, mosaic floors, and building plaques were inscribed. This category also includes inscribed tombstones or other funerary or religious monuments, milestones, etc.

7. Funerary Stelae (Uninscribed) and Sarcophagi—From the Archaic to the Ottoman period, marble, limestone, and other stone sculptural monuments have relief decoration of animals or human figures seated or standing. Stone coffins also have relief decoration. Approximately 50–155 cm in height.

8. Floor Mosaics—Floor mosaics date as early as the 4th century B.C. in domestic and public contexts and continue to be produced through the 3rd century A.D. Examples include the mosaics at Nea Paphos, Kourion, and Kouklia.

9. Tools and Weapons—Starting in the Epipaleolithic, this category includes flint, obsidian, and other hard stones. Chipped stone types include blades, small blades, borers, scrapers, sickles, cores, arrow heads, and spindle whorls. Ground stone types include grinders (e.g., mortars, pestles, millstones, whetstones), choppers, axes, hammers, and mace heads. This category also includes tools such as loom weights and spindle whorls.

### *C. Metal*

#### 1. Copper/Bronze.

a. Vessels and Utensils—Dating from the Bronze Age (c. 2300 B.C.) through A.D. 1770, bronze vessel forms include bowls, cups, amphorae, jugs, juglets, pyxides, dippers, lamp stands, dishes, and plates. Approximately 4–30 cm in height.

b. Bronze Stands—Dating from the Late Bronze Age (c. 1550 B.C.) through the end of the Classical period (c. 325 B.C.), are bronze stands with animal and other decoration.

c. Sculpture—Dating from the Late Bronze Age (c. 1550) to the end of the Hellenistic period (c. 50 B.C.), small figural sculpture includes human forms with attached attributes such as spears or goblets, animal figures, animal- and vessel-shaped weights, and Classical representations of gods and mythological figures. This category also includes statuettes and statues of votive or religious nature. Approximately 5–25 cm in height.

d. Jewelry and Personal Objects—Dating from the Early Bronze Age (c. 2300 B.C.) to the end of the Roman period (A.D. 330), forms include toggle pins, straight pins, fibulae, and mirrors.

#### 2. Silver.

a. Vessels—Dating from the Bronze Age (c. 2300 B.C.) through the end of the Roman period (A.D. 330), forms include bowls, dishes, coffee services, and ceremonial objects such as incense burners. These are often decorated with molded or incised geometric motifs or figural scenes.

b. Jewelry and Personal Objects—Starting from the Late Bronze Age (c. 2300 B.C.), forms include fibulae, rings, bracelets, and spoons.

3. Gold Jewelry and Personal Objects—Gold jewelry has been found on Cyprus starting in the Early Bronze Age (c. 2300 B.C.). Items include hair ornaments, bands, wreaths, frontlets, pectorals, earrings, necklaces, rings, pendants, plaques, beads, and bracelets.

#### 4. Coins of Cypriot Types.

Coins of Cypriot types made of gold, silver, and bronze including but not limited to:

a. Issues of the ancient kingdoms of Amathus, Kition, Kourion, Idalion, Lapethos, Marion, Paphos, Soli, and Salamis dating from the end of the 6th century B.C. to 332 B.C.

b. Issues of the Hellenistic period, such as those of Paphos, Salamis, and Kition from 332 B.C. to c. 30 B.C.

c. Provincial and local issues of the Roman period from c. 30 B.C. to A.D. 235. Often these have a bust or head on one side and the image of a temple (the Temple of Aphrodite at Palaipaphos) or statue (statue of Zeus Salaminios) on the other.

d. Byzantine, Medieval Frankish, Lusignan, Venetian, and Ottoman types that circulated primarily in Cyprus, ranging in date from A.D. 235 to 1770. Coins were made in copper, bronze, silver, and gold. Examples are generally round, have writing, and show imagery of animals, buildings, symbols, or royal or imperial figures.

5. Tools—In copper, bronze, iron, silver, gold, and lead. Types include hooks, weights, ingots, axes, scrapers (strigils), trowels, keys; the tools of craftspersons such as carpenters, masons and metal smiths; and medical tools such as needles, spoons, lancets, and forceps.

6. Seals and Tokens—In lead, tin, copper, bronze, silver, and gold. Types include rings, amulets, and seals with shank.

7. Weapons and Armor—In copper, bronze, iron, and lead. Types include both launching weapons (spears and javelins) and weapons for hand-to-hand combat (swords, daggers, etc.). Armor includes body armor, such as helmets, cuirasses, shin guards, and shields, and horse armor often decorated with elaborate engraved, embossed, or perforated designs.

8. Vessels—In bronze, gold, and silver. These may belong to conventional shapes such as bowls, cups, jars, jugs, strainers, cauldrons, and lamps, or may occur in the shape of an animal or part of an animal.

#### *D. Glass, Faience, and Enamel*

1. Vessels—Shapes include small jars, lamps, bowls, animal shaped, goblet, spherical, candle holders, and perfume jars (unguentaria).

2. Beads, Seals, and Spindle Whorls—Globular and relief beads, other jewelry, seals, and spindle whorls.

3. Small Statuary—Includes human and animal figures in the round, scarabs, and other imitations of eastern themes. These range from approximately 3 to 20 cm in height.

### *E. Ivory, Bone, Shell, Wood, and Other Organics*

1. Small Statuary and Figurines— Usually in ivory or wood. Subject matter includes human and animal figures and groups of figures in the round or as part of composite objects. These range from approximately 10 cm to 1 m in height.

2. Personal Ornaments—In bone, ivory, and shell. Types include amulets, combs, pins, spoons, small containers, necklaces, bracelets, buckles, and beads.

3. Seals and Stamps—Small devices usually in ivory with at least one side engraved with a design for stamping or sealing; they can be discoid, cuboid, conoid, or in the shape of animals or fantastic creatures (*e.g.*, a scarab).

4. Tools—Including needles, handles, spatulae, and spindle whorls.

5. Vessels—Often decorated with an incised scene (*e.g.*, geometric, animal, human, etc.), and including boxes and lids.

6. Furniture—Bone and ivory furniture inlays and veneers.

7. Ships and Vehicles—This includes whole ships and vehicles or pieces used in composing a ship, chariot, or other vehicle; typically in wood.

## **II. Ethnological Material**

Ethnological material covered by the agreement includes ecclesiastical ritual and ceremonial objects, emblems of the state, structural and decorative architectural material, documents and manuscripts, and traditional clothing that contribute to the knowledge of the origins, development, and history of the Cypriot people. This includes objects from the 4th century A.D. starting in the Byzantine Period and ending in A.D. 1878 with the British Protectorate.

### *A. Ecclesiastical Ritual and Ceremonial Objects*

#### 1. Metal.

a. Bronze—Ceremonial objects include icons, small figural sculpture, crosses, censers (incense burners), rings, and buckles for ecclesiastical garments. The objects may be decorated with engraved or modeled designs or Greek inscriptions. Crosses, rings and buckles are often set with semi-precious stones.

b. Lead—Lead objects include ampulla (small bottle-shaped forms) used in religious observance.

c. Silver and Gold—Ceremonial vessels and objects used in ritual and as components of church treasure. Ceremonial objects include icons, censers (incense burners), book covers, liturgical crosses, archbishop's crowns, buckles, and chests including reliquaries. These are often decorated with molded or incised geometric motifs or scenes

from the Bible, and encrusted with semi-precious or precious stones. The gems themselves may be engraved with religious figures or inscriptions. Church treasure may include all of the above, as well as rings, earrings, and necklaces (some decorated with ecclesiastical themes) and other implements (e.g., spoons).

2. Wood—Artifacts made of wood are primarily those intended for ritual or ecclesiastical use. These include painted icons, painted wood screens (iconostases), carved doors, crosses, painted wooden beams from churches or monasteries, thrones, chests including reliquaries, and musical instruments. Religious figures (Christ, the Apostles, the Virgin, and others) predominate in the painted and carved figural decoration. Ecclesiastical furniture and architectural elements may also be decorated with geometric or floral designs.

3. Ivory and Bone—Ecclesiastical and ritual objects of ivory and bone boxes, plaques, pendants, candelabra, stamp rings, crosses, and relics. Carved and engraved decoration includes religious figures, scenes from the Bible, and floral and geometric designs.

4. Glass—Ecclesiastical objects such as lamps and ritual vessels.

5. Textiles and Ritual Garments—Ecclesiastical garments and other ritual textiles. Robes, vestments and altar clothes are often of a fine fabric and richly embroidered in silver and gold. Embroidered designs include religious motifs and floral and geometric designs.

6. Stone.

a. Wall Mosaics—Wall mosaics are found in ecclesiastical buildings. These generally portray images of Christ, Archangels, the Apostles, and Saints in scenes of Biblical events. Surrounding panels may contain animal, floral, or geometric designs.

b. Floor Mosaics—Floor mosaics from ecclesiastical contexts. Examples include the mosaics at Nea Paphos, Kourion, Koukklia, Chrysopolitissa Basilica and Campanopetra Basilica. Floor mosaics may have animal, floral, geometric designs, or inscriptions.

7. Funerary Objects—This category includes objects related to funerary rites and burials in all materials. Examples of funerary objects include, but are not limited to, the following objects:

a. Sepulchers—Sepulchers are repositories for remains of the dead, primarily in stone (usually limestone or marble), but also in metal and wood. Types of burial containers include sarcophagi, caskets, coffins, and urns. These may also have associated sculpture in relief or in the round. May be plain or have figural, geometric, or floral motifs either painted or carved in relief. May also contain human or animal remains.

b. Inscriptions, Memorial Stones, Epitaphs, and Tombstones—This category includes inscribed funerary objects, primarily slabs in lime-

stone, marble, and ceramic; engraved in a variety of languages and scripts. These may also have associated sculpture in relief or in the round.

8. Frescoes/Wall Paintings—Wall paintings from religious structures (churches, monasteries, chapels, etc.). Like the mosaics, wall paintings generally portray images of Christ, Archangels, the Apostles, and Saints in scenes of Biblical events. Surrounding paintings may contain animal, floral, or geometric designs.

### *B. Emblems of the State*

This category includes items that provide information on periods of social and political history of the people of Cyprus from the Byzantine Period through the end of the Ottoman Period that may be absent from written records.

1. Clothing—Ceremonial garments, clothing emblematic of imperial, court, or government position, and other accessories thereof such as shoes, headdresses and hats, belts, and jewelry.

#### 2. Weapons and Armor.

a. Weapons—These are often in iron, steel, or other metal. This category includes arrows, daggers, swords, saifs, scimitars, other blades with or without sheaths, spears, and pre-industrial firearms and cannon; may be for use in combat or ceremonial. May be inlaid with gemstones, embellished with silver or gold, or engraved with floral or geometric motifs. Grips or hilts may be made of metal, wood, or semi-precious stones such as agate, or bound with leather.

b. Armor—Armor may consist of small metal scales, originally sewn to a backing of textile or leather. This type also includes helmets, body armor, shields, and horse armor. Other objects may be made of leather, including archer's bags, shields, and masks.

c. Auxiliary Objects and Vehicles—Powder horns and belts; military standards; and boats, chariots, or other means of official or military transportation, and parts thereof.

3. Ceremonial Objects and Containers—Objects of imperial, court, or government office such as scepters, staffs, insignia, relics, and monumental boxes, trays, and containers.

4. Stamps, Seals, and Writing Instruments—Stamps, seals including seal rings, and writing implements for official use by the state.

5. Wall Hangings and Flags—Often in silk or linen, tapestries, wall hangings, and other representations and emblems of the imperial court; flags, banners, flagstaffs, and finials.

6. Musical Instruments—This category includes instruments important for state ceremonies, such as drums of various sizes in leather, metal instruments, such as cymbals and trumpets, and wooden instruments.

### *C. Structural and Decorative Architectural Material*

This category includes architectural elements and decoration from religious and public buildings. These buildings are comparatively rare due to the combination of historical influences on the island of Cyprus, including successive cycles of Arab and Byzantine conquest, occupation during the Medieval Crusades, and a period of Ottoman influence.

1. Structural Material—Usually in stone, plaster, metal, or wood, including blocks; columns, capitals, bases, lintels, jambs, friezes, and pilasters; panels, doors, door frames, and window fittings; altars, prayer niches (mihrab), screens, iconostasis, fountains, ceilings, tent poles, and carved and molded brick.

2. Relief and Inlay Sculpture—Usually in stone or plaster, includes relief and inlay sculpture such as appliques and plaques that may have been part of a building. May be plain, molded, carved, or inscribed. Decorative motifs may be incised or in high relief.

3. Other Decorative Material—In stone, metal, wood, glass, and plaster. Metal elements are primarily in copper, brass, lead, and alloys, and may include doors, door fixtures, lathes, finials, chandeliers, screens, and sheets to protect domes. Glass elements include windows and mosaic tesserae in floors, walls, and ceilings.

### *D. Documents and Manuscripts*

This category includes written records of religious, political, or scientific importance, including, but not limited to, the following:

1. Works on Papyrus, Parchment, Paper, or Leather—Papyrus documents are often rolled and/or fragmentary. Parchment and paper documents may be single leaves or bound as scrolls or books. Works on paper and parchment may have illustrations or illuminated paintings with gold or other colors. There are also examples of religious and/or rare books written on leather pages.

2. Containers and Covers—Boxes for books or scrolls made of wood or other organic materials, and book or manuscript covers made of leather, textile, or metal.

### *E. Traditional Clothing and Textiles*

Traditional Cypriot clothing and textiles were signifiers of identity, social status, and culture, providing information about the multiple

religious and ethnic populations in Cyprus from the Byzantine through Ottoman periods which may be absent from written records as historical documents rarely address ceremonies or social customs of non-elite groups. This category includes, but is not limited to, headdresses, headbands, hats, and pins (*fez, kasketo*); pants, dresses, and other body covers (*karpastiki, pafitki, sayia/saya, sarka, doupletti, foustani, routzieti, vraka, gileko, zimbouni*); aprons, belts and girdles (*zonari*), and socks (*klatses*) and shoes (*frangopodines, scarpes*).

### **Inapplicability of Notice and Delayed Effective Date**

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

### **Regulatory Flexibility Act**

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

### **Executive Order 12866**

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

### **Signing Authority**

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

Chris Magnus, the Commissioner of CBP, having reviewed and approved this document, has delegated the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

### **List of Subjects in 19 CFR Part 12**

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



**Amendment to the CBP Regulations**

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

**PART 12—SPECIAL CLASSES OF MERCHANDISE**

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

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

\* \* \* \* \*

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

\* \* \* \* \*

■ 2. In § 12.104g, amend the table in paragraph (a) by revising the entry for Cyprus to read as follows:

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

(a) \* \* \*

State party	Cultural property	Decision No.
	* * * * *	
Cyprus .....	Archaeological material ranging approximately from the 11th millennium B.C. to A.D. 1770 and ethnological material ranging from approximately the 4th century A.D. to A.D. 1878.	CBP Dec. 22–15.
	* * * * *	
*	* * * * *	

ROBERT F. ALTNEU,  
*Director,*  
*Regulations & Disclosure Law Division,*  
*Regulations & Rulings, Office of Trade,*  
*U.S. Customs and Border Protection.*

**ANNOUNCEMENT OF THE MODIFICATION OF THE  
NATIONAL CUSTOMS AUTOMATION PROGRAM (NCAP)  
TEST CONCERNING THE AUTOMATED COMMERCIAL  
ENVIRONMENT (ACE) PORTAL ACCOUNTS TO  
ESTABLISH THE VESSEL AGENCY PORTAL ACCOUNT  
AND TO DECOMMISSION THE CARTMAN AND  
LIGHTERMAN PORTAL ACCOUNTS**

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

**ACTION:** General notice.

**SUMMARY:** This document announces U.S. Customs and Border Protection's (CBP) modification of the National Customs Automation Program (NCAP) test concerning Automated Commercial Environment (ACE) Portal Accounts to establish the ACE Vessel Agency Portal Account, and to decommission the Cartman and Lighterman Portal Accounts due to a lack of usage by the public. The ACE Vessel Agency Portal Account will include access to Vessel Entrance and Clearance Reports. Account ownership will be a prerequisite for eligibility in the forthcoming Maritime Forms Automation Test pilot, which will allow Vessel Agency Account users to file electronic Vessel Entrance and Clearance Statements through the Vessel Entrance and Clearance System (VECS). This notice describes the eligibility and documentation requirements to apply for a Vessel Agency Portal Account and invites public comment concerning any aspect of these modifications to the ACE Portal Account Test.

**DATES:** The modifications of the ACE Portal Account Test announced in this notice regarding the creation of the Vessel Agency Portal Account will be implemented on July 20, 2022. The decommissioning of the Cartman and Lighterman Portal Accounts will be implemented on August 19, 2022. This test will continue until concluded by way of announcement in the **Federal Register**.

**ADDRESSES:** Comments concerning this notice and any aspect of the modified ACE Portal Account Test may be submitted at any time during the testing period via email to Brian Sale, Cargo and Conveyance Security, Office of Field Operations, at *OFO-MANIFESTBRANCH@cbp.dhs.gov*. The email subject line should be as follows, "Comment on ACE Vessel Agency Portal Account FRN". For technical questions related to the application or requests for an ACE Portal Account, including ACE Vessel Agency Account, contact the ACE Account Service Desk by calling 1-866-530-4172, selecting option 1, then option 2, or by emailing *ACE.Support@cbp.dhs.gov* for assistance.

## SUPPLEMENTARY INFORMATION:

### I. Automated Commercial Environment (ACE)

#### *A. The National Customs Automation Program*

The National Customs Automation Program (NCAP) was established by Subtitle B of Title VI—Customs Modernization in the North American Free Trade Agreement (NAFTA) Implementation Act (Customs Modernization Act) (Pub. L. 103–182, 107 Stat. 2057, 2170, December 8, 1993) (19 U.S.C. 1411). With the establishment of the NCAP, customs modernization has focused on addressing trade compliance and the development of ACE, which is the planned successor to the Automated Commercial System (ACS). ACE is an automated and electronic system for commercial trade processing that is intended to streamline business processes, facilitate growth in trade, ensure cargo security, and foster participation in global commerce, while ensuring compliance with U.S. laws and regulations and reducing costs for U.S. Customs and Border Protection (CBP) and all of its communities of interest. The ability to meet these objectives depends on successfully modernizing CBP's business functions and the information technology that supports those functions. CBP's modernization efforts are accomplished through phased releases of ACE component functionalities designed to replace specific legacy ACS functions and add new capabilities.

The procedures and criteria applicable to participation in the ACE Portal Account Test remain in effect unless otherwise explicitly changed by this notice.

#### *B. ACE Portal Accounts*

On May 1, 2002, the former U.S. Customs Service, now CBP, published a general notice in the **Federal Register** (67 FR 21800) announcing a plan to conduct an NCAP test of the first phase of ACE. The test was described as the first step toward the full electronic processing of commercial importations with a focus on defining and establishing an importer's account structure. That general notice announced that importers and authorized parties could access their customs data via an internet-based Portal Account. The notice also set forth eligibility criteria for companies interested in establishing ACE Portal Accounts.

Subsequent general notices expanded the types of ACE Portal Accounts. On February 4, 2004, CBP published a general notice in the **Federal Register** (69 FR 5360) that established ACE Truck Carrier Accounts. On September 8, 2004, CBP published a general notice in the **Federal Register** (69 FR 54302) inviting customs brokers to participate in the ACE Portal Account Test and informing interested

parties that once they had been notified by CBP that their request to participate in the ACE Portal Account Test had been accepted, they would be asked to sign and submit a “Terms and Conditions” document. CBP subsequently contacted those participants and asked them to sign and submit an ACE Power of Attorney form and an Additional Account/Account Owner Information form.

On October 18, 2007, CBP published a general notice in the **Federal Register** (72 FR 59105) announcing the expansion of the ACE Portal Account Test to include the additional following ACE account types: Carriers (all modes: air, rail, sea); Cartman; Lighterman; Driver/Crew; Facility Operator; Filer; Foreign Trade Zone (FTZ) Operator; Service Provider; and Surety. On October 21, 2015, CBP published a general notice in the **Federal Register** (80 FR 63817) announcing the creation of the Exporter Portal Account. On August 8, 2016, CBP published a general notice in the **Federal Register** (81 FR 52453) announcing the creation of the Protest Filer Account. Since then, CBP has not announced the creation of any new types of ACE accounts.

## II. Authorization for the ACE Portal Account Test

The Customs Modernization Act authorizes the Commissioner of CBP to conduct limited test programs or procedures designed to evaluate planned components of the NCAP. The ACE Portal Account Test, as modified in this notice, is authorized pursuant to section 101.9 of title 19 of the Code of Federal Regulation (19 CFR 101.9(b)), which provides for the testing of NCAP programs or procedures. *See* Treasury Decision (T.D.) 95–21.

## III. Modification of the ACE Portal Account Test

This document announces the modification of the ACE Portal Account Test to establish the Vessel Agency Portal Account type. This new ACE account will provide vessel agents and vessel operators with the ability to submit consolidated, electronic vessel arrival, entrance, and clearance applications via ACE during the future Maritime Forms Automation Test (MFA) pilot,<sup>1</sup> and any future electronic submissions following regulatory amendments. Features of this new

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<sup>1</sup> CBP will automate its paper-based commercial vessel arrival, entrance, and clearance forms and related processing. CBP plans to issue a **Federal Register** notice to announce the creation of the MFA pilot that will allow participants to submit consolidated, electronic vessel arrival, entrance, and clearance applications via ACE to the Vessel Entrance and Clearance System (VECS). The MFA pilot will be open only to those who have requested and established a Vessel Agency Account type within ACE, as described in this notice. More information about the MFA pilot will be made publicly available in a subsequent **Federal Register** notice and on CBP’s website.

portal account type, as well as the eligibility and documentation requirements for applying for an ACE Vessel Agency Portal Account, are described below.

### *A. Vessel Agency Portal Account*

The ACE Vessel Agency Portal Account will provide vessel owners or operators, or their authorized agents, with access to ACE and the ability to submit electronically vessel entrance and clearance information through the Vessel Entrance and Clearance System (VECS) as part of the MFA pilot, as well as special permit data associated with a carrier's International Maritime Organization (IMO) number (or other unique vessel ID number), *i.e.*, Entrance and Clearance Reports.<sup>2</sup> The ACE Vessel Agency Portal Account will only be available to vessel owners or operators, or authorized agents, which are either a U.S.-based entity or have a U.S.-based address (P.O. boxes not allowed) for enforcement purposes.

Vessel owners or operators, or authorized agents, who do not have existing ACE portal accounts will be required to submit an ACE application form and apply for an ACE Vessel Agency Portal Account, as explained in Section B.1 below. Existing ACE Portal Account owners wishing to request an ACE Vessel Agency Portal Account should follow instructions in Section B.2 below. Both new and existing ACE account holders must agree to the "Terms and Conditions for Account Access of the Automated Commercial Environment (ACE) Portal." *See* 72 FR 27632 (May 16, 2007) and 73 FR 38464 (July 7, 2008). New ACE users will be prompted to accept these Terms and Conditions during the application process.

### *B. Establishing a Vessel Agency Account*

#### 1. New ACE Portal Account

Owner Vessel owners or operators, or authorized agents who do not have an existing ACE Portal Account may apply for a Vessel Agency Account according to the instructions online at: <https://www.cbp.gov/trade/automated/getting-started/using-ace-secure-data-portal>. Applicants will be required to complete an application at <https://www.cbp.gov/document/guidance/ace-secure-data-portal-account-application>; provide the "Corporate Information" and "ACE Account Owner" information listed below; certify that the applicant has read and agrees to the Terms and Conditions; and, submit the application

<sup>2</sup> *See, e.g.*, 19 CFR 4.7(b)(4)(ii)(A) and 4.7a(c)(4)(x).

to *ACE.Applications@cbp.dhs.gov* by clicking the Submit By Email button at the bottom of the form. The account validation process will begin once all steps have been completed.

Corporate Information:

- (1) Company Name
- (2) Company Officer Name
- (3) Company Officer Title
- (4) DUNS Number (optional)
- (5) Company Organizational Structure
- (6) End of Fiscal Year (month and day)
- (7) U.S. Mailing Address (P.O. box not allowed)
- (8) Vessel Agency Company Name
- (9) Vessel Agency Identifier (EIN, IR, CBP Assigned Number)

ACE Account Owner:

- (1) Name
- (2) Date of Birth
- (3) Email Address
- (4) Telephone Number
- (5) Fax Number (optional)
- (6) Address (if the Account Owner's Address differs from the Corporate Address provided above)

Once the applicant completes and submits the Vessel Agency Portal Account application, the applicant will receive an email message confirming the submission of the application. This email will also direct the applicant to log on to ACE to complete the account set up process and access the ACE Vessel Agency Portal Account.<sup>3</sup> Applicants who do not receive an email message within 24 hours should contact the ACE Account Service Desk by calling 1-866-530-4172,

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<sup>3</sup> Establishing an ACE Vessel Agency Portal Account does not automatically provide access to the ACE Portal Account features for importers. Applicants wishing to establish an ACE Portal Account should submit an application by clicking on the "Apply for an Account" link located under the ACE Secure Data Portal sidebar on the following website: *http://www.cbp.gov/trade/automated*.

selecting option 1, then option 2, or by emailing *ACE.Support@cbp.dhs.gov* for assistance.

## 2. Existing ACE Portal Account Owners

Parties with existing ACE Portal Accounts may request a Vessel Agency Portal Account through their established ACE Portal Accounts. For these accounts, an account owner may establish access to the Vessel Agency Portal Account functionality according to the instructions on the following website: *<https://www.cbp.gov/trade/automated/getting-started/portal-managing>*.

In order to request Vessel Agency Portal Account access, the account owner will be asked to provide the following information:

Corporate Information:

- (1) Vessel Agency Company Name
- (2) Vessel Agency Identifier (EIN, IR, CBP Assigned Number)
- (3) Other Company Names (optional)
- (4) U.S. Mailing Address (P.O. box not allowed)
- (5) Company Telephone (optional)
- (6) Website Address (optional)

Contact Information:

- (1) Name
- (2) Date of Birth (optional)
- (3) Address (optional)
- (4) Email Address (optional)
- (5) Telephone Number (optional)
- (6) Fax Number (optional)

Once the existing ACE Account Owner completes the process, the Vessel Agency Portal Account will be created and the account owner will be able to access the Vessel Agency Portal Account functionality.

#### **IV. Decommissioning the ACE Cartman and Lighterman Account Types**

As noted above, the Cartman and Lighterman ACE Portal Accounts were announced in a **Federal Register** notice published on October 18, 2007. *See* 72 FR 59105 (Oct. 18, 2007). However, these two accounts were not used by the public. Accordingly, these two accounts will not be included in the migration to the modernized ACE system and will be decommissioned as of August 19, 2022. Beginning on that day, these accounts will no longer be accessible. For further information, please contact *OFO-MANIFESTBRANCH@cbp.dhs.gov*.

#### **V. Test Duration**

Except as stated below, the modification of the ACE Portal Account Test announced in this notice regarding the creation of the Vessel Agency Portal Account is effective on July 20, 2022; the decommissioning of the Cartman and Lighterman Portal Accounts is effective on August 19, 2022. This modified test will continue until it concludes by way of announcement published in the **Federal Register**. After the testing of the modified test concludes, an evaluation will be conducted and the results of that evaluation will be published in the **Federal Register** and the *Customs Bulletin*, as required by section 101.9(b)(2) of the CBP regulations (19 CFR 101.9(b)(2)).

#### **VI. Comments**

All interested parties are invited to comment on any aspect of this modification of the ACE Portal Account Test for the duration of the test. CBP requests comments and feedback on all aspects of this modification, including the design, conduct, and implementation of the modification, in order to determine whether to modify, alter, expand, limit, continue, end, or fully implement this modification.

#### **VII. Paperwork Reduction Act**

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget (OMB). The ACE Vessel Agency Portal Account application has been approved by OMB in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507) and assigned OMB control number 1651-0105. The information collection conducted under 19 CFR part 4, including VECS under OMB control number 1651-0019,



has been submitted to OMB for review and approval in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507).

### **VIII. Confidentiality**

All data submitted and entered into ACE is subject to the Trade Secrets Act (18 U.S.C. 1905) and is considered confidential, except as otherwise provided by law. Electronic Export Information (EEI) is also subject to the confidentiality provisions of 15 CFR 30.60. As stated in previous notices, participation in the ACE Portal Account Test or any of the previous ACE tests is not confidential and upon a written Freedom of Information Act (FOIA) request, a name(s) of an approved participant(s) will be disclosed by CBP in accordance with 5 U.S.C. 552.

### **IX. Misconduct Under the Test**

A test participant may be subject to civil and criminal penalties, administrative sanctions, liquidated damages, or discontinuance from participation in the ACE Portal Account Test, as modified by this notice, for any of the following:

- (1) Failure to follow the terms and conditions of this test;
- (2) Failure to exercise reasonable care in the execution of a participant's obligations;
- (3) Failure to abide by applicable laws and regulations that have not been waived; or
- (4) Failure to deposit duties, taxes or fees in a timely manner.

If the Director of the Entry Summary, Accounts, and Revenue Division (ESAR) finds that there is a basis for discontinuing test participation privileges, the Director of ESAR will send a written notice to the test participant, which proposes the discontinuance with a description of the facts or conduct warranting the action. The test participant can appeal the Director's decision in writing within 10 calendar days of receipt of the written notice. The appeal must be submitted to the Executive Director, Trade Transformation Office (TTO), Office of Trade, by emailing *ESAR@cbp.dhs.gov*.

The Executive Director will issue a decision in writing on the proposed action within 30 working days after receiving a timely filed appeal from the test participant. If no timely appeal is received, the proposed notice becomes the final decision of CBP as of the date that the appeal period expires. A proposed discontinuance of a test participant's privileges will not take effect unless the appeal process under this paragraph has been concluded with a written decision adverse to the test participant.

In the case of willful misconduct or when public health, interest, or safety so requires, the Director of ESAR may immediately discontinue the test participant's privileges upon written notice to the test participant. The notice will contain a description of the facts or conduct warranting the immediate action. The test participant will be offered the opportunity to appeal the Executive Director's decision within ten calendar days of receipt of the written notice providing for immediate discontinuance. The appeal must be submitted to the Executive Director, TTO, Office of Trade, by emailing *ESAR@cbp.dhs.gov*. The immediate discontinuance will remain in effect during the appeal period. The Executive Director will issue a decision in writing on the discontinuance within fifteen working days after receiving a timely filed appeal from the test participant. If no timely appeal is received, the notice becomes the final decision of CBP on the date that the appeal period expires.

Dated: July 14, 2022.

ANNMARIE R. HIGHSMITH,  
*Executive Assistant Commissioner,  
Office of Trade.*

[Published in the Federal Register, July 20, 2022 (85 FR 43278)]

## 19 CFR PART 177

### REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A FLUORESCENCE CONFOCAL MICROSCOPE

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

**ACTION:** Notice of revocation of one ruling letter, and of revocation of treatment relating to the tariff classification of a fluorescence confocal microscope.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of a fluorescence confocal microscope 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. 56, No. 20, on May 25, 2022. 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 October 2, 2022.

**FOR FURTHER INFORMATION CONTACT:** Patricia Fogle, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0061.

#### 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. 56, No. 20, on May 25, 2022, proposing to revoke one ruling letter pertaining to the tariff classification of a fluorescence confocal microscope. 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") N300518, dated October 10, 2018, CBP classified a fluorescence confocal microscope in heading 9012, HTSUS, specifically in subheading 9012.10.00, HTSUS, which provides for "Microscopes other than optical microscopes; diffraction apparatus; parts and accessories thereof: Microscopes other than optical microscopes; diffraction apparatus." CBP has reviewed NY N300518 and has determined the ruling letter to be in error. It is now CBP's position that the fluorescence confocal microscope is properly classified, in heading 9018, HTSUS, specifically in subheading 9018.19.40, HTSUS, which provides for "Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Electro-diagnostic apparatus (including apparatus for functional exploratory examination or for checking physiological parameters); parts and accessories thereof: Other: Apparatus for functional exploratory examination, and parts and accessories thereof."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N300518 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H311645, set forth as an attachment to this notice. Addition-

ally, 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*.

GREGORY CONNOR  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

*Attachment*

HQ H311645

July 18, 2022

CLA-2 OT:RR:CTF:EMAIN H311645 PF

CATEGORY: Classification

TARIFF NO.: 9018.19.40

SCOTT CASSELL

JAS FORWARDING USA, INC.

1000 CENTRE GREEN WAY, SUITE 200

CARY, NC 27513

RE: Revocation of NY N300518; Classification of a fluorescence confocal microscope

DEAR MR. CASSELL:

This is in reference to New York Ruling Letter (NY) N300518, dated October 10, 2018, issued to you on behalf of your client Mauna Kea Technologies, Inc., concerning the tariff classification of a fluorescence confocal microscope, under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed NY N300518 and find it to be in error. For the reasons set forth below, we hereby revoke NY N300518.

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. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 20, on May 25, 2022. No comments were received in response to this notice.

**FACTS:**

In NY N300518, CBP described the merchandise as follows:

The product at issue, identified as the Cellvizio NOVA, is described as a standalone fluorescence confocal microscope. Per the information provided, the Cellvizio NOVA utilizes a confocal laser system with fiber optic probes that allow for the imaging of the internal microstructure of tissue. The instrument consists of a wheeled platform that incorporates the requisite laser imaging system, a touchable user interface (TUI), connectors for the fiber optic probes, and other peripheral equipment, such as a thermic printer.

The Cellvizio NOVA is said to be suitable for use in a variety of applications, including gastroscopy, colonoscopy, bronchoscopy, and uteroscopy, among others. The Cellvizio NOVA utilizes its confocal laser system to generate endomicroscopic images that a physician can view (via the TUI) and print.

In addition, your ruling request stated that the Cellvizio NOVA was used by physicians in the clinical practice to obtain endomicroscopic images.

In NY N300518, U.S. Customs and Border Protection (CBP) classified the subject product under heading 9012, HTSUS, which provides for “Microscopes other than optical microscopes; diffraction apparatus; parts and accessories thereof.”

**ISSUE:**

Whether the fluorescence confocal microscope is classifiable in heading 9012, HTSUS, as microscopes other than optical microscopes, or in heading 9018, HTSUS, as instruments and appliances used in medical, surgical, dental or veterinary sciences.

**LAW AND ANALYSIS:**

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The HTSUS provisions under consideration are as follows:

<b>9012</b>	Microscopes other than optical microscopes; diffraction apparatus; parts and accessories thereof:
9012.10.00	Microscopes other than optical microscopes; diffraction apparatus * * *
<b>9018</b>	Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof:  Electro-diagnostic apparatus (including apparatus for functional exploratory examination or for checking physiological parameters); parts and accessories thereof:
9018.19	Other:
9018.19.40	Apparatus for functional exploratory examination, and parts and accessories thereof.

The Harmonized Commodity Description and Coding System (HS) Explanatory Notes (ENs) constitute the official interpretation of the HS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HS at the international level, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127 (Aug. 23, 1989).

In NY N300518, the merchandise at issue was a fluorescence confocal microscope, also known as a probe-based Confocal Laser Endomicroscopy system. The instant Cellvizio NOVA used a confocal laser system with fiber optic probes that allowed for the internal imaging of the internal microstructure of tissue. Accordingly, the Cellvizio NOVA is *prima facie* classifiable in heading 9012, HTSUS, as a microscope. However, the Cellvizio NOVA is designed to enter the body of a person or an animal for purposes of examining and obtaining endomicroscopic images and is suitable for use in a variety of applications, including gastroscopy, colonoscopy, bronchoscopy, and uteroscopy, among others. Therefore, it is also *prima facie* classifiable in heading

9018, as an instrument and appliance used in medical, surgical, dental or veterinary sciences.<sup>1</sup>

According to GRI 3(a):

When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

The heading which provides the most specific description shall be preferred to headings providing a more general description....

Where articles can be classified under two HTSUS headings, under GRI 3(a) the classification “turns on which of these two provisions are more specific.” *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998). To do so, CBP will “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.” *Orlando Food*, 140 F.3d at 1441 (*internal citations omitted*).

Under a GRI 3(a) analysis, heading 9018, HTSUS, prevails over heading 9012, HTSUS. The tariff terms “[i]nstruments and appliances used in medical, surgical, dental or veterinary sciences” heading are more specific than the tariff term “microscopes.” Accordingly, heading 9018, HTSUS is the most difficult provision to satisfy as it covers a narrower set of items than heading 9012, HTSUS. By application of GRI 3(a), we find that the Cellvizio NOVA is classified under heading 9018, HTSUS.

CBP has classified similar products in heading 9018, HTSUS. *See* NY N287815, dated July 21, 2017 (Cellvizio 100 Series – probe-based laser endomicroscopy system); NY N287804, dated July 19, 2017 (probe-based confocal laser endomicroscope designed for in-vivo imaging of small animals); NY N238114, dated March 5, 2013 (Cellvizio probe-based Confocal Laser Endomicroscope designed for in-vivo imaging of small animals); and N052415, dated March 13, 2009 (Cellvizio/Leica systems using Confocal Endomicroscopy and/or Fluorescence Optical Imaging). Since the Cellvizio NOVA is an endomicroscopy system that is designed to be used by physicians in clinical practice during gastroscopy, colonoscopy, bronchoscopy, and uteroscopy procedures, among others, it is also properly classified in heading 9018, HTSUS, which provides for “[i]nstruments and appliances used in medical, surgical, dental or veterinary sciences.”

### **HOLDING:**

By application of GRI 1 and GRI 3(a), we find the subject fluorescence confocal microscope is classified heading 9018, HTSUS. By application of GRI 6, it is specifically provided for under subheading 9018.19.40, HTSUS, which provides for “Instruments and appliances used in medical, surgical, dental or

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<sup>1</sup> We note that EN 90.18 excludes microscopes of heading 9012, HTSUS. However, the ENs are not meant to restrict the tariff terms and can be read in conjunction with the legal text. Notably, EN 90.18 indicates that the legal text of heading 9018 “...covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc.” EN 90.18 references endoscopes among the products that are covered by the legal text. In this case, the Cellvizio NOVA, which is a probe-based endomicroscope, meets the terms of the legal text of heading 9018 given that it is used for endoscopy (albeit to visualize the microstructure of tissue) in professional practice.



veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments; parts and accessories thereof: Electro-diagnostic apparatus (including apparatus for functional exploratory examination or for checking physiological parameters); parts and accessories thereof: Other: Apparatus for functional exploratory examination, and parts and accessories thereof.” The column one, general rate of duty is free.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 9018.19.4000, HTSUS Annotated, unless specifically excluded, are subject to an additional 25 percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.01, in addition to subheading 9018.19.4000, HTSUS Annotated, listed above.

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

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

**EFFECT ON OTHER RULINGS:**

NY N300518, dated October 10, 2018, is hereby REVOKED.

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

*Sincerely,*

GREGORY CONNOR

*for*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

**PROPOSED REVOCATION OF ONE RULING LETTER AND  
PROPOSED REVOCATION OF TREATMENT RELATING TO  
THE TARIFF CLASSIFICATION OF INSULATED LUNCH  
BAGS**

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

**ACTION:** Notice of proposed modification of one ruling letter and proposed revocation of treatment relating to the tariff classification of insulated lunch 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 NY N251467, dated April 4, 2014, concerning the tariff classification of insulated lunch 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 September 2, 2022.

**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 *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:** Austen Walsh, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–0114.

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

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the tariff classification of a plastic sink basket strainer. Although in this notice, CBP is specifically referring to NY N251467, dated April 4, 2014 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N251467, CBP classified insulated lunch bags with an outer surface of thermoplastic olefin ("TPO") plastic sheeting and man-made textile material in heading 4202, HTSUS, specifically in sub-heading 4202.92.0807, HTSUS, which provides, for insulated food and beverage bags, with outer surface of textile materials, other, of man-made fibers. CBP has reviewed N254167 and has determined the ruling letters to be in error. It is now CBP's position that the

insulated lunch bags are properly classified in subheading 4202.92.10, HTSUS, which provides for “Trunks, suitcases... traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper: Other: With outer surface of sheeting of plastic or of textile materials: Insulated food or beverage bags: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N251467 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H264201, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: May 20, 2022

ALLYSON MATTANAH  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

Attachments

(ATTACHMENT A)

N251467

April 4, 2014

CLA-2-42:OT:RR:NC:N4:441

CATEGORY: Classification

TARIFF NO.: 4202.92.0807

LYNN SCHAB  
LISS GLOBAL, INC.  
7746 DUNGAN ROAD  
PHILADELPHIA, PA 19111

RE: The tariff classification of an insulated lunch bag from China

DEAR Ms. SCHAB:

In your letter dated March 10, 2014, you requested a tariff classification ruling. You have submitted a sample, which we are returning to you.

Item 159111, which you have described as the “BTS LUNCH BAG HOT BRIGHT IGLOO” is an insulated lunch bag constructed with an outer surface of thermoplastic olefin (TPO) plastic sheeting and man-made textile material. The front panel is wholly constructed with an outer surface of the textile material. The textile is bright pink, orange, white, and black. The black textile is a mesh which creates a textured appearance. The side panels are of approximately 60% textile that is the same bright pink as the front panel and 40% plain black TPO sheeting. The front of the bag also has a decorative textile strap that is used to secure the top opening. The bottom panel and back panel are made up of the TPO sheeting. The textile of the front and side panels creates the most visually prominent and stunning impact. The decorative design created by the brightly colored textile on the front panel is the first thing the consumer is likely to see. It is also what will most likely prompt the consumer to choose the article. As such, the essential character of the bag is imparted by the textile, General Rule of Interpretation 3(b) of the Harmonized Tariff Schedule (HTSUS), noted.

The lunch bag is designed to provide storage, protection, organization, and portability to food and beverages during travel. It is also designed to maintain the temperature of food and beverages. The bag has one interior storage compartment with a plastic lining and a layer of foam plastic between the lining and the body of the bag. The lunch bag has a flap with a snap buckle closure and a carrying handle at the top. The front exterior of the bag has open mesh pocket. The bag measures approximately 7.75” (W) x 10.5” (H) x 4.25” (D).

The applicable subheading for the insulated lunch bag will be 4202.92.0807, HTSUS, which provides for insulated food and beverage bags, with outer surface of textile materials, other, of man-made fibers. The duty rate will be 7% ad valorem.

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

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

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 Vikki Lazaro at [vikki.lazaro@cbp.dhs.gov](mailto:vikki.lazaro@cbp.dhs.gov).

*Sincerely,*

GWENN KLEIN KIRSCHNER

*Acting Director*

*National Commodity Specialist Division*

HQ H264201  
CLA-2 OT:RR:CTF:TCM H264201 AMW  
CATEGORY: Classification  
TARIFF NO.: 4202.92.10

LYNN SCHAB  
LISS GLOBAL, INC.  
7746 DUNGAN ROAD  
PHILADELPHIA, PA 19111

Re: Revocation of NY N251467; classification of insulated lunch bags

DEAR MS. SCHAB:

This is in reference to New York Ruling Letters (“NY”) N251467, issued by the U.S. Customs and Border Protection (“CBP”) National Commodity Division to Liss Global, Inc. on April 2, 2014, regarding the classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) of insulated lunch bags.

We have reconsidered this decision. For the reasons set forth below, we have determined that the classification of the containers in subheading 4202.92.08, HTSUS, as insulated food or beverage bags having an outer surface of textile, is incorrect.

**FACTS:**

In NY N251467, the subject merchandise was described as follows:

Item 159111, which you have described as the “BTS LUNCH BAG HOT BRIGHT IGLOO” is an insulated lunch bag constructed with an outer surface of thermoplastic olefin (TPO) plastic sheeting and man-made textile material. The front panel is wholly constructed with an outer surface of the textile material. The textile is bright pink, orange, white, and black. The black textile is a mesh which creates a textured appearance. The side panels are of approximately 60% textile that is the same bright pink as the front panel and 40% plain black TPO sheeting. The front of the bag also has a decorative textile strap that is used to secure the top opening. The bottom panel and back panel are made up of the TPO sheeting...

The lunch bag is designed to provide storage, protection, organization, and portability to food and beverages during travel. It is also designed to maintain the temperature of food and beverages. The bag has one interior storage compartment with a plastic lining and a layer of foam plastic between the lining and the body of the bag. The lunch bag has a flap with a snap buckle closure and a carrying handle at the top. The front exterior of the bag has open mesh pocket. The bag measures approximately 7.75” (W) x 10.5” (H) x 4.25” (D).

In a document subsequently submitted to CBP, the item’s manufacturer has provided photographs of the subject lunch bag models. The front panel of the lunch bags at issue feature an orange and white “Igloo” logo but are otherwise unadorned with patterns or graphic representations.

**ISSUE:**

Whether the subject insulated lunch bags should be classified at subheading 4202.92.08, HTSUS, as insulated food or beverage bags having an outer surface of man-made textile, or at 4202.92.10, as insulated food or beverage bags having an outer surface other than textile.

**LAW AND ANALYSIS:**

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (“GRIs”). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the remaining GRIs 2 through 6. GRI 6, HTSUS, requires that the GRI’s be applied at the subheading level on the understanding that only subheadings at the same level are comparable. The GRI’s apply in the same manner when comparing subheadings within a heading.

4202: Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:

Other:

4202.92: With outer surface of sheeting of plastic or of textile materials:

Insulated food or beverage bags:

With outer surface of textile materials:

4202.90.04: Beverage bags whose interior incorporates only a flexible plastic container of a kind for storing and dispensing potable beverages through attached flexible tubing. . .

4202.92.08: Other . . . .

4202.92.10: Other . . .

\* \* \*

There is no dispute that the instant lunch bags are classified in heading 4202, HTSUS, as insulated food or beverage bags. The issue arises at the 8 digit subheading level, which requires the application of GRI 6. GRI 6 requires that the GRI’s be applied at the subheading level on the understanding that only subheadings at the same level are comparable.

At the eight-digit subheading level, the issue is whether the instant insulated lunch bags have an outer surface of textile or non-textile material. Because the instant bags have outer panels of both textile and plastic, classification is determined by application of GRI 3.

GRI 3 states:



When by application of [GRI] 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods . . . , those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components . . . which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

The headings covering the article refer only to part of the materials or components contained therein. Therefore, under GRI 3(a), the headings must be regarded as equally specific in relation to the article, and the article will then be classified as if it consisted of the material or component which gives it its essential character, pursuant to GRI 3(b).

The “essential character” of an article is “that which is indispensable to the structure, core or condition of the article, i.e., what it is.” *Structural Industries v. United States*, 360 F. Supp. 2d 1330, 1336 (Ct. Int’l Trade 2005). EN VIII to GRI 3(b) explains that “[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods.” The classification of the instant cooler bags will thus turn on which component imparts the essential character to the whole.

CBP has consistently determined that the material comprising the bulk of the exterior surface area of a bag imparts the essential character, even where the front panel features a visually appealing design such as a cartoon character. *See e.g.*, NY M82559, dated May 2, 2006 (in which three bags with front panels of PVC sheeting featuring Dora the Explorer, Tinkerbell, and Sponge-Bob motifs were classified according to the majority textile outer surface area) and NY M84189, dated June 16, 2006 (in which two bags with PVC front panels depicting a Cars theme were classified on the basis of the textile outer surface area). *See also*, HQ H025873, dated September 3, 2010 (classifying a cooler bag in accordance with the majority of the exterior surface area); HQ 962817, dated January 14, 2002 (four panels with an outer surface of plastic imparted the essential character of a bag because they comprised the bulk of the outer surface of the bag); NY K83596, dated March 3, 2004 (classifying a cooler bag with an exterior surface of an equal quantity of plastic and textile material at GRI 3(c) in subheading 4202.92.10, HTSUS). Furthermore, in HQ H088427, dated May 29, 2015, CBP revoked several ruling letters in which it had determined that the essential character of various soft-sided coolers was imparted not by the bulk of the outer surface, but instead by which portion of the outer surface that imparted a more

visually striking effect. In doing so, CBP reiterated, “a finding that the essential character is imparted by the bulk of the outer surface area is appropriate and consistent with past CBP rulings.” See HQ H088427.

With respect to insulated coolers such as those subject to the present matter, CBP has nevertheless deferred to GRI 3(c) in narrow instances in which it is impossible to determine whether the “bulk of the surface” imparts an item’s essential character. Again in HQ H088427, CBP declined to use the “bulk of the surface” standard in classifying one style of cooler in which the “closer ratio of textile to plastic [the textile surface comprised roughly 40% of the surface area] and higher value of the textile” was in tension with the fact that “the greater surface of the bag is composed of plastic.” See HQ H088427 (revoking NY N047035). Instead, because neither material could be said to impart the essential character, CBP determined the item’s classification based on GRI 3(c), which holds that classification falls to the heading or subheading which occurs last in numerical order among those which equally merit consideration.

In the case of item 159111 and NY N251467, the ratio of textile to plastic is similar to that in NY N047035, which was revoked in HQ H088427. Accordingly, neither material can be said to impart the essential character of the item. Classification will thus be determined by GRI 3(c), which holds that classification falls to the heading or subheading which occurs last in numerical order among those which equally merit consideration. In the instant case, subheading 4202.92.10 occurs last in numerical order.

#### **HOLDING:**

By application of GRI 3(c), item 159111, at issue in NY N251467, is classified in heading 4202, HTSUS, specifically subheading 4202.92.10, HTSUS, which provides for “Trunks, suitcases... traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper: Other: With outer surface of sheeting of plastic or of textile materials: Insulated food or beverage bags: Other.” The 2022 column one, general rate of duty is 3.4% *ad valorem*.

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

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

NY N251467 (Apr. 4, 2014) is hereby revoked.

*Sincerely,*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

**COPYRIGHT, TRADEMARK, AND TRADE NAME  
RECORDATIONS**

**(No. 04 2022)**

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

**SUMMARY:** The following copyrights, trademarks, and trade names were recorded with U.S. Customs and Border Protection in April 2022. A total of 117 recordation applications were approved, consisting of 3 copyrights and 117 trademarks.

Corrections or updates may be sent to: Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street, NE., 10th Floor, Washington, D.C. 20229-1177, or via email at *iprrquestions@cbp.dhs.gov*.

**FOR FURTHER INFORMATION CONTACT:** Christopher Hawkins, Paralegal Specialist, Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade at (202) 325-0295.

ALAINA VAN HORN

*Chief,*

*Intellectual Property Enforcement Branch  
Regulations and Rulings, Office of Trade*

## CBP IPR RECORDATION — APRIL 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 01-00451	04/13/2022	04/13/2032	MONTECRISTO	Cuban Cigar Brands, N.V.	No
TMK 02-00601	04/26/2022	02/21/2032	Inner Rim of Lock Nut DESIGN	ESNA, LLC	No
TMK 02-00849	04/29/2022	10/26/2032	M & Design	Milwaukee Brewers Baseball Club, Limited Partnership	No
TMK 02-00964	04/19/2022	02/06/2032	ADVAIR DISKUS	GLAXO GROUP LIMITED	No
TMK 03-00074	04/22/2022	05/12/2032	ONE TOUCH ULTRA	LIFESCAN IP HOLDINGS, LLC	No
TMK 03-00161	04/26/2022	08/05/2032	ESNA (STYLIZED)	ESNA, LLC	No
TMK 03-00642	04/29/2022	05/19/2032	DODGERS & DESIGN	LOS ANGELES DODGERS LLC	No
TMK 03-00751	04/18/2022	04/29/2032	VOLCOM	ABG-VOLCOM, LLC	No
TMK 03-00839	04/18/2022	06/26/2032	Volcom Diamond Logo	ABG-VOLCOM, LLC	No
TMK 04-00228	04/11/2022	02/20/2032	BOTOX	Allergan, Inc. CORPORATION	No
TMK 04-00823	04/01/2022	03/29/2032	SWANSON SPEED	Swanson Tool Company, Inc.	No
TMK 04-00890	04/01/2022	12/15/2031	PICCOLO PETE	AMERICAN PROMOTIONAL EVENTS, INC.	No
TMK 05-00971	04/25/2022	08/25/2032	Stripedcheck logo (shoe)	REEBOK INTERNATIONAL	No
TMK 05-00991	04/22/2022	05/12/2032	Chrome Hearts plus Horseshoe Design	Chrome Hearts, Inc.	No
TMK 07-00073	04/20/2022	07/16/2032	Chrome Hearts plus Scroll Design	Chrome Hearts LLC	No
TMK 07-00431	04/08/2022	04/19/2032	NICORETTE	GLAXOSMITHKLINE CONSUMER HEALTHCARE L.P.	No
TMK 07-00645	04/04/2022	02/01/2025	VANS	VANS INC CORPORATION	No
TMK 07-00683	04/25/2022	04/14/2026	OFF THE WALL	VANS, INC.	No
TMK 07-00777	04/22/2022	04/01/2032	ON Design	Semiconductor Components Industries, L.L.C.	No
TMK 07-00900	04/21/2022	04/22/2032	JL AUDIO	JL Audio, Inc.	No

## CBP IPR RECORDATION — APRIL 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 07-01269	04/29/2022	06/30/2032	VALENTI FRANCO	OLEM SHOE CORPORATION	No
TMK 08-00551	04/01/2022	07/14/2032	ARROW	ABG IZOD LLC	No
TMK 09-00474	04/19/2022	01/20/2032	JUAN LOPEZ	AUSA PREMIUM CIGAR HOLDINGS INC.	No
TMK 09-00477	04/19/2022	01/20/2032	GISPERT	AUSA PREMIUM CIGAR HOLDINGS INC.	No
TMK 09-00849	04/18/2022	03/18/2032	CONMAR	IDEAL FASTENER CORPORATION	No
TMK 10-00396	04/14/2022	04/02/2025	MAZDA (STYLIZED)	MAZDA MOTOR CORPORATION JAPAN	No
TMK 10-01060	04/13/2022	03/25/2032	CHEVROLET	GENERAL MOTORS LLC	No
TMK 11-01455	04/13/2022	01/22/2032	CHEVROLET EMBLEM	GENERAL MOTORS LLC	No
TMK 12-00170	04/01/2022	02/28/2032	DIVX & DESIGN	DIVX, LLC	No
TMK 12-00206	04/07/2022	04/07/2032	MOTOROLA (STYLIZED)	MOTOROLA TRADEMARK HOLDINGS, LLC	No
TMK 12-00307	04/29/2022	01/04/2032	VALUE ADVANTAGE	NISSAN NORTH AMERICA, INC.	No
TMK 12-00360	04/18/2022	03/20/2032	KINECT	Microsoft Corporation	No
TMK 12-00396	04/18/2022	07/10/2032	GAME BOY	Nintendo of America Inc.	No
TMK 12-00413	04/13/2022	07/10/2032	SUPER MARIO LAND	Nintendo of America Inc.	No
TMK 12-00543	04/08/2022	07/03/2032	Queen Arabic Logo	Greenland Trading Corp.	No
TMK 12-00545	04/08/2022	07/03/2032	QUEEN	Greenland Trading Corp.	No
TMK 12-00697	04/11/2022	08/10/2031	COOLSCULPTING	Zeltiq Aesthetics, Inc.	No
TMK 12-00865	04/29/2022	04/05/2032	BULGARI	BULGARI S.P.A. JOINT STOCK ITALY	No
TMK 12-01430	04/18/2022	06/30/2032	NINTENDO POWER & Design	Nintendo of America Inc. CORPORATION	No
TMK 13-00284	04/22/2022	03/18/2032	MICHAEL KORS	MICHAEL KORS, L.L.C.	No

## CBP IPR RECORDATION — APRIL 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 13-00778	04/25/2022	04/24/2032	GEAUX TIGERS	Board of Supervisors of Louisiana State University and Agricultural and Mechanical College	No
TMK 13-00785	04/25/2022	03/27/2032	Tiger Eye	Board of Supervisors of Louisiana State University and Agricultural and Mechanical College	No
TMK 13-00980	04/27/2022	04/01/2032	M AND DESIGN	Micron Technology, Inc.	No
TMK 14-00069	04/25/2022	04/24/2032	INTENZE	INTENZE PRODUCTS, INC.	No
TMK 14-00194	04/08/2022	03/06/2032	VELOSTER	Hyundai Motor America CORPORATION	No
TMK 14-00563	04/14/2022	03/26/2032	TARARA	Tarara Winery, LLC	No
TMK 14-00655	04/08/2022	07/08/2032	PRO-ACT	AKEBONO BRAKE CORPORATION	No
TMK 14-00885	04/14/2022	02/05/2032	CADILLAC	GENERAL MOTORS LLC	No
TMK 15-00200	04/01/2022	02/28/2032	ALTERNATIVE	ALTERNATIVE APPAREL, INC.	No
TMK 15-00495	04/29/2022	04/30/2032	NUFACE BY CAROL COLE	Carol Cole Company	No
TMK 15-00827	04/22/2022	04/03/2032	ARMOR	CHURCH & DWIGHT CO., INC.	No
TMK 15-01012	04/19/2022	04/17/2032	INDIA TEMPLE	R. EXPO (USA) LTD., INC.	No
TMK 16-00837	04/29/2022	12/06/2031	NRT	CARBO Ceramics Inc.	No
TMK 16-01102	04/11/2022	05/14/2032	YETI AND DESIGN	YETI COOLERS, LLC	No
TMK 17-00346	04/08/2022	02/06/2032	PRADA (STYLIZED)	PRADA S.A.	No
TMK 17-00419	04/22/2022	04/10/2032	SHOYOROLL	SHOYOROLL CORPORATION	No
TMK 17-00420	04/22/2022	04/17/2032	SHOYOROLL DESIGN/LOGO	SHOYOROLL CORPORATION	No
TMK 17-00475	04/11/2022	08/29/2032	LAND ROVER & Design	Jaguar Land Rover Limited private company limited by shares (pre) UN	No
TMK 17-00819	04/01/2022	03/06/2032	ROUGHY	HOOey, LLC	No

## CBP IPR RECORDATION — APRIL 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 18-00593	04/14/2022	04/22/2032	ENFAMIL	MEAD JOHNSON & COMPANY, LLC	No
TMK 18-00606	04/08/2022	04/30/2032	KINDER JOY (STYLIZED)	SOREMARTEC S.A. CORPORATION BELGIUM	No
TMK 18-01119	04/27/2022	04/30/2032	TECH N9NE	Strange Music, Inc.	No
TMK 19-00259	04/14/2022	10/26/2031	CLEVELAND (STYLIZED)	CLEVELAND GUARDIANS BASEBALL COMPANY, LLC	No
TMK 19-00840	04/11/2022	08/03/2031	ALLODERM	Lifecell Corporation	No
TMK 19-00891	04/13/2022	08/26/2031	CARAFATE	APTALIS PHARMA CANADA ULC	No
TMK 19-01216	04/29/2022	04/17/2032	RYO	AMOREPACIFIC CORPORATION	No
TMK 20-00108	04/01/2022	10/05/2031	SHINGRIX	GlaxoSmithKline Biologicals, S.A.	No
TMK 20-00144	04/08/2022	04/21/2032	MEDTRONIC	Medtronic, Inc.	No
TMK 22-00296	04/04/2022	06/10/2029	HANDY PAINT CUP	Bercom International, LLC	No
TMK 22-00297	04/04/2022	02/01/2027	CONFIGURATION OF CHECKER- BOARD SHOE	VANS, INC.	No
TMK 22-00298	04/04/2022	11/17/2031	CHECKERBOARD SLIDE	Vans, Inc.	No
TMK 22-00299	04/04/2022	11/25/2030	VANS	Vans, Inc.	No
TMK 22-00300	04/04/2022	03/03/2024	Side Stripe	Vans, Inc.	No
TMK 22-00301	04/04/2022	01/22/2030	VANS	Vans, Inc.	No
TMK 22-00302	04/04/2022	11/25/2030	VANS	Vans, Inc.	No
TMK 22-00303	04/04/2022	10/13/2031	VANS	Vans, Inc.	No
TMK 22-00304	04/04/2022	12/07/2031	VANS	Vans, Inc.	No
TMK 22-00305	04/04/2022	05/23/2031	VANS	Vans, Inc.	No
TMK 22-00306	04/07/2022	06/22/2032	NEVER	Never Coffee, LLC	No
TMK 22-00307	04/07/2022	06/06/2028	KING TIDE	Gerald T. Willis	No

## CBP IPR RECORDATION — APRIL 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 22-00308	04/07/2022	03/07/2032	JACK DANIEL'S DESIGN	Jack Daniel's Properties, Inc.	No
TMK 22-00309	04/07/2022	11/09/2026	RUMPL	Rumpl, Inc. DBA Rumpl	No
TMK 22-00310	04/08/2022	02/17/2026	DERMATOUCH	SPA DE SOLEIL, INC.	No
TMK 22-00311	04/11/2022	07/05/2032	FLIP SIX SECURITY SOLUTIONS (FSSS), L.L.C. INNOVATIVE SOLUTIONS FOREXCEPTIONAL CHALLENGES & DESIGN	Flip Six Security Solutions L.L.C.	No
TMK 22-00312	04/11/2022	06/09/2031	OUTLETICS	Outletics International SA, SWITZERLAND	No
TMK 22-00313	04/11/2022	02/29/2032	TOWNCAST	Flavio Romeo Enterprises, LLC	No
TMK 22-00314	04/13/2022	12/29/2030	Skateboard design	Vans, Inc. CORPORATION	No
TMK 22-00315	04/13/2022	10/09/2023	TECFIDERA	BIOGEN MA INC.	No
TMK 22-00316	04/14/2022	06/07/2027	SPINRAZA	BIOGEN MA INC. CORPORATION	No
TMK 22-00317	04/14/2022	04/13/2025	TYSABRI	BIOGEN MA INC. CORPORATION	No
TMK 22-00318	04/14/2022	04/18/2032	THE PEOPLE STORE	The People Store	No
TMK 22-00319	04/14/2022	06/08/2032	DHARMA	MONSOON DRINKS DBA DHARMA CORPORATION	No
TMK 22-00320	04/18/2022	04/25/2032	Barrel Logo	Arisaka LLC	No
TMK 22-00321	04/18/2022	02/09/2032	Heat Transfer Warehouse Principal-Logo	Heat Transfer Warehouse, Inc.	No
TMK 22-00322	04/18/2022	06/02/2031	LIONS FLOOR	Lions Investment & Trading Inc.	No
TMK 22-00323	04/18/2022	01/19/2032	PLAYSEAT	F. Smit Holding B.V. NETHERLANDS	No
TMK 22-00324	04/19/2022	06/26/2032	APA	APA - The Engineered Wood Association CORPORATION	No
TMK 22-00325	04/19/2022	03/17/2030	PURPLE RAIN	M&M Wine Cellar DBA L'uva Bella Winery	No



## CBP IPR RECORDATION — APRIL 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 22-00326	04/19/2022	08/19/2025	INKTASTIC	INKtastic, Inc.	No
TMK 22-00327	04/19/2022	04/03/2027	SVENPAD	BRETT S. BARRY, P.C.	No
TMK 22-00328	04/20/2022	04/25/2032	INTELLISITE	IntelliSite, LLC	No
TMK 22-00329	04/21/2022	06/15/2032	CDC CENTERS FOR DISEASE CONTROL AND PREVENTION and Design	U.S. Department of Health and Human Services	No
TMK 22-00330	04/22/2022	10/25/2030	ACON logo	LEADWAY (HK)	No
TMK 22-00331	04/22/2022	04/17/2026	Compassion Child Design Mark (“Skippy”)	Compassion International, Inc.	No
TMK 22-00332	04/22/2022	05/17/2025	COMPASSION	Compassion International, Inc.	No
TMK 22-00333	04/22/2022	06/30/2031	D/A DANIEL ALEXANDER	MORRO LICENSING, LLC	No
TMK 22-00334	04/22/2022	09/22/2030	COMPASSION & Design	Compassion International, Inc.	No
TMK 22-00335	04/22/2022	06/08/2026	EDIPOUS	MORRO LICENSING, LLC	No
TMK 22-00336	04/22/2022	07/05/2026	MENSUAS	MORRO LICENSING, LLC	No
TMK 22-00337	04/22/2022	03/14/2032	Coast City Fine Art & Design Studio LLC - Trademark	Latyschow, Kathleen INDIVIDUAL	No
TMK 22-00338	04/22/2022	12/22/2030	VANS	Vans, Inc.	No
TMK 22-00339	04/25/2022	06/09/2031	LIONS FLOOR	Lions Investment & Trading Inc. DBA	No
TMK 22-00340	04/29/2022	05/01/2032	ALPHA	LaCrosse Footwear, Inc.	No
TMK 22-00341	04/29/2022	06/16/2031	HARDTIMES	HARDTIMES REAL BEEF JERKY INCORPORATED	No
COP 22-00015	04/14/2022	04/14/2042	OVERLANDING	Kevin Noh	No
COP 22-00016	04/15/2022	02/03/2042	Pinnacle Fete Wall Covering	Artistic Tile, Inc. Address	No
COP 22-00017	04/18/2022	04/18/2042	Beach Bunny Liner	Riedell Shoes, Inc.	No

**COPYRIGHT, TRADEMARK, AND TRADE NAME  
RECORDATIONS**

**(No. 05 2022)**

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

**SUMMARY:** The following copyrights, trademarks, and trade names were recorded with U.S. Customs and Border Protection in May 2022. A total of 139 recordation applications were approved, consisting of 7 copyrights and 132 trademarks.

Corrections or updates may be sent to: Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street, NE., 10th Floor, Washington, D.C. 20229-1177, or via email at *iprrquestions@cbp.dhs.gov*.

**FOR FURTHER INFORMATION CONTACT:** Christopher Hawkins, Paralegal Specialist, Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade at (202) 325-0295.

ALAINA VAN HORN

*Chief,*

*Intellectual Property Enforcement Branch  
Regulations and Rulings, Office of Trade*

## CBP IPR RECORDATION — May 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 02-00221	05/25/2022	02/23/2032	SWIFT & DESIGN	MOTIC INSTRUMENTS USA, INC.	No
TMK 02-00264	05/19/2022	10/17/2031	CSA Certified	Canadian Standards Association CORPORATION CANADA	No
TMK 02-00325	05/18/2022	04/26/2032	LACOSTE	Lacoste Alligator S.A. CORPORATION SWITZERLAND	No
TMK 02-00800	05/18/2022	06/19/2032	SECURE CARE PRODUCTS	SECURE CARE PRODUCTS, LLC	No
TMK 02-00923	05/09/2022	09/11/2031	DOLBY	DOLBY LABORATORIES LICENSING CORPORATION	No
TMK 02-00951	05/17/2022	06/16/2032	TB & DESIGN	TAMPA BAY RAYS BASEBALL LTD.	No
TMK 02-00952	05/17/2022	06/12/2032	TAMPA BAY DEVIL RAYS & DESIGN	TAMPA BAY RAYS BASEBALL LTD.	No
TMK 03-00507	05/12/2022	03/08/2032	Arrows & Circles Design	Fabbrica d'Armi P. Beretta S.p.A.	No
TMK 05-00031	05/18/2022	08/14/2032	LA TOUR EIFFEL & DESIGN	LA TOUR EIFFEL PARIS	No
TMK 05-00770	05/13/2022	11/13/2032	THREE-DIMENSIONAL SHAPE OF ZIPPO LIGHTER	ZIPPO MANUFACTURING COMPANY	No
TMK 06-00115	05/25/2022	03/12/2032	PERFORMANCE LOGO	ADIDAS INTERNATIONAL NETHERLANDS	No
TMK 06-00481	05/25/2022	05/09/2032	PATAGONIA	PATAGONIA, INC. CORPORATION	No
TMK 07-00310	05/17/2022	05/23/2032	FRESH STEP	CLOROX PET PRODUCTS COMPANY, THE CORPORATION	No
TMK 09-00393	05/25/2022	11/11/2028	PERFORMANCE LOGO DESIGN	ADIDAS INTERNATIONAL MARKET-ING B.V. NETHERLANDS	No
TMK 09-00394	05/25/2022	05/24/2028	ADIDAS	ADIDAS AG	No
TMK 09-00479	05/23/2022	04/12/2032	SAINT LUIS REY	AUSA PREMIUM CIGAR HOLDINGS	No
TMK 11-01070	05/09/2022	04/08/2032	U-2	LOCKHEED MARTIN CORPORATION	No
TMK 11-01485	05/20/2022	10/11/2031	DOWNY	Procter & Gamble Company, The	No

## CBP IPR RECORDATION — May 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Trm	Owner Name	GM Restricted
TMK 12-00321	05/19/2022	11/04/2029	SKY BALL	JAKKS PACIFIC, INC.	No
TMK 12-00388	05/25/2022	04/22/2032	3-Bar Design	adidas International Marketing B.V.	No
TMK 12-01311	05/17/2022	02/13/2032	POWER RANGERS	SCG POWER RANGERS LLC	No
TMK 12-01337	05/18/2022	02/17/2032	POWER RANGERS	SCG POWER RANGERS LLC	No
TMK 12-01339	05/18/2022	02/13/2032	POWER RANGERS	SCG POWER RANGERS LLC	No
TMK 13-00292	05/20/2022	04/15/2032	TRIJICON	TRIJICON, INC.	No
TMK 13-00301	05/20/2022	04/17/2032	TRIJIDOT	Trijicon, Inc.	No
TMK 13-00704	05/25/2022	02/28/2032	SUPERTOP (STYLIZED)	WATCH CLUB, INC.	No
TMK 15-00395	05/20/2022	05/14/2032	LIFESAVER	Mid-Continent Instrument Company, Inc.	No
TMK 15-00448	05/09/2022	04/15/2032	Santa Fe & DESIGN	Hyundai Motor America CORPORATION	No
TMK 15-00808	05/23/2022	08/31/2031	STIHL (STYLIZED)	Andreas Stihl AG & Co KG CORPORATION GERMANY	No
TMK 16-00087	05/19/2022	01/06/2023	HINDS	HINDS PRODUCTS, LLC	No
TMK 16-00494	05/12/2022	08/12/2032	MUSTANG Horse & Bars	FORD MOTOR COMPANY	No
TMK 16-00789	05/12/2022	07/23/2032	ACCUCAST	CARBO CERAMICS INC.	No
TMK 16-01085	05/13/2022	06/20/2031	GEM	POLARIS INDUSTRIES INC.	No
TMK 17-00077	05/17/2022	12/27/031	CHRISTIAN LOUBOUTIN (STYLIZED)	FALOÏSE SAS	No
TMK 19-00080	05/24/2022	05/28/2022	POLYSTAR	ROBROY ENCLOSURES, INC.	No
TMK 19-00466	05/18/2022	06/27/2032	GAMBLER SMOKING MAN DESIGN	Top Tobacco L.P.	No
TMK 20-00038	05/10/2022	05/26/2032	LODGE	Lodge Manufacturing Company	No
TMK 20-00607	05/13/2022	02/20/2032	ROCKWELL AUTOMATION	Rockwell Automation, Inc.	No

## CBP IPR RECORDATION — May 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Tm	Owner Name	GM Restricted
TMK 22-00342	05/04/2022	06/08/2032	BLUEY	(REGISTRANT) Ludo Studio Pty Ltd proprietary limited company (p/l or Pty. Ltd.) AUSTRALIA Level 2 282 Wickham Street, Fortitude Valley Queensland AUSTRALIA 4006	No
TMK 22-00343	05/04/2022	06/08/2032	Dog Design	Ludo Studio Pty Ltd	No
TMK 22-00344	05/04/2022	08/18/2031	MOBILIT & DESIGN	True Angle Medical Technologies Inc. CANADA	No
TMK 22-00345	05/04/2022	09/14/2024	WACOAL	Wacoal Corp.	No
TMK 22-00346	05/04/2022	02/24/2031	TYPHOON	Dark Storm Industries LLC	No
TMK 22-00347	05/04/2022	12/18/2027	GOORIN	Goorin Brothers, Inc	No
TMK 22-00348	05/04/2022	12/18/2027	Castle design	Goorin Bros., Inc. CORPORATION	No
TMK 22-00349	05/04/2022	02/15/2027	VIDVIE (STYLIZED)	Shenzhen Aifengchengpin Trading Co.,Ltd limited company (Ltd.)	No
TMK 22-00350	05/04/2022	07/12/2032	MAKIN GROCERIES-KEEPIH HOUSE	Stephens Coatney, Jocelyn	No
TMK 22-00351	05/09/2022	07/19/2032	CONFIGURATION OF A DOUBLE HOODED SWEATSHIRT	Amperсанд Avenue LLC	No
TMK 22-00352	05/09/2022	02/23/2032	CONFIGURATION OF A DOUBLE HOODED SWEATSHIRT WITH ZIPPER	Amperсанд Avenue LLC	No
TMK 22-00353	05/09/2022	11/29/2027	CORERIGID	The Pro Design Group	No
TMK 22-00354	05/09/2022	07/12/2032	NIGEL B DESIGN (STYLIZED)	NIGEL B. DESIGN, INC.	No
TMK 22-00355	05/09/2022	06/26/2029	DD DOLBY AUDIO & DESIGN	Dolby Laboratories Licensing Corporation	No
TMK 22-00356	05/09/2022	04/08/2029	DD DOLBY ATMOS & DESIGN	Dolby Laboratories Licensing Corporation	No
TMK 22-00357	05/09/2022	06/26/2029	DD DOLBY VISION & DESIGN	Dolby Laboratories Licensing Corporation	No
TMK 22-00358	05/09/2022	06/26/2029	DD DOLBY & DESIGN	Dolby Laboratories Licensing	No

## CBP IPR RECORDATION — May 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 22-00359	05/09/2022	08/03/2032	ARISAKA	Arisaka LLC	No
TMK 22-00360	05/09/2022	07/11/2027	TEN LEI YEN & DESIGN	TEN LEI YEN LLC	No
TMK 22-00361	05/09/2022	04/19/2031	ECO & DESIGN	ESTYLE CORP, LLC	No
TMK 22-00362	05/09/2022	06/14/2027	ECO STYLE	ESTYLE CORP, LLC	No
TMK 22-00363	05/09/2022	07/12/2032	HOUSE OF REHAB	House of Rehab LLC	No
TMK 22-00364	05/09/2022	04/26/2026	580	Costa Del Mar, Inc. CORPORATION	No
TMK 22-00365	05/09/2022	08/28/2023	BLACKFIN	COSTA DEL MAR, INC.	No
TMK 22-00366	05/09/2022	07/29/2028	C-MATES	COSTA DEL MAR, INC. CORPORATION	No
TMK 22-00367	05/09/2022	12/01/2030	COSTA	Costa Del Mar, Inc.	No
TMK 22-00368	05/09/2022	04/15/2029	COSTA	Costa Del Mar, Inc.	No
TMK 22-00369	05/09/2022	01/05/2031	COSTA	COSTA DEL MAR, INC. CORPORATION	No
TMK 22-00370	05/09/2022	02/17/2030	COSTA 580	COSTA DEL MAR, INC. CORPORATION	No
TMK 22-00371	05/09/2022	12/27/2025	COSTA DEL MAR	COSTA DEL MAR, INC. CORPORATION	No
TMK 22-00372	05/09/2022	01/13/2023	COSTA DEL MAR	COSTA DEL MAR, INC. CORPORATION	No
TMK 22-00373	05/09/2022	07/06/2030	COSTAS	COSTA DEL MAR, INC.	No
TMK 22-00374	05/09/2022	07/16/2029	DEL MAR	Costa Del Mar, Inc. CORPORATION	No
TMK 22-00375	05/09/2022	11/23/2026	C (STYLIZED)	COSTA DEL MAR, INC.	No
TMK 22-00376	05/10/2022	04/15/2029	C (STYLIZED)	Costa Del Mar, Inc. CORPORATION	No
TMK 22-00377	05/10/2022	08/08/2028	C & DESIGN	Costa Del Mar, Inc.	No
TMK 22-00378	05/10/2022	11/07/2027	C & DESIGN	COSTA DEL MAR, INC. CORPORATION	No
TMK 22-00379	05/10/2022	12/01/2030	C Costa & DESIGN	Costa Del Mar, Inc.	No
TMK 22-00380	05/10/2022	07/29/2024	C Costa & DESIGN	COSTA DEL MAR, INC. CORPORATION	No
TMK 22-00381	05/12/2022	03/24/2030	C COSTA (STYLIZED)	Costa Del Mar, Inc.	No

## CBP IPR RECORDATION — May 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 22-00382	05/12/2022	04/12/2031	ECO (STYLIZED)	ESTYLE CORP, LLC	No
TMK 22-00383	05/12/2022	12/01/2030	Puff Glow & DESIGN	EVO BRANDS, LLC	No
TMK 22-00384	05/12/2022	04/10/2027	BURBERRY LONDON, ENGLAND	Burberry Limited limited company UNITED KINGDOM	No
TMK 22-00385	05/12/2022	06/15/2032	PLANT A BETTER TOMORROW	Riverbend Nursery, LLC	No
TMK 22-00386	05/12/2022	05/02/2031	PUFF BAR	EVO BRANDS, LLC	No
TMK 22-00387	05/12/2022	05/15/2032	PUFF FLOW & DESIGN	EVO BRANDS, LLC	No
TMK 22-00388	05/12/2022	01/08/2030	GEMTESA	Urovant Sciences GmbH	No
TMK 22-00389	05/12/2022	02/26/2023	CONFIGURATION OF PERSONAL SAUNA BED	VISIBELLE DERMA INSTITUTE, INC.	No
TMK 22-00390	05/13/2022	04/01/2023	TAB-IT	Daniel L. Pryor INDIVIDUAL	No
TMK 22-00391	05/13/2022	08/28/2022	CABLE CUFF	Ginocchio, Mark H.	No
TMK 22-00392	05/13/2022	08/23/2027	Configuration of self-contained sauna	Visibelle Derma Institute, Inc.	No
TMK 22-00393	05/13/2022	02/19/2030	UROVANT SCIENCES	Urovant Sciences GmbH SWITZERLAND	No
TMK 22-00394	05/17/2022	07/04/2031	HERCULES	HERCULES TIRE & RUBBER COMPANY, THE CORPORATION	No
TMK 22-00395	05/18/2022	06/11/2026	IRONMAN	THE HERCULES TIRE & RUBBER COMPANY	No
TMK 22-00396	05/18/2022	06/09/2031	SWISS MILITARY	Victorinox AG JOINT STOCK COMPANY SWITZERLAND	No
TMK 22-00397	05/19/2022	01/19/2032	QIRAT	QIRAT LLC LIMITED LIABILITY	No
TMK 22-00398	05/19/2022	01/12/2032	UNSHAKEABLE WOMEN	The Polen Group CORPORATION	No
TMK 22-00399	05/19/2022	04/18/2032	ROYALLY B	BParsement, LLC	No
TMK 22-00400	05/19/2022	04/11/2032	B (STYLIZED)	BPARSEMENT, LLC	No

## CBP IPR RECORDATION — May 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 22-00401	05/19/2022	03/03/2030	KIBBERIA	Kibberia, LLC	No
TMK 22-00402	05/19/2022	09/26/2028	FLEX YOUR HORNS	Macario Guzman DBA HPE	No
TMK 22-00403	05/19/2022	11/05/2028	EXPLORER	Ford Motor Company CORPORATION	No
TMK 22-00404	05/19/2022	09/16/2025	DIACRAFT	DIACRAFT, INC. DBA CIRCA CORPORATION	No
TMK 22-00405	05/19/2022	03/14/2032	B	BPARSEMENT, LLC	No
TMK 22-00406	05/20/2022	08/03/2032	LA FARAONA CIGARS	Dominguez Odelma Matos DBA La Faraona Cigars	No
TMK 22-00407	05/23/2022	01/01/2024	FENDI	Fendi S.r.l. Limited Liability Company ITALY	No
TMK 22-00408	05/23/2022	10/09/2023	FF (STYLIZED)	Fendi S.r.l. Limited Liability Company ITALY	No
TMK 22-00409	05/24/2022	07/26/2032	AMARAN	Amaran Snacks LLC	No
TMK 22-00410	05/24/2022	07/19/2032	ELEMENT (STYLIZED)	US Conec Ltd. CORPORATION	No
TMK 22-00411	05/25/2022	11/13/2025	BERINGER	TREASURY WINE ESTATES	No
TMK 22-00412	05/25/2022	10/16/2026	STAGS LEAP	TREASURY WINE	No
TMK 22-00413	05/25/2022	09/12/2027	STERLING	TREASURY CHATEAU & ESTATES, LLC	No
TMK 22-00414	05/25/2022	06/22/2032	ASTRAY (STYLIZED)	Astray, LLC	No
TMK 22-00415	05/25/2022	01/07/2028	GRANGE	SOUTHCORP BRANDS PTY LIMITED COMPANY AUSTRALIA	No
TMK 22-00416	05/25/2022	12/22/2030	PENFOLDS QUANTUM	Southcorp Brands Pty Limited Australian Proprietary Company, Limited by Shares AUSTRALIA	No
TMK 22-00417	05/25/2022	10/20/2029	ETUDE	TREASURY WINE ESTATES AMERICAS COMPANY CORPORATION	No



## CBP IPR RECORDATION — May 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/TmK/TmM	Owner Name	GM Restricted
TMK 22-00418	05/25/2022	01/17/2030	BLOSSOM HILL	TREASURY CHATEAU & ESTATES, LLC	No
TMK 22-00419	05/25/2022	01/12/2032	ST HUBERTS THE STAG	Rothbury Wines Pty Ltd AUSTRALIA	No
TMK 22-00420	05/25/2022	01/02/2032	RAWSON'S RETREAT	ROTHBURY WINES PTY LTD PROPRIETARY LIMITED COMPANY AUSTRALIA	No
TMK 22-00421	05/25/2022	06/12/2032	MATUA	TREASURY WINE ESTATES NEW ZEALAND	No
TMK 22-00422	05/25/2022	07/12/2032	M & DESIGN	Motorola Trademark Holdings, LLC	No
TMK 22-00423	05/25/2022	09/02/2029	GABBIANO	Beringer Blass Italia S.R.L COMPANY ITALY	No
TMK 22-00424	05/25/2022	02/11/2024	WOLF BLASS	Bilyara Vineyards Pty Ltd CORPORATION AUSTRALIA	No
TMK 22-00425	05/25/2022	04/10/2025	PENFOLDS	SOUTHCORP BRANDS PTY LIMITED	No
TMK 22-00426	05/25/2022	06/11/2024	BERINGER LUMINUS	TREASURY WINE ESTATES AMERICAS COMPANY	No
TMK 22-00427	05/25/2022	03/27/2026	BEAULIEU VINEYARD	TREASURY CHATEAU & ESTATES, LLC	No
TMK 22-00428	05/25/2022	03/20/2032	19 CRIMES	Rothbury Wines Pty Ltd Australian Proprietary Company,	No
TMK 22-00429	05/25/2022	05/05/2023	SQUEALING PIG	Treasury Wine Estates	No
TMK 22-00430	05/25/2022	08/16/2028	LINDEMANS	TREASURY WINE ESTATES UK BRANDS LIMITED	No
TMK 22-00431	05/31/2022	12/22/2025	FUTURE PERFECT	STRICKER, SUNSHINE	No
TMK 22-00432	05/31/2022	10/13/2031	THE ESTIE BESTIE	Microblade St Pete LLC	No
TMK 22-00433	05/31/2022	11/18/2030	Three-dimensional Configuration of a Massage Device	AJB Enterprises LLC	No

## CBP IPR RECORDATION — May 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 22-00434	05/31/2022	08/31/2026	STAR INSIDE OF A DOUBLE PARABOLA DESIGN	CBS Studios Inc.	No
TMK 22-00435	05/31/2022	07/19/2026	DOUBLE PARABOLA [STAR TREK: THE NEXT GENERATION] [DELTA SHIELD #2]	CBS Studios Inc.	No
COP 22-00018	05/09/2022	02/02/2042	Adena Tile Mosaic Artwork	Artistic Tile, Inc. Address	No
COP 22-00019	05/09/2022	02/03/2042	Hidden Circles Tile Mosaic Artwork	Artistic Tile, Inc. Address	No
COP 22-00020	05/19/2022	05/17/2042	TWINS	SUZYLEE, INC.	No
COP 22-00021	05/19/2022	12/16/2041	TOM AND JERRY - SUPER CARTOON DESIGN KIT (ALL FAMILY) (s21)	Turner Entertainment Co. Address	No
COP 22-00022	05/31/2022	05/31/2042	KIRBY MASS ATTACK	HAL LABORATORY, INC.	No
COP 22-00023	05/31/2022	05/31/2042	Game & Watch: The Legend of Zelda	Nintendo of America Inc., Transfer	No
COP 22-00024	05/31/2022	05/31/2042	Pokemon Legends: Arceus	The Pokemon Company	No

# U.S. Court of International Trade

Slip Op. 22–82

TAU-KEN TEMIR LLP, AND JSC NMC TAU-KEN SAMRUK, Plaintiffs, and  
MINISTRY OF TRADE AND INTEGRATION OF THE REPUBLIC OF KAZAKHSTAN,  
Plaintiff-Intervenor, v. UNITED STATES, Defendant, and GLOBE  
SPECIALTY METALS, INC., AND MISSISSIPPI SILICON LLC, Defendant-  
Intervenors.

Before: Leo M. Gordon, Judge  
Court No. 21–00173

[Commerce’s *Final Determination* sustained.]

Dated: July 14, 2022

*Peter J. Koenig* and *Jeremy W. Dutra* of Squire Patton Boggs LLP, of Washington, D.C., for Plaintiffs Tau-Ken Temir LLP and JSC NMC Tau-Ken Samruk, and Plaintiff-Intervenor Ministry of Trade and Integration of the Republic of Kazakhstan.

*Bret R. Vallacher*, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, Washington, D.C., for Defendant United States. On the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel was *Jared M. Cynamon*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

*Adam H. Gordon*, *Jennifer M. Smith*, *Lauren N. Fraid*, and *Ping Gong* of The Bristol Group PLLC, of Washington, D.C., for Defendant-Intervenors Globe Specialty Metals, Inc. and Mississippi Silicon LLC.

## OPINION

### Gordon, Judge:

This action involves the U.S. Department of Commerce’s (“Commerce”) final affirmative determination in the countervailing duty (“CVD”) investigation of silicon metal from the Republic of Kazakhstan. *See Silicon Metal from the Republic of Kazakhstan*, 86 Fed. Reg. 11,725 (Dep’t of Commerce Feb. 26, 2021) (“*Final Determination*”), and the accompanying Issues and Decision Memorandum, C-834–811 (Dep’t of Commerce Feb. 22, 2021), <https://enforcement.trade.gov/frn/summary/kazakhstan/2021–04032–1.pdf> (last visited this date) (“*Decision Memorandum*”).

Before the court is the USCIT Rule 56.2 motion for judgment on the agency record filed by Plaintiffs Tau-Ken Temir LLP (“TKT”) and JSC NMC Tau-Ken Samruk (“TKS”) (collectively “Plaintiffs” or “TKT/TKS”). *See* Pl. Tau-Ken Temir LLP et. al.’s Rule 56.2 Br. for J. upon

the Agency R., ECF No. 33<sup>1</sup> (“Pls.’ Br.”)<sup>2</sup>; *see also* Def.’s Resp. to Pls.’ Mots. for J. upon the Agency R., ECF No. 37 (“Def.’s Resp.”); Def.-Intervenors’ Resp. Br. in Opposition to Pls.’ Rule 56.2 Mot. for J. upon the Agency R., ECF No. 38; Reply Br. of Pl. Tau-Ken Temir LLP et. al., ECF No. 39 (“Pls.’ Reply”). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2018),<sup>3</sup> and 28 U.S.C. § 1581(c) (2018). For the reasons set forth below, the court sustains Commerce’s *Final Determination*.

### I. Standard of Review

The court sustains Commerce’s “determinations, findings, or conclusions” unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”). Substantial evidence has been described as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as “something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966). Fundamentally, though, “substantial evidence” is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr. & Richard Murphy, *Administrative Law and Practice* § 9.24[1] (3d ed. 2022). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action “was reasonable given the circumstances presented by the

<sup>1</sup> All citations to the parties’ briefs and the agency record are to their confidential versions unless otherwise noted.

<sup>2</sup> Plaintiff-Intervenor, Ministry of Trade and Integration of the Republic of Kazakhstan, did not file its own USCIT Rule 56.2 motion, nor an opening or reply brief in its own right. Nevertheless, it appears to join and support Plaintiffs’ motion, and briefs and arguments. *See* Pls.’ Br. at 1; Pls.’ Reply at 1.

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

whole record.” 8A *West’s Fed. Forms*, National Courts § 3.6 (5th ed. 2022).

## II. Background

In the underlying investigation, Commerce sought information via Section III of its Initial Questionnaire regarding entities either cross-owned or affiliated with TKT and TKS, the mandatory respondents. See *Decision Memorandum* at 15. TKT/TKS filed a timely response to the affiliation portion of the Initial Questionnaire. *Id.* Commerce subsequently sought supplemental information relative to Plaintiffs’ response and information regarding two other affiliated entities (collectively “First Supplemental Questionnaire”). Acting on separate requests from TKT/TKS, Commerce twice extended the filing deadline for Plaintiffs’ response to the First Supplemental Questionnaire, with an ultimate due date of September 15, 2021.<sup>4</sup> *Id.*

On September 15th, Plaintiffs’ counsel (“Counsel”) found that it was unable to meet Commerce’s 5:00 pm filing deadline for filing its response to the First Supplemental Questionnaire because of technical/computer problems with the data supplied by Plaintiffs and with its submission to Commerce via the ACCESS system.<sup>5</sup> *Id.* at 6. Faced with these problems, Counsel, at 3:50 pm, one hour and 10 minutes prior to the 5:00 pm filing deadline, filed a request for a third extension—this time for one day. Commerce was unable to act on Plaintiffs’ request before the close of business at 5:00 pm on September 15th, so TKT/TKS received an automatic extension until 8:30 am on the next work day, September 16th. *Id.* at 15 (citing *Extension of Time Limits*, 78 Fed. Reg. 57,790 (Dep’t of Commerce Sept. 20, 2013) (“*Final Rule*”) (modifying 19 C.F.R. § 351.302, regulation governing extension of time limits in antidumping and countervailing duty proceedings)); see also 78 Fed. Reg. at 57,792 (“For submissions that are due at 5:00 p.m., if the Department is not able to notify the party requesting the extension of the disposition of the request by 5:00 p.m., then the submission would be due by the opening of business (8:30 a.m.) on the next work day.”)).

Throughout the evening on September 15th and the early morning of September 16th, Counsel attempted to resolve its technical/computer problems and file Plaintiffs’ response to the First Supple-

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<sup>4</sup> The September 15th deadline was for Plaintiffs’ response to the First Supplemental Questionnaire. Commerce made a further request for affiliation information for a third entity with a filing deadline of September 25, 2021. See *Decision Memorandum* at 15. That information request is not the subject of this action.

<sup>5</sup> ACCESS is Commerce’s electronic database and Internet filing system used by parties participating in an antidumping or countervailing duty proceeding.

mental Questionnaire, but was unable to complete the entirety of the filing until 10:11 am on September 16th, one hour and 41 minutes beyond the 8:30 am deadline. *Decision Memorandum* at 16. Commerce then denied Plaintiffs' request for an extension of time and rejected Plaintiffs' response to Section III of the Initial Questionnaire as well as the First Supplemental Questionnaire (collectively "Plaintiffs' Response") as untimely. *See id.* at 20–21 (citing Commerce's Rejection Letter, PR<sup>6</sup> 238 (Oct. 1, 2020) ("First Rejection Letter") and Commerce's Denial of Second Request for Reconsideration, PR 319 (Nov. 19, 2020) ("Second Rejection Letter")). As a result of Plaintiffs' failure to make a timely filing, Commerce relied on facts otherwise available with adverse inferences ("AFA") in reaching its final determination to countervail certain subsidies provided by the Government of Kazakhstan. *Id.* at 4. Additionally, Commerce rejected Plaintiffs' argument that a conflict-of-interest claim raised by Petitioners (Defendant-Intervenors in this action) interfered with Counsel's ability to file a timely response on behalf of Plaintiffs. *Id.* at 32–33.

TKT/TKS now challenge Commerce's denial of Plaintiffs' extension request, as well as Commerce's determination to reject Plaintiffs' Response, and Commerce's resulting determination to use AFA. *See Pls.' Br.* at 4–22; 33–34. Plaintiffs also challenge Commerce's refusal to take corrective action with respect to the conflict-of-interest claim raised by Petitioners, who Plaintiffs maintain interfered with its ability to timely file a response. *See id.* at 26–33.

### III. Discussion

#### A. Framework

19 C.F.R. Part 351 sets forth the procedures before Commerce in an antidumping or countervailing duty proceeding, with Subpart C—§§ 351.301–351.313—governing the submission of factual information, argument, and other material. Section 351.301 provides the time limits for the submission of factual information, while the rules for filing, including electronically in ACCESS, are contained in § 351.303. The latter regulation specifically requires that a filing "must be received successfully in its entirety" via ACCESS "by 5 p.m. Eastern Time on the due date." 19 C.F.R. § 351.303(b).

Prior to the expiration of any time limit established by Part 351, a party may request, in writing, an extension of time. *Id.* § 351.302(c); *see also Final Rule*, 78 Fed. Reg. at 57,790 ("Th[is] modification clarifies that parties may request an extension of time limits before

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<sup>6</sup> "PR \_\_\_" refers to a document contained in the public version of the administrative record, which is found in ECF No. 22–2 unless otherwise noted.

any time limit established under Part 351 expires.”). Upon receipt of a timely filed request for an extension, Commerce may, for good cause shown, extend a time limit, except where precluded by statute. *Id.* § 351.302(b); *see also Final Rule*, 78 Fed. Reg. at 57,791 (“This modification is ... consistent with section 351.302(b), which provides that the Secretary may, for good cause, extend any time limit established under this part.”).

Unless an extension is granted, Commerce will reject any untimely filed factual information, written argument, or other material with a written notice explaining the reasons for the rejection. *Id.* §§ 351.302(d)(2); 351.301(c)(1). Additionally, Commerce will not consider nor retain such information, argument, or other material in the official record of the subject proceeding. *Id.* § 351.302(d)(1)(i).

“Commerce has discretion both to set deadlines and to enforce those deadlines by rejecting untimely filings.” *Grobtest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT 98, 122, 815 F. Supp. 2d 1342, 1365 (2012) (citing *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206–07 (Fed. Cir. 1995)). Agency decisions on acceptance or rejection of documents submitted for the record are reviewed for abuse of discretion. *Id.*; *see also Maverick Tube Corp. v. United States*, 39 CIT \_\_\_, \_\_\_, 107 F. Supp. 3d 1318, 1331 (2015) (“Strict enforcement of time limits and other requirements is neither arbitrary nor an abuse of discretion when Commerce provides a reasoned explanation for its decision.”). “Judicial review of agency discretionary decisions ... is supposed to be highly deferential.” 33 *Fed. Prac. & Proc. Judicial Review* § 8411 (2d ed. 2022).<sup>7</sup>

“An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors.” *Consol. Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005) (citation omitted); *see also Nat’l Wildlife Federation v. Nat’l Marine Fisheries Serv.*, 422 F. 3d 782, 798 (9th Cir. 2005) (“An abuse of discretion is ‘a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.’” (citation omitted)).

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<sup>7</sup> “To capture the notion that judicial review of agency discretion should be strongly deferential, the Administrative Procedure Act (APA), along with many agency enabling acts, instructs courts to set aside such determinations only if they are ‘arbitrary,’ ‘capricious,’ or amount to an ‘abuse of discretion.’ These three terms are essentially synonymous.” 33 *Fed. Prac. & Proc. Judicial Review* § 8411.

## B. Denial of Extension Request and Rejection of TKT/TKS's Questionnaire Response

The parties agree that Plaintiffs filed a third request for an extension of time on a timely basis, *i.e.*, prior to the 5:00 pm deadline on September 15th, and that § 351.302(b) imposes a “good cause” standard on a party seeking an extension of time. *E.g.*, Pls.’ Br. at 6–7; Def.’s Resp. at 5, 7. Where the parties, however, diverge is on whether Commerce abused its discretion in denying Plaintiffs’ extension request and rejecting the filing of Plaintiffs’ Response as untimely.

As to whether Commerce unreasonably denied Plaintiffs’ extension request, it appears that Plaintiffs fail to develop an argument demonstrating that Plaintiffs satisfied the “good cause” standard. There is no language in either Plaintiffs’ USCIT Rule 56.2 Brief or Reply Brief directly addressing how Commerce abused its discretion. *See generally* Pls.’ Br. & Pls.’ Reply (mentioning “good cause” only once, in a quotation from the *Decision Memorandum*, and developing no argument as to that standard). Under these circumstances, the court could deem this issue waived. *See United States v. Great Am. Ins. Co.*, 738 F. 3d 1320, 1328 (Fed. Cir. 2013) (“It is well established that arguments that are not appropriately developed in a party’s briefing may be deemed waived.”); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990 (“Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work, create the ossature for the argument, and put flesh on its bones.”)).

Giving Plaintiffs the benefit of the doubt, it may be that TKT/TKS combined arguments regarding “good cause” and the denial of the third extension request with arguments challenging Commerce’s rejection of Plaintiffs’ Response. Assuming that is the case, Plaintiffs have not shown that Commerce abused its discretion in denying Plaintiffs’ extension request.

Despite receiving full information from Plaintiffs in response to the First Supplemental Questionnaire at approximately 11:00 am on September 15th, Counsel believed it was possible to file the entirety of that submission prior to the 5:00 pm deadline. *Decision Memorandum* at 16 (citing TKT/TKS’s Administrative Case Brief at 6, PR 338 (Jan. 4, 2021); TKT/TKS’s Request for Reconsideration of Acceptance of Questionnaire Response at 2, PR 241 (Oct. 2, 2020) (“Request for Reconsideration”)); *see also* Extension of Time Request, PR 220 (Sept. 15, 2020) (“TKT/TKS’s EOT Request”). Similarly, Counsel indicated that it experienced technical/computer problems when initially at-



tempting to file on ACCESS; yet again, it continued to believe that these problems were fixable before the 5:00 pm filing deadline on September 15th. *Id.* (citing Request for Reconsideration). However, later that afternoon, Counsel determined that meeting the filing deadline was not possible, so it filed a request for a one-day extension, until 5:00 pm on September 16th.<sup>8</sup> See TKT/TKS's EOT Request. As noted previously, Commerce was unable to notify Plaintiffs of the disposition of its request for an extension prior to 5:00 pm that day. Consequently, pursuant to § 351.103(b) and the *Final Rule*, Plaintiffs received an automatic extension until 8:30 am on the next work day, September 16th. See *Decision Memorandum* at 15.

In an effort to buttress Plaintiffs' extension request, Counsel, on September 17th, provided Commerce with an "illustrative" example of the technical/computer problems it experienced in the form of two emails from access@trade.gov, one sent at 3:46 pm on September 15th, and the other sent at 7:02 am on September 16th, indicating that the documents that Counsel had attempted to file were rejected because of problems with embedded hyperlinks. See TKT/TKS's EOT Request; Request for Reconsideration; TKT/TKS's Comments on Filing Issues, PR 224 (Sept. 17, 2020). Counsel further explained that it faced other technical/computer issues, including corrupted files and difficulty in converting Russian language documents into searchable PDF format that were not resolvable by the 5:00 pm deadline on September 15th. See Request for Reconsideration.

After considering Plaintiffs' extension request, including Counsel's supplemental submissions, Commerce concluded that Plaintiffs' filings "failed to meet the requirements of 19 CFR § 351.303, which stipulate[s] that the submission must be filed **in its entirety** by 5:00 p.m. on the due date specified or ... [pursuant to the *Final Rule*], by 8:30 a.m. on the following work day," and rejected TKT/TKS's September 16th submission as untimely. See First Rejection Letter ("In accordance with 19 C.F.R. 351.303(b)(1), an electronically filed document must be received successfully in its entirety ..."). Commerce reasoned that it had been "unable to respond to [TKT/TKS's] request" for an extension and that TKT/TKS had not filed its response "*in its entirety*"<sup>9</sup> as required by the regulation before the automatic exten-

<sup>8</sup> The substance of Plaintiffs' request was:

Tau-Ken Temir LLP (TKT) requests a one day extension from today September 15, 2020 to tomorrow September 16, to answer the subsidy questionnaire, including as to cross-owned companies. They have worked flat out to get this done. We have now received full response but are some technical/computer issues to resolve to file it. The prior extension requests indicate the need for time to answer the questionnaire.

TKT/TKS's EOT Request.

<sup>9</sup> In particular, Commerce noted that Plaintiffs had failed to file the business proprietary versions of certain exhibits before the deadline.

sion deadline of 8:30 am on the next work day pursuant to the *Final Rule. Id.*

Commerce further explained that the *Final Rule* emphasized “the need for extension requests to be submitted before the last minute,” and that the exception set forth in the *Final Rule* would not “excuse the untimely filing of a submission for which Commerce received a last-minute extension request which [Commerce] did not have time to evaluate.” *Decision Memorandum* at 18. Commerce also advised TKT/TKS that Commerce would neither consider nor retain a copy of Plaintiffs’ Response in accordance with 19 C.F.R. § 351.104(a)(2)(iii). *See id.* In rejecting Plaintiffs’ submission, it is reasonably discernible that Commerce denied Plaintiffs’ extension request for lack of “good cause.” *See id.* at 21 (noting that “Commerce’s rejection of TKS/TKT’s response from the record and the explanatory letters issued to TKS/TKT explaining this action represent a clear and direct response to TKS/TKT’s September 15, 2020, extension request.”)

Counsel’s subsequent request for reconsideration explained the work done to file Plaintiffs’ response to the First Supplemental Questionnaire, including specifically addressing the problem with “missing” parts of certain BPI exhibits (actually one computer file) for which a public version was submitted. Counsel stated that one file, a TKS BPI file, was inadvertently uploaded twice instead of the relevant TKT BPI file, noting that Commerce “remedies such situations by requesting the BPI version via a supplemental questionnaire.” *See Request for Reconsideration. Plaintiffs’ Request for Reconsideration* (and the case for acceptance of Plaintiffs’ Response) was supplemented in two conference calls between Counsel and Commerce. *See Decision Memorandum* at 53 (“In October, we twice held meetings or conference calls with TKS/TKT’s counsel to discuss its rejected submissions, as well as TKS/TKT’s request that Commerce terminate the investigation, first with the Director of the office handling this investigation, and then with the Assistant Secretary of Enforcement & Compliance.”).

Commerce thereafter denied Plaintiffs’ request for reconsideration and reaffirmed its denial of Plaintiffs’ extension request and rejection of Plaintiffs’ Response as untimely. *See Second Rejection Letter; see also Decision Memorandum* at 21. In so doing, Commerce addressed Plaintiffs’ difficulty in responding because of “extremely tight deadlines.” *Second Rejection Letter* (quoting *Request for Reconsideration*). Commerce commented that:

TKT was aware that it need not wait until deadlines were extremely tight to request an extension. TKT had twice previously requested extensions for submitting its questionnaire re-

sponse during this investigation, the first time on August 25, 2020, six days before the actual due date, and then later on September 9, 2020, one full day before the extended due date. In both instances, TKT cited difficulties in assembling its response due to personnel issues and Covid-19, and Commerce was able to accommodate TKT's requests by providing additional time. With respect to the latter request, while Commerce provided an extension on the same day as the request, we note that the request was made early in the morning, not one hour prior to the close of business.

*Id.* at 2. Additionally, Commerce rejected TKT/TKS's characterization of the *Final Rule* "as a pre-COVID-19 relic." *Id.* Commerce highlighted that "[t]o the extent that Commerce chooses to modify its rules and procedures to accommodate the pandemic, it is capable of doing so." *Id.* (citing, e.g., *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID-19; Extension of Effective Period*, 85 Fed. Reg. 41,363 (July 20, 2020)). However, Commerce did not modify the requirements for an extension of time in the *Final Rule*, nor indicate that those requirements were no longer in effect because of COVID. *Id.*

Commerce re-emphasized many of these same considerations in the *Final Determination*. Commerce specifically noted that Counsel was well aware of the 8:30 am deadline on September 16th as evidenced by the fact that "it began submission of its supplemental questionnaire response at 5:31 am [that morning], and continued filing its submission through 10:10 am ...." *Decision Memorandum* at 15. Commerce stated that despite Plaintiffs' numerous "difficulties," "the fact remains that [TKT/TKS] was represented by experienced counsel, and Commerce had already granted multiple extensions as a result of these issues." *Id.* at 16. Commerce explained that TKT/TKS made "the minimum effort to ensure that Commerce had notice of [Counsel's] ongoing computer/technical issues," highlighting that Counsel "did not attempt to contact either the official in charge of the investigation or the ACCESS help desk before the close of business" on September 15th. *Id.* at 16–17. Commerce also explained that if "difficulties" prevented an electronic filing by the deadline—which may have been the situation in this proceeding—Plaintiffs were required, pursuant to the instructions in the Initial Questionnaire, to contact Commerce officials and "submit a full written explanation of the reasons {the recipient is} unable to file the document electronically." *Id.* at 17. The inference here is that Plaintiffs' 5-line barebones ex-

tension request, *see supra* at fn. 8, did not satisfy the requirement for “a full written explanation.”

As to “missing” parts of Plaintiffs’ exhibits, Commerce clarified that “the absence of portions of the BPI submission only supplemented the fact that the submission was not filed in its entirety prior to the stated 5:00 p.m. deadline or the 8:30 a.m. deadline provided for in the *Final Rule*.” *Decision Memorandum* at 21. As Commerce explained:

To be clear, our highlighting of [TKT/TKS’s] deficient response had as much to do with the untimeliness of the accompanying public version than any documents missing from the BPI version of the submission. Moreover, in the *Preliminary Determination*, we did not rely on [TKT/TKS’s] failure to provide a full version of the submission as a reason for its rejection; in fact, we did not reference it at all. We stated only that “[TKT/TKS’s] failure to provide the requested information in a timely manner means that the necessary information is not available on the record, and [TKT/TKS] has significantly impede this proceeding.’

*Id.*

### C. Application of the Final Rule

TKT/TKS contend that its submission was timely despite completing the electronic submission at 10:11 am, one hour and 41 minutes after the rollover 8:30 am deadline. Pls.’ Br. at 7–25. Plaintiffs argue that, because the extension request was filed prior to the 5:00 pm deadline on September 15th, the request was timely under the *Final Rule*, and as a consequence, Commerce was required to accept the response, even though not submitted in its entirety until after the passage of the 8:30 am deadline on September 16th. *See* Pls.’ Br. at 4–9. In particular, Plaintiffs maintain that “Commerce should have considered and accepted [Plaintiffs’ supplemental] questionnaire response” because TKT/TKS “filed the extension request *before* the deadline and then filed the response before the [end of the] requested” deadline of 5:00 pm on September 16th. *Id.* at 15.

The timeliness of TKT/TKS’s extension request does not dictate Commerce’s decision on it. The *Final Rule* makes clear that:

Parties should be aware that the likelihood of the Department granting an extension will decrease the closer the extension request is filed to the applicable time limit because the Department must have time to consider the extension request and decide on its disposition. Parties should not assume that they will receive an extension of a time limit if they have not received

a response from the Department. For submissions that are due at 5:00 p.m., if the Department is not able to notify the party requesting the extension of the disposition of the request by 5:00 p.m., then the submission would be due by the opening of business (8:30 a.m.) on the next work day.

*Final Rule*, 78 Fed. Reg. at 57,792.

TKT/TKS nevertheless argue that one of the purposes behind the *Final Rule* supports its position, namely that “Commerce will not adopt rules that are ‘inflexible to permit’ Commerce ‘to effectively and fairly administer the AD and CVD laws.’” Pls.’ Br. at 8 (quoting *Modification of Regulation Regarding the Extension of Time Limits*, 78 Fed. Reg. 3,367, 3,370 (Jan. 16, 2013)). Plaintiffs misapprehend Commerce’s rationale for the *Final Rule*. As Commerce explained, the objective of the modification was “to clarify” that parties may request an extension of time before the expiration of any time limit provided for in Part 351, not just the time limits for submissions made under 19 C.F.R. § 351.301. 78 Fed. Reg. at 3,368; 78 Fed. Reg. at 57,791. It also sets forth the “specific circumstances under which [Commerce] will consider an untimely-filed extension request.” 78 Fed. Reg. at 3,368; 78 Fed. Reg. at 57,791. Commerce further explained that it was making the modification to address last-minute extension requests that “often resulted in confusion among parties, difficulties in [Commerce’s] organization of its work, and undue expenditures of ...resources, which impede ... [Commerce’s] ability to conduct AD and CVD proceedings in a timely and orderly manner.” 78 Fed. Reg. at 57,791. The language relied upon by TKT/TKS does not accurately characterize those objectives.<sup>10</sup>

TKT/TKS had ample notice of the consequences of failing to timely file. The Initial Questionnaire issued to TKT/TKS clearly stated that “Commerce will not accept any requested information submitted after the established deadlines.” See Commerce’s Letter, “Countervailing Duty Investigation of Silicon Metal from the Republic of Kazakhstan: Supplemental Questionnaire,” PR 33 at 1; Commerce’s Letter, “Investigation of Silicon Metal from the Republic of Kazakhstan: Countervailing Duty Questionnaire,” PR 27 at 3. The *Final Rule* also put TKT/TKS and Counsel on notice of the decreasing likelihood of receiving an extension of time the closer the extension request was to

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<sup>10</sup> It appears that Plaintiffs have taken the quoted material out of context. That material is found in a section of the initial Federal Register notice entitled *Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize any Significant Economic Impact of the Proposed Rule on Small Entities*, and reflects Commerce’s rejection of an alternative proposal regarding untimely extension requests in favor of the language ultimately adopted in the *Final Rule*.

the deadline. See *Final Rule*, 78 Fed. Reg. at 57,792 (“Parties should not assume that they will receive an extension of a time limit if they have not received a response from the Department.”). In the absence of a response from Commerce, Counsel knew or should have known that it had an “automatic extension” until 8:30 am on the next work day in accordance with the *Final Rule*. See *id.*

At the core of the parties’ dispute are differing interpretations of *Dongtai Peak Honey Indus. v. United States*, 777 F.3d 1343 (Fed. Cir. 2015) (“*Dongtai Peak*”), which involved an untimely extension request along with the recitation of technical difficulties and the fact that respondent’s counsel represented an overseas client. *Dongtai Peak*, 777 F.3d at 1351–52. The main question there was what prevented the respondent from filing an extension request earlier. *Id.* (emphasizing that “all of the causes of delay noted in the April 19 Letter were known to Appellant prior to the April 17th deadline, and did not prevent the company from filing an extension request before that date”).

Here, similarly, it is unclear why Plaintiffs did not file an extension request earlier. Despite receiving the completed response from Plaintiffs at 10:58 am on September 15th (roughly six hours before the 5:00 pm deadline), Counsel nevertheless did not request an extension of time, concluding instead that it would be possible to complete submission of the response to Commerce by the 5:00 pm deadline. See *Decision Memorandum* at 16, 19 (“Nonetheless, on the final due date for the questionnaire response, TKS/TKT failed to submit a similarly-early additional extension request, concluding on its own that just over six hours was enough time for its counsel to receive and submit the documents via ACCESS.”). While Counsel emphasized difficulties in communicating with Plaintiffs, noting “the inexperience of [Plaintiffs]’ personnel in responding to such questionnaires, and issues related to COVID-19,” none of that excused TKT/TKS from making a timely filing of Plaintiffs’ response to the initial supplemental questionnaire. As Commerce noted, “these factors did not prevent TKS/TKT from filing previous additional extension requests early enough for Commerce to respond.” *Decision Memorandum* at 19. Commerce concluded that, given the circumstances in the underlying proceeding, the decision by Counsel to attempt to file Plaintiffs’ response in its entirety without earlier requesting an additional extension of time constituted an unwise gamble that did not justify granting the subsequent last-minute request. *Id.*

TKT/TKS contend that Commerce’s rejection of Plaintiffs’ Response was an abuse of discretion akin to that found in *Artisan Mfg. Corp. v. United States*, 38 CIT \_\_\_, 978 F. Supp. 2d 1334 (2014) (holding that

Commerce abused discretion in rejecting questionnaire response filing submitted less than 24 hours after deadline where “[s]uch a brief period could not have delayed the investigation in any meaningful way”). See Pls.’ Br. at 20–22. Commerce found TKT/TKS’s reliance on *Artisan* to be misplaced, emphasizing that *Artisan* predated both the *Final Rule*, which specifically clarifies Commerce’s policy regarding extension requests, as well as guidance from the U.S. Court of Appeals for the Federal Circuit in *Dongtai Peak*. See *Decision Memorandum* at 18–21.

TKT/TKS also argue that Commerce “made no effort to meet its statutory mandate to calculate accurately the subsidy margin.” See Pls.’ Br. at 9; *id.* at 19–20 (maintaining that Commerce failed to balance the interests of “accuracy and fairness” against the “interest in finality”). Defendant argues to the contrary that Commerce did not abuse its discretion in prioritizing the need for finality over Commerce’s obligation to determine the most accurate CVD margin. See Def.’s Resp. at 13 (citing *Bebitz Flanges Works Private Ltd. v. United States*, 44 CIT \_\_\_, \_\_\_, 433 F. Supp. 3d 1297, 1305 (2020) (“*Bebitz CVD*”). In *Bebitz CVD*, the respondent filed a fourth extension request 20 minutes before the 5:00 pm deadline. See 44 CIT at \_\_\_, 433 F. Supp. 3d at 1302. Commerce did not respond by 5:00 pm, so the filing deadline automatically rolled over to 8:30 am the next work day. *Id.* The *Bebitz CVD* plaintiff-respondent missed the 8:30 am deadline the following day and instead filed its response at 10:24 am. See *id.* The *Bebitz CVD* court was not persuaded that Commerce unreasonably denied the extension request and that *Bebitz*’s untimely filing must be accepted, emphasizing that it is not for the respondent “to establish Commerce’s deadlines or dictate to Commerce whether and when Commerce actually needs the requested information.” *Id.* 44 CIT at \_\_\_, 433 F. Supp. 3d at 1305 (citing *Dongtai Peak*, 777 F.3d at 1352). The court explained that the applicable regulation, § 351.302(b), provides Commerce with discretion on “whether to grant or deny an extension request,” and that the plaintiff-respondent failed to demonstrate that Commerce abused its discretion. See *id.* 44 CIT at \_\_\_, 433 F. Supp. 2d at 1305–06. The circumstances here are parallel to those in *Bebitz CVD*, and the court sees no reason to differ in the outcome, particularly in light of the multiple extensions already granted to TKT/TKS.<sup>11</sup>

A court “cannot set aside application of a proper administrative procedure because it believes that properly excluded evidence would

<sup>11</sup> The court notes that Counsel here also represented plaintiff-respondent in *Bebitz CVD*.

yield a more accurate result if the evidence were considered.” *PSC VSMPO*, 688 F.3d at 761. The Statement of Administrative Action (“SAA”) accompanying the Uruguay Round Agreements Act explains that the purpose of the adverse facts available provision is “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” SAA, H.R. Doc. No. 103–316, 870, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199 (1994). Congress “intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.” *Flli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). Commerce reasonably determined that, under the facts of this case, Plaintiffs failed to act to the best of their ability and that the use of facts available with an adverse inference was warranted.

The record demonstrates that TKT/TKS did not put forth a maximum effort to provide Commerce with the requested information by the deadline, that Plaintiffs did not follow instructions in the Initial Questionnaire to contact Commerce officials in case of difficulty filing a submission, nor did Plaintiffs file a response by 8:30 am the following work day pursuant to the *Final Rule*. Counsel’s explanation here is vague and conclusory.<sup>12</sup> Counsel submitted no affidavits from its staff or Plaintiffs detailing the technical or other difficulties experienced or the efforts undertaken in “preparing” TKT/TKS’s documents for filing with ACCESS or attempts to reach Commerce.

The court agrees with Commerce that Plaintiffs’ reliance on *Artisan* is misplaced. Plaintiffs offer little to support their position, other than asserting that *Dongtai Peak* and *Bebitz CVD* run contrary to Commerce’s determination. Given that Plaintiffs fail to develop how Commerce abused its discretion here, *see* Pls.’ Reply at 5, the court finds that Plaintiffs’ argument on this point is meritless. Accordingly, the court cannot agree with Plaintiffs that Commerce’s decisions to deny the September 15th extension request and reject Plaintiffs’ Response constituted an abuse of discretion.

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<sup>12</sup> *See, e.g.*, TKT/TKS’s EOT Request (“They have worked flat out to get this done. We have now received full response but are some technical/computer issues to resolve to file it. The prior extension requests indicate the need for time to answer the questionnaire.”); TKT/TKS’s Comments on Filing Issues (“as to our September 15, 2017 extension request to answer the subsidy questionnaire (which we did in three parts), attached illustrates technical filing issues that we were facing as to the huge filing and continuing to deal with.”) TKT Request to Terminate Investigation, PR 240 (Oct. 2, 2020) (“Petitioner claims, loudly made, consumed many, many multiples of the 1.5 hours of all concerned in the TKT questionnaire response process.”); Request for Reconsideration.



### D. Due Process Claim

Plaintiffs also argue that, under *Dongtai Peak*, “TKT’s due process rights were violated by Commerce rejecting TKT’s extension request for doing exactly as Commerce told TKT to do.” Pls.’ Br. at 16 (emphasizing that “(a) TKT filed its extension request before the deadline and in writing (in ACCESS), doing exactly as Commerce instructed; and (b) Commerce had not informed TKT to do otherwise than exactly what TKT did.”). The court does not agree. The Court of Appeals held that “Commerce’s rejection of untimely-filed factual information does not violate a respondent’s due process rights when the respondent had notice of the deadline and an opportunity to reply.” *Dongtai Peak*, 777 F.3d at 1353; *see also PSC VSMPO–Avisma Corp. v. United States*, 688 F.3d 751, 761–62 (Fed. Cir. 2012) (respondent had opportunity to put forth evidence supporting proposed accounting methodology but failed to do so, and therefore respondent was not deprived of due process). TKT/TKS knew the deadline, and that the deadline was previously extended—not once, but three times—and failed to respond accordingly. *See Decision Memorandum* at 19 (“As the CAFC noted in *Dongtai Peak* with respect to the need for fairness and accuracy, Commerce’s rejection of an untimely-filed questionnaire response does not violate any due process rights of a respondent such as TKS/TKT, because the respondent had notice of the deadline and the opportunity to respond to the Initial Questionnaire in a timely manner, or file an earlier request for an extension. The Initial Questionnaire emphasized the importance of submitting the response in a timely manner and highlighted that the consequences for failing to do so might result in the application of AFA. As such, TKS/TKT was afforded notice regarding the consequences of its decisions.” (footnotes omitted)).

### E. Time to Complete Investigation

TKT/TKS nonetheless contends that its extension request provided sufficient time for Commerce to recognize that a filing was made, consider the request through proper channels, and draft, file, and put on the record a disposition prior to 5:00 pm. Pls.’ Br. at 15–16, 22–25. Plaintiffs specifically argue that granting counsel’s one-day extension request would not have hindered Commerce’s investigation because there was still some time before Commerce’s next deadline. *Id.* at 9–10, 18. Additionally, Plaintiffs maintain that Commerce “violate[d] its own precedent” because it has, in the past, granted extension requests later than TKT/TKS’s 3:50 pm request. *Id.* Defendant maintains that Commerce does not “automatically” grant extension re-

quests. Def's Resp. at 7 (citing 19 C.F.R. § 351.302(b)). While Commerce has discretion in enforcing time limits, that discretion is not unbounded. *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) ("an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently"); *see also Cerro Flow Prod., LLC v. United States*, 38 CIT \_\_\_, \_\_\_, 2014 WL 3539386 at \*6 (2014) ("Commerce must treat similarly situated parties consistently"). Furthermore, "[s]trict enforcement of time limits and other requirements is neither arbitrary nor an abuse of discretion when Commerce provides a reasoned explanation for its decision." *Maverick Tube Corp. v. United States*, 39 CIT \_\_\_, \_\_\_, 107 F. Supp. 3d 1318, 1331 (2015). Here, Commerce has provided such reasons, and the denial of Plaintiffs' extension request and the rejection of Plaintiffs' incomplete and untimely submission were within Commerce's discretion.

Plaintiffs highlight that Commerce has granted extension of time requests, even certain untimely requests, in numerous circumstances. *See* Pls.' Br. at 22–24 (listing examples of Commerce granting extension of time requests including in *Ripe Olives from Spain*, C-469–818 (Dep't of Commerce Apr. 30, 2020) ("*Ripe Olives*"). Plaintiffs' argument, however, ignores any factual distinctions between those prior proceedings and the underlying investigation. For instance, in *Ripe Olives*, the submitting party had already uploaded most of its submission, experienced technical issues with one attachment, had promptly contacted Commerce personnel about the problem, and, importantly, was able to file before 8:30 am the next work day. *See id.*; *see also Bebitz Flanges Works Private Ltd. v. United States*, 44 CIT \_\_\_, \_\_\_, 433 F. Supp. 3d 1309, 1324 n.6 (2020) (explaining that various cases "in which the court rejected Commerce's use of its discretion in connection with rejecting information from respondents," also cited by Plaintiffs here, were inapposite). Plaintiffs would like the court to conclude that *Ripe Olives* and other prior proceedings where Commerce granted extension of time requests stand for the proposition that because Commerce "can" grant an extension in certain scenarios, it "must" grant them in others, and that the timing of the filing is the only dispositive factor. *See* Pls.' Br. at 22–25. Plaintiffs provide no authority for its position. Accordingly, the court finds Plaintiffs' arguments relying on Commerce's granting of extension requests in other proceedings unpersuasive. In fact, the only conclusion that can be drawn from Commerce's prior determinations is that Commerce has an administrative "practice" to treat extensions on a case-by-case basis.

## F. Conflict-of-Interest Claim

Plaintiffs next challenge Commerce’s determination that a conflict-of-interest claim raised by Petitioners during the underlying proceeding did not interfere with Counsel’s ability to submit Plaintiffs’ response to the First Supplemental Questionnaire via ACCESS. Pls.’ Br. at 26–32. Plaintiffs maintain that Counsel submitted a letter including two decisions of Commerce plus a copy of a transcript before the U.S. International Trade Commission (“ITC”) involving the same petitioners as here in support of its interference argument. *See* TKT/TKS’s Letter Re: Hearings & Decisions, PR 257 (Oct. 28, 2020). Plaintiffs argue that the ITC transcript is evidence of bad faith on the part of Petitioners regarding Counsel’s alleged conflict-of-interest, which claim was meant to distract Plaintiffs from filing a timely response with Commerce. *See* Pls.’ Br. at 26–32.

On September 8th, Petitioners (which included Mississippi Silicon LLC) requested that Commerce disqualify and require the immediate withdrawal of Counsel because of a conflict-of-interest. *See* Request to Disqualify, PR 45 (Sept. 8, 2020). Petitioners alleged that a direct and ongoing conflict-of-interest existed because Counsel had previously represented Mississippi Silicon LLC in a 2017 investigation before the ITC, also involving silicon metal from Kazakhstan. *Id.* Ultimately, Commerce determined that no ongoing conflict-of-interest existed. *See Decision Memorandum* at 27 (citing Disqualification Memorandum, PR 247 (Oct. 6, 2020)).

TKT/TKS argue that Mississippi Silicon’s conflict-of-interest claim lacked “even colorable merit,” and thus, Petitioners “necessarily had some other intent, where the only one possible intent seems to be a litigious one to disrupt TKT’s ability to participate in the questionnaire process.” Pls.’ Br. at 27–29. Plaintiffs argue that Mississippi Silicon’s actions, in raising the conflict-of-interest claim, succeeded in disrupting Counsel’s ability to meet the September 15th deadline. *Id.* at 30–32.

Regardless of the claim by Counsel as to the motive/intent of Petitioners, the issue here is whether substantial evidence on the record supports Commerce’s determination. TKT/TKS placed no information on the record regarding an abuse of process by Petitioners. Indeed, Commerce found “no evidence that petitioner’s allegation of a conflict-of-interest interfered with the respondent’s ability to respond ... in a timely manner.” *Decision Memorandum* at 31. In reaching its determination, Commerce explained that:

TKS/TKT did not reference any additional burden placed upon it by the petitioners’ submission of the previous day, nor any uncertainty regarding the role of counsel vis-à-vis TKS/TKT. Nor

did TKS/TKT claim that the petitioners' submission had any deleterious effect on its ability to timely submit its response to the Initial Questionnaire on the revised due date, September 15, 2020. Further, following Commerce's rejection of TKS/TKT's initial questionnaire response as untimely, TKS/TKT similarly failed to argue that the petitioners interfered in its response preparation process as part of its October 2, 2020, reconsideration request. In that letter, TKS/TKT merely notes that its counsel only received the complete questionnaire response at 10:58 a.m. on the date the submission was due. Thus, the record does not support TKS/TKT's contentions.

*Id.* at 32 (footnotes omitted). Given the record and Commerce's explanation, Plaintiffs' argument lacks merit.

## **G. Application of Adverse Facts Available**

### **1. Framework**

In an investigation or review, “the burden of creating an adequate record lies with interested parties.” *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011). If Commerce determines that “necessary information is not available on the record” or “an interested party or any other person ... withholds information that has been requested” by Commerce, “fails to provide such information by the deadlines ... or in the form and manner requested,” “significantly impedes a proceeding,” or “provides such information but the information cannot be verified,” then Commerce is permitted to use “facts otherwise available” in making its determinations. 19 U.S.C. § 1677e(a); *see* 19 C.F.R. § 351.308 (providing for “[d]eterminations on the basis of the facts available”). The purpose of “facts otherwise available” is to fill “gaps” in the administrative record. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) (“*Nippon Steel II*”).

Additionally, “if an interested party ‘fail[s] to cooperate by not acting to the best of its ability to comply with a request for information,’ then Commerce ‘may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available,’ commonly referred to as AFA.” *Deacero S.A.P.I. de C.V. v. United States*, 996 F.3d 1283, 1295–96 (Fed. Cir. 2021) (quoting 19 U.S.C. § 1677e(b)); *see* 19 C.F.R. § 351.308 (similar).

## 2. Information Gap

Commerce's rejection of Plaintiffs' Response resulted in eliminating from the record the entirety of that response on affiliation. *See supra*. As a result, there was a gap of necessary information in the record of the underlying proceeding. Given the circumstances presented, Commerce found that necessary information was not on the record, and as a consequence, resorted to facts available pursuant to 19 U.S.C. § 1677e. *See Decision Memorandum* at 15–21, 25. Commerce determined that:

TKS/TKT did not put forth the “maximum effort” required of it. TKS/TKT retained and was represented by experienced trade counsel throughout the entirety of this proceeding, and, therefore, had the ability to understand Commerce's requests for information at the time such requests were issued. In addition, it was TKS/TKT's responsibility to provide complete and accurate information to Commerce so that we could analyze and determine the amount of any benefits received under the programs being investigated. The “failure to provide information” in a timely manner lies with TKS/TKT. As the CAFC held in *Maverick Tube*, [857 F.3d 1353, 1360–61 (Fed. Cir. 2017),] it is the responsibility of Commerce, and not the responsibility of a respondent, to analyze and determine if a benefit exists, and if it does, to determine the amount of benefit received. Moreover, given TKS/TKT's retention of experience counsel, TKS/TKT's inability to comply with the instructions in the Initial Questionnaire to contact Commerce officials in case of difficulty filing a submission, to file an extension request early enough to consider it, or to file a complete response by 8:30 a.m. the following business day in accordance with the Final Rule is inexplicable, and evidence of the respondent's failure to act to the best of its ability.

*Id.* at 26–27 (footnote omitted).

## 3. Adverse Inference

Plaintiffs do not challenge Commerce's decision to resort to facts available, only Commerce's decision to use an adverse inference in its selection of facts available. *See* Pls.' Br. at 33–34. TKT/TKS argue that, given the circumstances of this proceeding, an adverse inference may not be drawn from failing to provide a questionnaire response, and that “more is required.” *See* Pls.' Br. at 33 (relying on *Nippon Steel Corp. v. United States*, 34 CIT \_\_\_, \_\_\_, 118 F. Supp. 2d 1366,

1377 (2000) (“*Nippon Steel I*”). The problem for Plaintiffs here is that they seem to misapprehend the applicable precedent regarding facts available. To avoid AFA, interested parties must “do the maximum [they are] able to do.” *Nippon Steel II*, 337 F.3d at 1382. This standard “does not require perfection and recognizes that mistakes sometimes occur,” but “it does not condone inattentiveness, carelessness, or inadequate record keeping.” *Id.* In reversing *Nippon Steel I*, the Court of Appeals noted that:

Compliance with the ‘best of its ability’ standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness [or] carelessness ...

*Nippon Steel II*, 337 F.3d at 1382. The Court also explained that “[w]hile intentional conduct, such as deliberate concealment or inaccurate reporting,” may show “a failure to cooperate, the statute does not contain an intent element.” *Id.* at 1383.

Plaintiffs also argue that Commerce should not “impose adverse inferences on a respondent company for the actions of its government.” Pls.’ Br. at 34 (citing *Clearon Corp. v. United States*, 44 CIT \_\_\_, \_\_\_, 474 F. Supp. 3d 1339, 1343–44 (2020); *Guizhou Tyre Co. v. United States*, 43 CIT \_\_\_, \_\_\_, 415 F. Supp. 3d 1402, 1403 (2019)). Again, TKT/TKS’s reliance on these decisions is misplaced. In those matters, it was the respective governmental entity that did not cooperate or withheld requested information, not the private party respondents. The non-cooperation in both cases complicated the examination of the particular subsidy program in issue, one that was outside the purview of the underlying investigation. Furthermore, the focus of those actions was on indicia in the record that the cooperating respondents did not use the program, as well as Commerce’s inadequate explanation of why it could not verify that fact despite the foreign government’s failure to provide the requested information. *See Clearon*, 44 CIT at \_\_\_, 474 F. Supp. 3d at 1349–54; *Guizhou Tyre*, 43 CIT at \_\_\_, 415 F. Supp. 3d at 1403–05.

Here, it was the private party respondent, not the government, that failed to provide necessary information “by the deadlines ... or in the form and manner requested,” 19 U.S.C. § 1677e(a). Commerce explained that its CVD analysis requires certain information, part from the foreign government relating to the contribution and specificity aspects of that analysis, and part from the private party respondents that produce and/or export the goods in question, including whether

a benefit was received. *See Decision Memorandum* at 46. That information was not filed in its entirety by Plaintiffs. Accordingly, the court cannot agree with Plaintiffs that Commerce improperly “impose[d] adverse inferences on a respondent company for the actions of its government.” *See Pls.’ Br.* at 34.

Plaintiffs also argue since there is “only one Kazakh silicon metal producer” that fact somehow implies that an adverse inference cannot be applied. *See Pls.’ Br.* at 34. TKT/TKS provides no authority for this proposition; nevertheless, Plaintiffs suggest that the imposition of AFA on TKT/TKS collaterally affects the Government of Kazakhstan’s willingness to cooperate in the future because the Government of Kazakhstan has no incentive to participate if the end result is AFA regardless of its cooperation. *Pls.’ Reply* at 7–8. That policy argument fails to demonstrate how Commerce’s determination was unsupported by substantial evidence. Therefore, Commerce’s determination to apply adverse inferences was reasonable.

### III. Conclusion

For the above reasons, TKT/TKS’s motion for judgment on the agency record is denied. Judgment will be entered accordingly.

Dated: July 14, 2022

New York, New York

*/s/ Leo M. Gordon*  
JUDGE LEO M. GORDON

## Slip Op. 22–83

UNIVERSAL TUBE AND PLASTIC INDUSTRIES, LTD., THL TUBE AND PIPE INDUSTRIES LLC, AND KHK SCAFFOLDING AND FRAMEWORK LLC, Plaintiffs, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge  
Court No. 20–03944

[Remanding to the issuing agency a determination concluding an administrative review of an antidumping duty order on certain welded steel pipe products from the United Arab Emirates]

Dated: July 15, 2022

*Robert G. Gosselink*, Trade Pacific PLLC, of Washington, D.C., for plaintiffs Universal Tube and Plastic Industries, Ltd., THL Tube and Pipe Industries LLC, and KHK Scaffolding and Framework LLC. With him on the brief was *Jonathan M. Freed*.

*Robert R. Kiepora*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant United States. With him on the brief were *Brian M. Boynton*, Deputy Principal Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

*Roger B. Schagrin*, Schagrin Associates, of Washington, D.C., for defendant-intervenor Wheatland Tube Company. With him on the brief were *Christopher T. Cloutier* and *Michelle R. Avrutin*.

## OPINION AND ORDER

### Stanceu, Judge:

In this action brought under section 516A of the Tariff Act of 1930, *as amended* (the “Tariff Act”), 19 U.S.C. § 1516a,<sup>1</sup> plaintiffs Universal Tube and Plastic Industries, Ltd., THL Tube and Pipe Industries LLC, and KHK Scaffolding and Framework LLC (collectively, the “Universal Producers”) contest a final determination the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) issued to conclude the second administrative review of an antidumping duty order on imports of circular welded carbon-quality steel pipe from the United Arab Emirates (“CWP” or the “subject merchandise”).

Before the court is the motion of the Universal Producers for judgment on the agency record, brought under USCIT Rule 56.2. Plaintiffs claim that Commerce, in calculating a weighted average dumping margin for their exports of subject merchandise, unlawfully refused to make a “level-of-trade” (“LOT”) adjustment when compar-

<sup>1</sup> All citations to the United States Code herein are to the 2018 edition and all citations to the Code of Federal Regulations herein are to the 2020 edition.



ing the sales of the subject merchandise in the United States to sales in the home market of the United Arab Emirates (“U.A.E.”). Opposing plaintiffs’ motion are defendant United States and defendant-intervenor Wheatland Tube Company.

Ruling that the Department’s decision to deny the Universal Producers’ request for a level-of-trade adjustment was based on an analysis that was unsatisfactory when viewed according to the statutory criteria and the record evidence on the whole, the court grants plaintiffs’ motion and remands the contested decision to Commerce for reconsideration.

## I. BACKGROUND

### A. The Contested Agency Determination

The contested administrative determination (the “Final Results”) was published as *Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Final Results of Antidumping Duty Administrative Review; 2017–2018*, 85 Fed. Reg. 77,159 (Int’l Trade Admin. Dec. 1, 2020) (“*Final Results*”). The Final Results incorporate by reference a “Final Issues and Decision Memorandum” containing explanatory discussion. *Issues and Decision Memorandum for the Final Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates* (Int’l Trade Admin. Nov. 23, 2020) (P.R. Doc. 223) (“*Final I&D Mem.*”).<sup>2</sup> As subsequently amended to correct a ministerial error, the contested decision culminated in a weighted average dumping margin of 3.63% for the subject merchandise produced and exported by the Universal Producers. *Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Amended Final Results of Antidumping Duty Administrative Review; 2017–2018*, 86 Fed. Reg. 289, 289 (Int’l Trade Admin. Jan. 5, 2021) (“*Amended Final Results*”).

### B. The Parties

Universal Tube and Plastic Industries, Ltd., THL Tube and Pipe Industries LLC, and KHK Scaffolding and Framework LLC are producers of the subject merchandise in the United Arab Emirates. In a decision not contested in this litigation, Commerce treated these three affiliated producers as a single entity for purposes of the review. Compl. ¶ 3 (Dec. 31, 2020), ECF No. 6. Defendant is the United States. Defendant-intervenor Wheatland Tube Company is a domes-

<sup>2</sup> All citations to documents from the administrative record are to public documents. These documents are cited as “P.R. Doc. \_\_\_.”

tic producer of circular welded carbon-quality steel pipe. Consent Mot. to Intervene as Def.-Intervenor 2 (Jan. 29, 2021), ECF No. 13.

### C. Proceedings Before Commerce

Commerce issued the antidumping duty order (the “Order”) in 2016. *Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman, Pakistan, and the United Arab Emirates: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Orders*, 81 Fed. Reg. 91,906 (Int’l Trade Admin. Dec. 19, 2016) (“Order”).<sup>3</sup> Commerce initiated the second periodic administrative review of the Order in 2019, covering entries made during the period of December 1, 2017 to November 30, 2018 (the “period of review” or “POR”). *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 9,297, 9,303 (Int’l Trade Admin. Mar. 14, 2019). Commerce chose the Universal Producers as one of two “mandatory” respondents, i.e., respondents for which Commerce intended to conduct an individual examination of sales and determine individual dumping margins. *Respondent Selection for the Antidumping Duty Review of Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates 1* (Apr. 15, 2019) (P.R. Doc. 37).

Commerce published preliminary results for the second review on February 7, 2020 (the “Preliminary Results”), in which Commerce preliminarily calculated a dumping margin of 9.11% for subject merchandise produced and exported by the Universal Producers. *Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018*, 85 Fed. Reg. 7,279, 7,280 (Int’l Trade Admin.) (“Preliminary Results”). Incorporated by reference in the Preliminary Results is an explanatory document, the “Preliminary Decision Memorandum.” *Decision Memorandum for the Preliminary Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates* (Int’l Trade Admin. Jan. 31, 2020) (P.R. Doc. 160) (“Prelim. Decision Mem.”). Commerce preliminarily found that Universal Producers had made U.S. and home market sales at only one level of trade during the period of review and, accordingly, preliminarily

<sup>3</sup> The antidumping duty order pertained to “welded carbon-quality steel pipes and tube, of circular cross-section, with an outside diameter (O.D.) not more than nominal 16 inches (406.4 mm), regardless of wall thickness, surface finish (e.g., black, galvanized, or painted), end finish (plain end, beveled end, grooved, threaded, or threaded and coupled), or industry specification.” *Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman, Pakistan, and the United Arab Emirates: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Orders*, 81 Fed. Reg. 91,906, 91,906 (Int’l Trade Admin. Dec. 19, 2016).

determined that a level-of-trade adjustment was not warranted. *Id.* at 29.

In the Final Results, Commerce assigned the subject merchandise produced and exported by the Universal Producers a weighted average dumping margin of 3.79%. *Final Results*, 85 Fed. Reg. at 77,160. In calculating this margin, Commerce again determined that the U.S. and home market sales occurred at a single level of trade and, accordingly, rejected the request for a level-of-trade adjustment. *Final I&D Mem.* at 18. To correct ministerial errors, Commerce issued amended final results that reduced this dumping margin from 3.79% to 3.63%. *Amended Final Results*, 86 Fed. Reg. at 289.

#### **D. Proceedings Before the Court**

Plaintiffs brought this action on December 31, 2020. Summons, ECF No. 1; Compl., ECF No. 6. On May 10, 2021, plaintiffs filed the instant motion for judgment on the agency record and accompanying brief. Pls.' Rule 56.2 Mot. for J. upon the Agency R., ECF Nos. 22 (conf.), 23 (public) ("Pls.' Mot.").

On July 9, 2021, Wheatland Tube filed its response in opposition to plaintiffs' motion. Resp. in Opp'n to Pls.' Rule 56.2 Mot. for J. on the Agency R. of Def.-Intervenor Wheatland Tube Company, ECF No. 27 ("Wheatland Tube's Resp.").

Defendant submitted its response in opposition on July 16, 2021. Def.'s Resp. to Pls.' Mot. for J. upon the Agency R., ECF No. 28 ("Def.'s Resp.").

On August 27, 2021, plaintiffs filed their reply brief. Reply Br. of Pls. Universal Tube and Plastic Industries, Ltd., THL Tube and Pipe Industries LLC, and KHK Scaffolding and Framework LLC, ECF No. 31.

Plaintiffs filed an unopposed motion for oral argument on their Rule 56.2 motion on September 10, 2021. Pls.' Unopposed Mot. for Oral Arg., ECF No. 46.

On April 25, 2022, the court requested that counsel for parties respond to certain questions arising from the court's review of the administrative record of this action and the parties' submissions on plaintiffs' 56.2 motion. Letter, ECF No. 50. The parties responded to the request on May 25, 2022. Def.'s Resp. to the Court's Questions, ECF Nos. 51 (public), 52 (conf.); Resp. to the Court's Letter, ECF No. 53; Resp. of Plaintiffs, Universal Tube and Plastic Industries, Ltd., et al., to the Court's April 25, 2022, Questions to the Parties, ECF Nos. 54 (conf.), 55 (public).

## II. DISCUSSION

### A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an administrative review of an antidumping duty order.

In reviewing a final determination, the court “shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

### B. The “Fair Comparison” Requirement in the Tariff Act and Adjustments to Normal Value for “Level of Trade” and “Constructed Export Price Offset”

Section 751(a)(1) of the Tariff Act requires Commerce, upon a proper request, to conduct a periodic administrative review at least once during each 12-month period beginning on the anniversary of the date of publication of an antidumping duty order. 19 U.S.C. § 1675(a)(1). In a review, Commerce is directed to determine a dumping margin for “each entry” of the subject merchandise, which is calculated by making a comparison between the “normal value” of the subject merchandise and the “U.S. price” (i.e., the “export price” (“EP”) or “constructed export price” (“CEP”)) of the subject merchandise. *Id.* § 1675(a)(2)(A)(i), (ii).

Fundamental to antidumping duty determinations is the obligation of Commerce, imposed by section 773(a) of the Tariff Act, to make a “fair comparison” between the U.S. price, i.e., the export price or constructed export price (as determined according to section 772, 19 U.S.C. § 1677a) and normal value. 19 U.S.C. § 1677b(a) (“In determining . . . whether subject merchandise is being, or is likely to be, sold at less than fair value, a *fair comparison* shall be made between the export price or constructed export price and normal value.”) (emphasis added). Normal value, specifically, is determined according to statutory procedures set forth in section 773 of the Tariff Act, 19 U.S.C. § 1677b, that are conducted “[i]n order to achieve a fair comparison with the export price or constructed export price.” *Id.*

In the ordinary method, normal value is determined according to the adjusted sale price of the foreign like product in the “comparison market,” which commonly is the home market of the producer or exporter (in this case, the United Arab Emirates). In fulfilling its obligation to arrive at an accurate dumping margin, Commerce must make such adjustments to the starting prices in the sales used to determine normal value as are necessary to achieve a fair comparison with the adjusted prices in the U.S. sales. To this end, Commerce is to determine normal value beginning with the price (often referred to as the “starting price”) “at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, *to the extent practicable, at the same level of trade* as the export price or constructed export price.” *Id.* § 1677b(a)(1)(B)(i) (emphasis added).

In some instances, it is not “practicable” to determine normal value according to a starting price in a home market sale of the foreign like product that was made at the same level of trade as the U.S. sale of the subject merchandise (whether an “export price” or “constructed export price” sale). When such a situation occurs, Commerce, as indicated by the statutory phrase “to the extent practicable,” *id.*, is not necessarily precluded from using the home market sales price as the starting price for determining normal value. For that purpose, the statute provides procedures in 19 U.S.C. § 1677b(a)(7), under which Commerce determines whether the starting price for determining normal value must be adjusted so that the calculation of normal value properly will account for any difference in the level of trade between the U.S. price, and the starting price for determining normal value, that would affect price comparability. Among the mechanisms provided are a “level of trade” adjustment made pursuant to paragraph (A), and a “constructed export price offset” made according to paragraph (B), of § 1677b(a)(7). Under paragraph (A), Commerce is directed to adjust the starting price:

to make due allowance for any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph 1(B) [i.e., the starting price] (other than a difference for which allowance is otherwise made under this section) that is shown to be wholly or partly due to a difference in level of trade between the export price or constructed export price and normal value, if the difference in level of trade—

(i) involves the performance of different selling activities, and

- (ii) is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined.

In a case described in the preceding sentence, the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined.

19 U.S.C. § 1677b(a)(7)(A). Paragraph (B) applies where U.S. price was determined according to the constructed export price method of 19 U.S.C. § 1677a(b) (as occurred with respect to the Universal Producers in the second review) and data are not available to make an appropriate level-of-trade adjustment under paragraph (A):

When normal value is established at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the constructed export price, but the data available do not provide an appropriate basis to determine under subparagraph (A)(ii) a level of trade adjustment, normal value shall be reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 1677a(d)(1)(D) of this title.

*Id.* § 1677b(a)(7)(B).

To summarize, Commerce, when calculating normal value, must make a “level-of-trade” adjustment when: (1) the starting price in the sale of the foreign like product in the comparison market was not made at the same level of trade as the export price or constructed export price of the subject merchandise; (2) an allowance for the difference in level of trade is not otherwise made under § 1677b; (3) the difference in level of trade involves the performance of different selling activities; (4) the difference in level of trade affected the price comparison; and (5) data are available to make an appropriate level-of-trade adjustment in the calculation of normal value.

In paragraph (B) of § 1677b(a)(7), Congress identified a special circumstance that may prevent a fair comparison and specified a remedy. This circumstance arises when U.S. price is determined according to the constructed export price method and the sales of the foreign like product in the comparison market (typically, as here, the home market) are made at “a more advanced stage of distribution

than the level of trade of the constructed export price” and data are not available for calculation of a level-of-trade adjustment. 19 U.S.C. § 1677b(a)(7)(B).

### **C. The U.S. and Home Market Sales of the Universal Producers and their Affiliates**

All reviewed sales of the subject merchandise produced and exported to the United States by the Universal Producers occurred through one of two affiliated resellers in the United States, UTP Pipe USA or Prime Metal Corp. USA. *See Prelim. Decision Mem.* at 28. Commerce, accordingly, determined the U.S. price of all subject merchandise in the review according to the constructed export price method of 19 U.S.C. § 1677a(b). *See id.* at 23. Commerce made adjustments to the reseller’s price (the CEP “starting price”) to arrive at CEP, including the deduction from the starting price of reseller profit and the “selling expenses associated with economic activities occurring in the United States, which include direct selling expenses (imputed credit expenses) and indirect selling expenses (inventory carrying costs and other indirect selling expenses).” *Id.* at 24 (citing 19 U.S.C. § 1677a(d)(1)) & 26 (“For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act [19 U.S.C. § 1677a(d)] (citing *Micron Technologies, Inc. v. United States*, 243 F.3d 1301, 1314–16) (Fed. Cir. 2001)).

The removal of the reseller profit and selling expenses from the CEP starting price would appear to have resulted in a reduction in the level of trade. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,370–71 (Int’l Trade Admin. May 19, 1997) (“The adjustments under subsection (d) [19 U.S.C. § 1677a(d), additional adjustments to constructed export price] normally change the LOT, so that the Department must determine the LOT of CEP sales after any deductions under subsection (d).”). Achieving a “fair comparison” of the downwardly-adjusted prices in the CEP sales with prices in home market sales required Commerce to determine whether the home market sales, or some portion of those sales, occurred at a different level of trade than did these CEP sales.

Some of the reviewed sales of the foreign like product in the United Arab Emirates were made directly by the Universal Producers to unaffiliated customers (to which the Universal Producers refer as “Channel 1 sales”), but other reviewed sales (the “Channel 2” sales) were made by resellers affiliated with the Universal Producers (prin-

cipally, DSS Steel LLC (“DSL”) to unaffiliated customers.<sup>4</sup> See *Prelim. Decision Mem.* at 28; see also *Final I&D Mem.* at 14. Commerce used both sets of home market sales in determining normal value. See Def.’s Resp. to Court’s Questions 2 (May 25, 2022), ECF Nos. 51 (public), 52 (conf.). Plaintiffs note that a majority of the U.S. sales (both by volume and by value) Commerce used in determining the margin for the Universal Producers were compared to sales made by affiliated resellers in the home market. Resp. of Pls., Universal Tube and Plastic Industries, Ltd., et al., to the Court’s April 25, 2022, Questions to the Parties 2 (May 25, 2022), ECF Nos. 54 (conf.), 55 (public).

The Tariff Act allows Commerce to use the resale prices in such “indirect sales” as starting prices when determining normal value. 19 U.S.C. § 1677b(a)(5) (“If the foreign like product is sold . . . through an affiliated party, the prices at which the foreign like product is sold . . . by such affiliated party may be used in determining normal value.”). Nevertheless, if using such sales and comparing them to CEP sales in the United States, Commerce ordinarily must make such adjustments to the starting prices in the home market sales used to determine normal value as are necessary to ensure the “fair comparison” required by 19 U.S.C. § 1677b(a). The dispute in this case arose because Commerce, although deciding to use the indirect “Channel 2” sales in determining normal value, performed neither a level-of-trade adjustment under 19 U.S.C. § 1677b(a)(7)(A), nor a constructed export price offset under § 1677b(a)(7)(B), as an adjustment for them.

In the Preliminary Results, Commerce preliminarily determined that all of the Universal Producers’ home market sales of the foreign like product occurred at a single level of trade. *Prelim. Decision Mem.* at 28. Commerce explained that “[n]otwithstanding that Universal reported two channels of distribution in the home market, we find that the differences were not quantitatively sufficient to warrant finding different LOTs in the home market.” *Id.* Commerce also preliminarily found that the Universal Producers’ U.S. sales also occurred at a single level of trade. *Id.* at 29. Commerce proceeded to conclude, preliminarily, that “the selling functions Universal performed for its U.S. and home market sales [did] not differ substantially, such that they meet the regulatory requirement of being ‘made

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<sup>4</sup> DSS Steel LLC (“DSL”) was the home market reseller affiliated with the Universal Producers that made sales to unaffiliated customers during the period of review (“POR”). Other affiliated resellers were involved in home market resales during comparison months adjacent to the POR. *Issues and Decision Memorandum for the Final Results of the 2017–2018 Administrative Review of the Antidumping Duty Order on Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates* 14 (Int’l Trade Admin. Nov. 23, 2020) (P.R. Doc. 223) (“*Final I&D Mem.*”).



at different marketing stages.” *Id.* (citing 19 C.F.R. § 351.412 (“The secretary will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent).”).

From these findings, Commerce preliminarily determined that “Universal’s sales to the United States and home market during the POR were made at the same LOT” and that “neither an LOT adjustment nor a CEP offset is warranted when Universal’s U.S. sales are compared to its home market sales.” *Id.* Commerce reached the same conclusion for the Final Results. *Final I&D Mem.* at 16–18. In short, Commerce determined in the Final Results that all home market sales, including the indirect sales by the affiliated resellers, were made at the same level of trade as the CEP sales.

In the review, the Universal Producers maintained before the agency that the indirect home market sales by the resellers (i.e., the “Channel 2” sales) occurred through a separate channel of distribution that was more remote from the factory and that were associated with more and different selling expenses. Before the court as well, plaintiffs claim that Commerce erred in finding that all home market sales occurred at a single level of trade and that there was no difference in the level of trade between the U.S. and the home market sales. They argue that record data demonstrate two levels of trade in the home market based on more and different selling activities and that the difference in the level of trade affected the comparability with U.S. price.

Because Commerce included the home market sales made by the resellers in its comparisons with the CEP sales in the U.S. market and made no level-of-trade adjustment or constructed export price offset with respect to them, this case presents the general issue of whether the Department’s decision to determine the weighted average dumping margin in this way satisfied the “fair comparison” obligation imposed by the Tariff Act.

In opposing plaintiffs’ motion, defendant and defendant-intervenor maintain that the record evidence supports the Department’s finding of a single level of trade and, therefore, that no level-of-trade adjustment was appropriate in the calculation of the weighted average dumping margin.

The court concludes that the Final Results must be remanded to Commerce for two reasons. First, the Department’s analysis failed to confront the central issue raised by plaintiffs’ claim. Second, Commerce reached certain findings and conclusions without analyzing

certain detracting evidence that the Universal Producers placed on the record of the second review. The court addresses these two shortcomings below.

**D. Commerce Did Not Demonstrate that Its  
Methodology Achieved a “Fair Comparison”  
Between Constructed Export Price and Normal Value**

The analysis Commerce put forth in the Final Issues and Decision Memorandum fails to address the central issue raised by plaintiffs’ claim in this litigation, which is how the Department’s methodology achieved a “fair comparison” between the constructed export price sales of the subject merchandise in the United States and the sales of the foreign like product in the home market. In ensuring that Commerce achieves a fair comparison when calculating a dumping margin, section 773(a)(7)(A) of the Tariff Act requires Commerce to determine, first, whether there exists “a difference in level of trade between the export price or constructed export price and normal value.” 19 U.S.C. § 1677b(a)(7)(A). Commerce reached a conclusory finding in the Preliminary Decision Memorandum that “Universal’s sales to the United States and home market during the POR were made at the same LOT” and that “neither an LOT adjustment nor a CEP offset is warranted when Universal’s U.S. sales are compared to its home market sales.” *Prelim Decision Mem.* at 29. The Final Issues and Decision Memorandum does not abandon this finding from the Preliminary Decision Memorandum, but its analysis devotes no discussion to the comparison of the U.S. sales (which were constructed export price sales) to the sales in the home market. *Final I&D Mem.* at 16–18. Commerce states its ultimate finding entirely in terms of the home market sales, not the comparison of those sales with the U.S. CEP sales. Based on its finding that “[t]he selling functions for the Universal producers and home market affiliated resellers are not sufficiently different nor are the home market affiliated resellers [*sic*] selling functions at a significantly more intense level than those of the Universal producers,” Commerce concluded that “[t]herefore, we continue to find that a LOT adjustment is not warranted.” *Id.* at 18. In short, this analysis fails to address the inquiry Congress directed Commerce to address. See 19 U.S.C. § 1677b(a)(7)(A) (requiring Commerce to determine whether there was “a *difference* in level of trade *between* the . . . *constructed export price* and *normal value*.”) (emphasis added).

As the court has explained, in determining constructed export price, Commerce removed all selling expenses from the CEP starting price except for a limited group of selling expenses, i.e., those that were not incurred in the United States. Congress had a particular

concern that such sales, i.e., CEP sales, when considered for comparison with home market sales that were made at a “more advanced stage of distribution,” 19 U.S.C. § 1677b(a)(7)(B), might not result in a “fair comparison,” *id.* § 1677b(a), absent a level-of-trade adjustment or constructed export price offset made according to § 1677b(a)(7).

In its response to Section A of the Department’s initial questionnaire, the Universal Producers explained that their home market sales occurred through two channels of distribution, with Channel 1 consisting of the direct sales to unrelated customers and Channel 2 consisting of the indirect sales made through their affiliated resellers, which first purchased and stored the merchandise in inventory and then resold the merchandise to unaffiliated customers in the U.A.E. *Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates*; at A-18–A-19, Ex. A-5 (May 22, 2019) (P.R. Docs. 56–62) (“*Section A Resp.*”).

Addressing the home market sales, Commerce found that “the Universal producers and affiliated resellers perform virtually the same selling functions for unaffiliated customers in the home market” and that “the differences in the level of activities performed in each of Universal’s claimed channels are not sufficiently different to warrant a LOT adjustment.” *Final I&D Mem.* at 18. There is no discussion of how a “fair comparison” was achieved by grouping all the home market sales, including the Channel 2 sales, within the same level of trade as the CEP sales of the subject merchandise in the United States.

In its request for additional information, the court asked the parties to address whether home market sales made by the affiliated producers used in determining normal value would “qualify as sales made ‘at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the constructed export price,’ as those words appear in 19 U.S.C. § 1677b(a)(7)(B).” Letter 4 (Apr. 25, 2022), ECF No. 50. Defendant’s response sheds no light on the Department’s implicit finding that the Channel 2 sales were not made at a more advanced stage of distribution than the CEP sales and merely summarizes the Department’s findings in the Preliminary Decision Memorandum and the Final Issues and Decision Memorandum. *See* Def.’s Resp. to Court’s Questions 3–4 (May 25, 2022), ECF Nos. 51 (public). 52 (conf.).

On remand, Commerce must perform the analysis expressly required by 19 U.S.C. § 1677b(a)(7) in light of the “fair comparison” standard the Tariff Act imposes and must address, specifically, the validity of comparing the Channel 2 indirect sales with the CEP sales in the United States without an adjustment made under 19 U.S.C.

§1677b(a)(7). In doing so, Commerce also must include an explanation of whether or not, and why, it considers the Channel 2 sales to have been made at a more advanced stage of distribution than the CEP sales.

### **E. In Reaching Findings and Conclusions, Commerce Did Not Analyze Certain Record Evidence Relevant to the Request for a Level-of-Trade Adjustment**

In ruling upon Universal's request for a level-of-trade adjustment, Commerce reached critical findings and conclusions in its Final Issues and Decision Memorandum but failed to address certain evidence on the record of the second review that detracts from these findings and conclusions.

Commerce found that “[a]ccording to Universal’s selling expense chart, the Universal producers and affiliated resellers perform virtually the same selling functions for unaffiliated customers in the home market” and that “[w]here Universal claims the differences in selling functions are significant, this assertion is not supported by the documentation provided by Universal.” *Final I&D Mem.* at 18. Commerce provided an example to explain this finding: “Universal reported a level ‘6’ for sales promotion and advertising for their affiliated resellers in Channel 2. However, as support, Universal merely stated it annually advertises in the yellow pages and gives gifts to some customers.” *Id.*

Before the court, plaintiffs argue that “while Universal reported a level ‘6’ for sales promotion and advertising for the Universal Affiliated Resellers, Universal did not report *any* promotion or advertising for the Universal Producers,” Pls.’ Mot. 13, that “Universal reported that the Universal Affiliated Resellers performed numerous advertising and other promotional activities” which included, among other things, “running advertisements in the yellow pages, designing advertisements for newspaper supplements, providing small promotional gifts . . . to customers throughout the year, and giving larger gifts to specific customers at particular times,” and that the Universal Producers provided documentary support for these examples. *Id.* at 14. Commerce did not address the record evidence that the Universal Producers, unlike the resellers, did not engage in any sales promotion and advertising activities. Moreover, Commerce itself acknowledged that the Universal Producers informed Commerce during the review that the principal Channel 2 reseller, DSL, frequently performed sales activities that they did not perform, including maintaining inventory for a wide range of products, making small-quantity sales, and extensively training sales personnel. *See Final I&D Mem.* at 15. Commerce did not refer to these arguments when reaching its finding

that “the Universal producers and affiliated resellers perform virtually the same selling functions for unaffiliated customers in the home market.” *Id.* at 18.

In addition to the findings discussed above, Commerce also reached conclusions that failed to address record evidence pertaining to the selling activities in the Channel 2 sales it used in determining normal value. As the court has discussed, Commerce calculated normal value using the indirect sales *by* the affiliated resellers to unaffiliated purchasers as well as the direct sales made by the Universal Producers to unaffiliated purchasers. Even though the prices in those indirect sales must be presumed to have included the selling expenses of the resellers to their unaffiliated customers, and even though the prices in the CEP sales were adjusted to remove U.S. selling expenses and reseller profit, Commerce decided against a level-of-trade adjustment or CEP offset for its comparison of the prices in the Channel 2 indirect sales and the adjusted prices in the CEP sales in the United States.

After stating that a request for a level-of-trade adjustment must be supported by quantitative evidence, Commerce concluded that “Universal failed to provide sufficient supporting documentation for its claims of the level and frequency of selling functions *it performed* through each channel during the POR” and that “[t]he quantitative analysis Universal does provide is not sufficient for Commerce to find that *Universal* made sales at different levels of trade in the home market.” *Id.* at 17–18 (emphasis added).<sup>5</sup> These conclusions do not capture in full the determination the Tariff Act required Commerce to make based on the record evidence. The issue Commerce was called on to decide was not only whether *Universal* made sales at different levels of trade in the home market. It was essential for Commerce to decide also whether the sales Commerce actually used in determining normal value—i.e., the home market sales, including in particular the home market sales made by the resellers—occurred at a different level of trade than the U.S. CEP sales and whether a level-of-trade adjustment (or CEP offset) was required to achieve a “fair comparison” between CEP and normal value. *See* 19 U.S.C. § 1677b(a)(7)(A) (identifying the comparison relevant to the LOT determination as one that is between “. . . constructed export price and normal value”).

Commerce acknowledged that the Universal Producers argued during the review that “DSL’s indirect selling expense ratio is more than 20 times higher than the Universal producers’ indirect selling ex-

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<sup>5</sup> In using the term “Universal,” Commerce referred to the three Universal Producers, which it treated as a single entity for purposes of the review, not the affiliated resellers. *Final I&D Mem.* at 1.

pense ratio.” *Final I&D Mem.* at 15. In its submissions to Commerce, the Universal Producers provided worksheets containing comparisons of products and selling functions. *Section A Resp.* at A-22, Ex. A-6; *Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Sections A and B Supplemental Questionnaire Responses*, at Supp A-5, Ex. SA-9B (P.R. Doc. 137); *Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Sections A and D Supplemental Questionnaire Response*, at SuppAD-3, Ex. SAD-4 (P.R. Doc. 172) (“*Suppl. Sections A&D Resp.*”). The Universal Producers’ analysis compared the two home market distribution channels with respect to the total selling expenses, the number of invoices per metric ton, the total finished goods warehouse areas, the warehouse expenses per metric ton, the number of invoices with commissions per metric ton, the number of sales staff, the number of sales with discounts, price, or billing adjustments, and other factors. It also compared the average inventory turnover periods for the U.S. and home market sales. *Suppl. Sections A&D Resp.*, Ex. SAD-4.

In their case brief submitted to Commerce during the review, the Universal Producers summarized data submitted in its questionnaire responses, *Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates – Case Brief 10–19* (P.R. Doc. 196) (“*Case Brief*”), explained that each channel of distribution served a different customer category, *id.* at 19–20, and provided a “comparison of the selling prices of CONNUMs sold both through Channel 1 by the Universal producers (UTP, KHK, and TTP) and through Channel 2 by DSL show[ing] that the prices of the Channel 2 sales” were substantially higher than prices of Channel 1. *Id.* at 22, Ex. 2.

Defendant argues that “Universal’s evidence was qualitative rather than quantitative and generally insufficient” and that “the numbers for intensity levels on the selling functions chart are not quantitative.” Def.’s Resp. 16. Similarly, defendant-intervenor maintains that “Commerce gave Universal three opportunities to submit sufficient quantitative evidence to demonstrate its entitlement to a LOT adjustment . . . but it failed to do so.” Wheatland Tube’s Resp. 11. The court does not find these arguments persuasive because they do not address the record evidence on the whole. Also, these arguments fail to confront the problem posed by the Department’s failure to perform an analysis that was satisfactory according to the determination the Tariff Act, in 19 U.S.C. § 1677b(a)(7), required Commerce to make in the circumstance presented by the second review, in which Commerce compared prices in the indirect home market (Channel 2) sales with downward-adjusted prices in the CEP sales in the United States.

### III. CONCLUSION AND ORDER

For the reasons the court has identified, the court concludes that the Final Results did not include a satisfactory analysis of the issue presented by the Universal Producers' request for a level-of-trade adjustment. On remand, Commerce must perform, under the "fair comparison" standard, a new analysis that expressly addresses the inquiry required by 19 U.S.C. § 1677b(a)(7) and reaches findings and conclusions supported by substantial evidence based on the record as a whole.

Therefore, upon consideration of all papers and proceedings herein, and upon due deliberation, it is hereby

**ORDERED** that plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record (May 10, 2021), ECF Nos. 22 (conf.), 23 (public), be, and hereby is, granted; it is further

**ORDERED** that Commerce, within 90 days from the date of issuance of this Opinion and Order, shall submit a redetermination upon remand ("Remand Redetermination") that complies with this Opinion and Order; it is further

**ORDERED** that plaintiffs and defendant-intervenor shall have 30 days from the filing of the Remand Redetermination in which to submit comments to the court; it is further

**ORDERED** that should plaintiffs or defendant-intervenor submit comments, defendant shall have 15 days from the date of filing of the last comment to submit a response; and it is further

**ORDERED** that plaintiffs' Unopposed Motion for Oral Argument (Sept. 10, 2021), ECF No. 46, be, and hereby is, denied.

Dated: July 15, 2022

New York, New York

*/s/ Timothy C. Stanceu*

TIMOTHY C. STANCEU, JUDGE

## Slip Op. 22–84

PRO-TEAM COIL NAIL ENTERPRISE, INC. AND PT ENTERPRISE INC.,  
Plaintiffs, UNICATCH INDUSTRIAL CO., LTD, TC INTERNATIONAL, INC.,  
HOR LIANG INDUSTRIAL CORP., ROMP COIL NAILS INDUSTRIES INC., AND  
PRIMESOURCE BUILDING PRODUCTS, INC., Consolidated Plaintiffs, and  
S.T.O. INDUSTRIES, INC., Plaintiff-Intervenor, v. UNITED STATES,  
Defendant, and MID CONTINENT STEEL & WIRE, INC., Defendant-  
Intervenor.

Before: Mark A. Barnett, Chief Judge  
Consol. Court No. 18–00027

[Sustaining Commerce’s use of the expected method in its calculation of the non-selected respondents’ rate in this antidumping duty review of certain steel nails from Taiwan]

Dated: July 15, 2022

*Ned H. Marshak*, *Max F. Schutzman*, and *Andrew T. Schutz*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, for Consolidated Plaintiffs Hor Liang Industrial Corp. and Romp Coil Nails Industries Inc.

*Sosun Bae*, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

*Adam H. Gordon* and *Ping Gong*, The Bristol Group PLLC, of Washington, DC, for Defendant-Intervenor Mid Continent Steel & Wire, Inc.

**OPINION****Barnett, Chief Judge:**

This consolidated action is before the court on the U.S. Department of Commerce’s (“Commerce” or “the agency”) third remand results in the first administrative review of the antidumping duty order on certain steel nails from Taiwan. *See Results of [Third] Redetermination Pursuant to Court Remand (“Third Remand Results”)*, ECF No. 127–1; *see generally Certain Steel Nails From Taiwan*, 83 Fed. Reg. 6,163 (Dep’t Commerce Feb. 13, 2018) (final results of antidumping duty admin. review and partial rescission of admin. review; 2015–2016) (“*Final Results*”), ECF No. 20–2, and accompanying



Issues and Decision Mem., A-583–854 (Feb. 6, 2018), ECF No. 20–3.<sup>1</sup> The court has previously issued three opinions resolving substantive issues in this case; familiarity with these opinions is presumed. See *Pro-Team Coil Nail Enter. v. United States* (“*Pro-Team III*”), 45 CIT \_\_\_, 532 F. Supp. 3d 1281 (2021); *Pro-Team Coil Nail Enter. v. United States* (“*Pro-Team II*”), 44 CIT \_\_\_, 483 F. Supp. 3d 1242 (2020); *Pro-Team Coil Nail Enter. v. United States* (“*Pro-Team I*”), 43 CIT \_\_\_, 419 F. Supp. 3d 1319 (2019).

After three remand determinations, the issue remaining before the court is whether Commerce properly determined the antidumping duty rate to be applied to respondents that were not selected for individual examination (i.e., the non-selected respondents). As discussed below, pursuant to these remand determinations, Commerce has assigned rates based on total adverse facts available<sup>2</sup> to two selected respondents, calculated a zero percent margin for a third selected respondent, and calculated the weighted average of these three rates to apply to the non-selected respondents. Some of the non-selected respondents, Hor Liang Industrial Corp. and Romp Coil Nails Industries (together, “Plaintiffs”) challenge that rate as not reasonably reflective of their potential dumping margins and, therefore, not based on substantial evidence. Confidential Consol. Pls.’, Hor Liang Indus. Corp. & Romp Coil Nails Indus. Inc., Cmts. on Redetermination (“Opp’n Cmts.”) at 6–10, ECF No. 129. Defendant United States and Defendant-Intervenor Mid Continent Steel & Wire, Inc. submitted comments urging the court to sustain the rate

<sup>1</sup> The administrative record associated with the Third Remand Results is divided into a Public Administrative Remand Record, ECF No. 128–2, and a Confidential Administrative Remand Record, ECF No. 128–3. Parties submitted joint appendices containing record documents cited in their comments on the Third Remand Results. See Confidential Third Remand J.A. (“RCJA”), ECF No. 136; Public Third Remand J.A. (“RPJA”), ECF No. 137. The court references the confidential version of the relevant record documents, unless otherwise specified. The RCJA and RPJA also contain documents from the administrative record associated with the *Final Results*, which was divided into a Public Administrative Record (“PR”), ECF No. 20–4, and a Confidential Administrative Record (“CR”), ECF No. 20–5. The court also cites to documents from the Confidential Joint Appendix (“CJA”), ECF No. 55, previously submitted to the court in conjunction with the parties’ Rule 56.2 filings.

<sup>2</sup> The phrase “adverse facts available” (or “AFA”) is often used by parties and Commerce to refer to Commerce’s reliance on facts otherwise available with an adverse inference to reach a final determination. In order to rely on AFA, Commerce must first identify why it needs to rely on facts otherwise available, and second, must explain how a party failed to cooperate to the best of its ability so as to warrant the use of an adverse inference when selecting from those facts. See 19 U.S.C. § 1677e(a)–(b). “Total adverse facts available” refers to situations in which Commerce finds that none of a party’s reported information is reliable or useable and, because of that party’s failure to cooperate to the best of its ability, that Commerce must use an adverse inference with respect to all categories of reported information. *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) (citation omitted); see also *Nat’l Nail Corp. v. United States*, 43 CIT \_\_\_, \_\_\_, 390 F. Supp. 3d 1356, 1374 (2019).

calculated in the Third Remand Results. *See generally* Confidential Def.'s Resp. to the [Opp'n Cmts.], ECF No. 134; Def.-Int. Mid Continent Steel & Wire, Inc.'s Cmts. in Support of [Third Remand Results], ECF No. 133.

For the reasons that follow, the court affirms Commerce's determination of the non-selected respondents' rate using the so-called expected method.<sup>3</sup>

## BACKGROUND

In this administrative review, Commerce selected three respondents for individual examination (i.e., the "mandatory respondents"): Pro-Team Coil Nail Enterprise, Inc. ("Pro-Team"); Unicatch Industrial Co., Ltd. ("Unicatch"); and Bonuts Hardware Logistics Co., LLC ("Bonuts"). Third Remand Results at 3. Commerce initially used AFA (the petition rate) to determine the dumping rates for each of the mandatory respondents. *See id.* at 3. Bonuts did not challenge the AFA rate it was assigned. *See Pro-Team I*, 419 F. Supp. 3d at 1323–25. Over the course of this litigation, Commerce continued to use the AFA rate for Unicatch and calculated a dumping margin of zero percent for Pro-Team, each of which has been sustained by this court. *See Pro-Team III*, 532 F. Supp. 3d at 1294 (sustaining Commerce's selection of the petition rate as AFA for Unicatch); *Pro-Team II*, 483 F. Supp. 3d at 1252 (sustaining Commerce's calculation of a zero percent dumping margin for Pro-Team). To calculate the non-selected respondents' rate, in the second remand results, Commerce used a simple average of the mandatory respondents' rates. *See* Final Results of [Second] Redetermination Pursuant to Court Remand at 12, ECF No. 99–1.

In *Pro-Team III*, the court remanded Commerce's use of a simple average to calculate the rate for non-selected respondents. 532 F. Supp. 3d at 1294. The court found that substantial evidence did not support Commerce's departure from the "expected method" (i.e., using a weighted average to calculate the non-selected respondents' rate) because Commerce had not explained why the U.S. Customs and Border Protection ("CBP") import volume data it had relied on for selecting mandatory respondents was not reliable for the purpose of calculating a dumping rate using the "expected method." *Id.* at 1293–94.

In the Third Remand Results, Commerce determined that it was feasible to rely on the CBP import volume data. Third Remand Re-

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<sup>3</sup> As explained in greater detail below, the "expected method" refers to the preferred method for calculating all-others rates when individually investigated exporters and producers receive dumping margins that are zero, *de minimis*, or based on facts available. In such instances, Commerce is expected to calculate the all-others rate by using a weighted average of the rates assigned to the individually investigated parties.

sults at 7–8. Thus, Commerce determined the dumping margin for non-selected respondents by calculating a weighted average of the margins of the mandatory respondents. *Id.* This use of the expected method resulted in an antidumping duty rate of 35.30 percent for the non-selected respondents. *See id.* at 17.

Commerce explained that this rate was reasonably reflective of Plaintiffs' dumping margins because there was no indication that mandatory respondents were not representative of non-selected companies. *Id.* Commerce also explained that there was no evidence that the 35.30 percent rate was not reasonably reflective of Plaintiffs' dumping margins because Plaintiffs were not individually examined in the investigation, and the rate assigned to both non-cooperating mandatory respondents had been corroborated using data from Pro-Team. *See id.* at 18. Commerce further found that there was no evidence that the rate determined using the expected method was punitive. *Id.* at 18–19.

Commerce rejected Plaintiffs' arguments that Bonuts' margin should not be included in determining the rate for non-selected respondents. *Id.* at 15. Commerce stated that Bonuts was chosen as a mandatory respondent because it was an exporter or producer accounting for the largest volume of subject merchandise during the period of review, and that case law supported the assumption that mandatory respondents are representative of non-examined respondents absent substantial evidence to the contrary. *Id.* at 15–16.

Finally, Commerce rejected Plaintiffs' suggestion that it should reopen the record to allow parties to submit data "necessary to obtain a 'reasonable' rate for [Plaintiffs]." *Id.* at 19. Commerce explained that no additional information was required to determine the non-selected respondents' rate. *Id.*

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),<sup>4</sup> and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

## DISCUSSION

At issue is whether Commerce's use of the expected method to determine the non-selected respondents' rate is supported by substantial evidence and otherwise in accordance with law when Com-

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<sup>4</sup> All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition, unless stated otherwise.

merce calculated the rate in part using AFA rates assigned to mandatory respondents. The court recently addressed a similar issue in an opinion dismissing a challenge to the results of the fourth administrative review of this order. See *PrimeSource Bldg. Prods., Inc., v. United States*, Slip Op. 22–73, 2022 WL 2176270 (CIT June 16, 2022). The court incorporates and restates much of the reasoning articulated in that opinion in rejecting Plaintiffs’ challenge to the Third Remand Results.

## I. Legal Framework

The statute is silent regarding how to determine the rate for companies not selected for individual examination in an administrative review. In determining the rates for such companies, Commerce looks to 19 U.S.C. § 1673d(c)(5) for guidance.<sup>5</sup> See, e.g., *Albemarle*, 821 F.3d at 1352 & n.6. Section 1673d(c)(5)(A) provides that the “all others rate” assigned to non-examined companies is calculated as “the weighted average of the estimated weighted average dumping margins” assigned to individually-examined companies, “excluding any zero and *de minimis* margins, and any margins determined entirely under section 1677e of this title [i.e., on the basis of adverse facts available].” 19 U.S.C. § 1673d(c)(5)(A).

When the dumping margins assigned to all individually examined companies are zero, *de minimis*, or based on facts available, the statute further provides that Commerce “may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.” *Id.* § 1673d(c)(5)(B).

The Statement of Administrative Action accompanying the Uruguay Round Agreements Act, which Congress has approved as an authoritative interpretation of the statute, *id.* § 3512(d), provides an “expected method” to determine the all-others rate in these situations, Uruguay Round Agreements Act, Statement of Administrative

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<sup>5</sup> By its terms, 19 U.S.C. § 1673d applies to market economy investigations, not administrative reviews. As a general rule, however, Commerce looks to § 1673d(c)(5) for guidance when calculating the rate for non-examined companies in administrative reviews—be it the “all-others” rate in a market economy proceeding or the “separate rate” in a non-market economy proceeding. See, e.g., *Albemarle Corp. v. United States*, 821 F.3d 1345, 1352 & n.6 (Fed. Cir. 2016). Jurisprudence for determining the rate applicable to non-selected, separate rate respondents in a nonmarket economy proceeding is relevant to determining non-selected respondents’ rates in a market-economy proceeding. See *id.* at 1373–74 (discussing the market-economy rule alongside the nonmarket-economy rule); *Bosun Tools Co. v. United States*, No. 20211929, 2022 WL 94172, at \*2–3 & n.2 (Fed. Cir. Jan. 10, 2022) (unpublished) (same).

Action, H.R. Doc. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201 (“SAA”). When the dumping margins for all individually investigated exporters and producers are determined entirely on the basis of facts available or are zero or *de minimis*, “[t]he expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available.” *Id.* The SAA further provides that “if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods.” *Id.*

As the court discussed in *PrimeSource*, 2022 WL 2176270, at \*4–7, prior litigation surrounding these statutory provisions and corresponding portions of the SAA provides the backdrop to the court’s consideration of this issue. Case law confirms that when Commerce relies on 19 U.S.C. § 1677f-1(c)(2) to select the largest exporters by volume for individual examination, it does so based on a statutorily supported assumption that the data from the largest exporters may be viewed as representative of all exporters. *See Albemarle*, 821 F.3d at 1353; *Changzhou Hurd Flooring Co. v. United States*, 848 F.3d 1006, 1012 (Fed. Cir. 2017). This respondent selection exercise occurs early in the administrative proceeding before questionnaires are issued and is based on the respondents’ export volumes, not the results of the agency’s dumping margin analysis. *See* Mem. Regarding Selection of Additional Mandatory Respondent (Feb. 9, 2017) at 1–3, PR 76, CJA Tab 17; Respondent Selection Mem. (Nov. 29, 2016) (“Selection Mem.”) at 1, 7–8, CR 6, PR 38, RCJA Tab 2. In other words, the selected respondents are assumed to be representative of the non-selected respondents without regard to whether their final antidumping duty margin is zero, *de minimis*, based entirely on the use of AFA, or calculated based on the questionnaire responses of the selected respondents. *See Albemarle*, 821 F.3d at 1353; *Bosun*, 2022 WL 94172, at \*4.

Furthermore, this assumption of representativeness carries weight when Commerce determines the rate applicable to non-selected respondents. As mentioned above, Commerce determines the rate for non-selected respondents consistent with 19 U.S.C. § 1673d(c)(5). Thus, Commerce will weight-average the above-*de minimis* calculated rates to determine the non-selected respondent rate. 19 U.S.C. § 1673d(c)(5)(A). However, if the rates for all selected respondents are zero, *de minimis*, or based on facts available, the SAA provides that the expected method is for Commerce to weight-average such rates to determine the non-selected respondents’ rate. SAA at 873, *reprinted*

in 1994 U.S.C.C.A.N. at 4201. That is to say, it is *expected* that zero, *de minimis*, and facts available rates will be used in determining the non-selected respondents' rate. *See id.*; *Bosun*, 2022 WL 94172, at \*4 (rejecting the appellants' argument that Commerce unreasonably based the separate rate, in part, on an AFA rate as "expressly foreclosed by statute").

*Albemarle* and *Changzhou Hawd* confirm that the expected method is the default method and that the burden of proof lies with the party seeking to depart from the expected method (or with Commerce as the case may be). In *Albemarle*, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") concluded that "[t]he burden is not on the separate respondents to show that their dumping is the same as that of the individually examined respondents." *Id.* In that case, however, Commerce sought to deviate from the expected method; thus, the appellate court held that "Commerce must find based on substantial evidence that there is a reasonable basis for concluding that the separate respondents' dumping is different." *Id.*

One year after the court's decision in *Albemarle*, the Federal Circuit again confirmed the relevance of the assumed representativeness of the mandatory respondents in *Changzhou Hawd*. *See Changzhou Hawd*, 848 F.3d at 1012 ("The very fact that the statute contemplates using data from the largest volume exporters suggests an assumption that those data can be viewed as representative of all exporters."). The court again found that in order to depart from the expected method, Commerce must identify substantial evidence that the non-selected respondents' dumping was different from that of the mandatory respondents. *See id.* ("[T]he presumption of representativeness may be overcome . . . [with] 'substantial evidence that there is a reasonable basis for concluding that the separate respondents' dumping is different.'" (quoting *Albemarle*, 821 F.3d at 1353).

Recently, in *Bosun*, the Federal Circuit confirmed that the representativeness of the selected respondents is independent of the results of Commerce's dumping margin analysis.<sup>6</sup> *See* 2022 WL 94172, at \*4. In the review underlying *Bosun*, Commerce selected the two largest respondents for examination and calculated a *de minimis* dumping margin for one respondent while basing the other respondent's rate on AFA. *Id.* at \*2–3. Commerce determined the rate for the non-selected respondents by finding the simple average of these two

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<sup>6</sup> Although *Bosun* is an unpublished opinion, as discussed herein, this court finds the opinion helpful to its analysis because the reasoning is consistent with and builds on the Federal Circuit's prior reasoning in *Albemarle* and *Changzhou Hawd* and is otherwise persuasive.

rates.<sup>7</sup> See *id.* at \*3. The *Bosun* court affirmed Commerce’s inclusion of the AFA-based rate in the average assigned to the non-selected respondents. See *id.* at \*4. In so doing, the court recalled its discussion in *Albemarle* regarding the “general assumption underlying the statutory framework”—specifically, the assumption that data from the largest volume exporters may be viewed as representative of all exporters, *id.* (quoting *Albemarle*, 821 F.3d at 1353)—and went on to find that “although *Albemarle* concerned a case with *de minimis* rates rather than AFA rates, its reasoning is equally applicable here; the same statutory language in [section] 1673d(c)(5)(B) that permits use of *de minimis* rates also permits use of AFA rates,” *id.* (emphasis added).<sup>8</sup>

These cases all recognize an important assumption that is built into Commerce’s statutory authority to engage in respondent selection: that the largest exporters by volume are assumed to be representative of the non-selected respondents. Consistent with this assumption, the cases also stand for the proposition that Commerce is expected to use the mandatory respondents’ rates to determine the antidumping duty rate to be assigned to the non-selected respondents.

These concepts, representativeness and expectedness, are connected. Representativeness allows Commerce to select certain respondents for individual examination and, in so doing, decline to individually examine other respondents. By allowing Commerce to focus its resources on certain respondents, the statute necessarily creates the assumption of representativeness because Commerce often will lack further information about the non-selected respondents. See *Albemarle*, 821 F.3d at 1353. Commerce is not otherwise required to collect information about the non-selected respondents because Commerce is permitted, in fact, expected, to treat the mandatory respondents as representative of the non-selected respondents when it determines the non-selected respondents’ rate.

This assumption of representativeness, combined with the expectation that Commerce will treat the mandatory respondents as rep-

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<sup>7</sup> By using the simple average, Commerce diverged from the expected method, which calls for using the weighted average of the selected respondents’ rates. SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201. Commerce may have used a simple average of the two respondents’ rates (in other words, giving equal weight to each rate) in order to avoid revealing the actual volume of imports into the United States by the cooperating respondent if such information was considered business proprietary. Regardless, the Federal Circuit did not fault Commerce’s use of a simple average.

<sup>8</sup> In a precedential opinion, the Federal Circuit recently upheld Commerce’s use of the expected method to determine the non-selected respondents’ rate using the AFA rates of mandatory respondents in an administrative review of an antidumping duty order involving a nonmarket economy country. *Shanxi Hairu Trade Co. v. United States*, No. 2021–2067, 2022 WL 2443960, at \*5 (Fed. Cir. July 6, 2022).

representative of the non-selected respondents, provides a basis for understanding the SAA language, which states that “if [the expected] method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-[examined] exporters or producers, Commerce may use other reasonable methods.” SAA at 873, *reprinted in* 1994 U.S.C.C.A.N. at 4201.

As discussed above, the statute clearly permits Commerce to engage in a respondent selection process pursuant to 19 U.S.C. § 1677f-1(c) when certain conditions have been met. Commerce engaged in that process in this administrative review and no party challenges that decision. Having determined to examine the largest exporters by volume in this review, the statute permits Commerce to proceed with the review without requiring additional information from the non-selected respondents. *See, e.g., Changzhou Hawd*, 848 F.3d at 1012 (discussing the statutory authority to select respondents rather than examining every exporter). This SAA language does not require Commerce to engage in a data collection exercise with the non-selected respondents in order to determine their “potential dumping margins” because such an exercise would be inconsistent with the language of 19 U.S.C. § 1677f-1(c) expressly permitting Commerce to “limit[] its examination” to the largest exporters and producers by volume. 19 U.S.C. § 1677f-1(c)(2). Such an interpretation would defeat the purpose of the respondent selection process. Nothing in the statute, SAA, or jurisprudence suggests that such a burden exists.

To the contrary, the courts have long recognized that the burden of establishing relevant facts may properly be assigned to the party in control of the information necessary to establish those facts. *See, e.g., Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190–91 (Fed. Cir. 1990) (placing “the burden of production on the [party] which has in its possession the information capable of rebutting the agency’s inference”). Thus, when, as here, the non-selected respondents are in control of the information that would establish whether applying the expected method based on the rates of the mandatory respondents would not reasonably reflect the potential dumping margins of those non-selected respondents, the non-selected respondents bear the burden of providing such evidence.

## II. Analysis

The court now turns to whether substantial evidence supports Commerce’s use of the expected method. Commerce found that there was “no indication that the selected mandatory respondents were not representative of the experience of the non-selected companies, even



when the rates were based on AFA.”<sup>9</sup> Third Remand Results at 17. While Plaintiffs argue that the record shows that the mandatory respondents were not representative of Plaintiffs’ dumping margins, *see* Opp’n Cmts. at 6–9, Commerce considered their arguments and concluded that Plaintiffs did not identify evidence to support their assertion that the rate assigned to non-selected respondents in this review is not reasonably reflective of their potential dumping margins, Third Remand Results at 15–19.

Plaintiffs argue that the 35.30 percent rate assigned to non-selected respondents is punitive and “aberrational compared to margins calculated for cooperative respondents” in the periods before, during, and immediately after this administrative review. Opp’n Cmts. at 6–8. While it is true that some mandatory respondents cooperated in this and subsequent administrative reviews, resulting in calculated rates lower than 35.30 percent, *see* Final Results of [First] Redetermination Pursuant to Court Remand at 6–8, 32 (zero percent margin for Pro-Team), ECF No. 71–1; *Certain Steel Nails From Taiwan*, 84 Fed. Reg. 11,506, 11,507 (Dep’t Commerce Mar. 27, 2019) (final results of antidumping admin. review and partial rescission of admin. review; 2016–2017) (“AR2 Final Results”) (dumping margins of zero percent and 6.16 percent for Pro-Team and Unicatch, respectively), Plaintiffs ignore that during the same administrative reviews, Unicatch was assigned an AFA rate once, and Bonuts twice received an AFA rate, *see* Final Results, 83 Fed. Reg. at 6,164; AR2 Final Results, 84 Fed. Reg. at 11,507. Moreover, in these Third Remand Results, Commerce explained that the fact that rates from the investigation and other administrative reviews differed from the rate in this administrative review did not, “on its face, demonstrate that the rates in this review are not reasonably reflective of the potential dumping margins for the companies not individually examined.” Third Remand Results at 18. Commerce explained that the non-selected respondent rate was not aberrant, noting that Plaintiffs failed to provide any evidence that the weighted average of the mandatory respondents’ rates was not reasonably reflective of the potential dumping margins for non-examined respondents, *see id.*, and that, furthermore, the AFA rates on which the non-selected respondent rate was based in part had been corroborated using data provided by Pro-Team, *see id.* at 17.

Plaintiffs cite to *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010), to support their claim that the rates

<sup>9</sup> Elsewhere in the Third Remand Results, Commerce erroneously stated that “the record evidence does demonstrate that the mandatory respondents are not representative.” Third Remand Results at 17. This appears to be a misstatement, as the discussion that follows contemplates the mandatory respondents being representative. *Id.* at 17–18.

in this review are aberrantly high when compared to the rates calculated for cooperative respondents in both the investigation and subsequent administrative reviews. Opp'n Cmts. at 8. In *Gallant Ocean*, the Federal Circuit held that it was unreasonable for Commerce to assign to a non-cooperating exporter a rate five times higher than the next highest assigned or calculated rate in the same review, and the rate was thus "punitive, aberrational [and] uncorroborated." 602 F.3d at 1323–24. Reliance on *Gallant Ocean* is misplaced. In *Gallant Ocean*, the plaintiff directly challenged the AFA rate assigned to it, not an all-others rate calculated using AFA rates received by mandatory respondents. 602 F.3d at 1322. Here, the 35.30 percent rate for non-individually examined respondents is not the highest rate determined in this administrative review; the AFA rates of 78.17 percent received by Unicatch and Bonuts are the highest rates determined during this administrative review. See Third Remand Results at 3–4, 17. Furthermore, while Plaintiffs would like to disregard the 27.69 percent calculated rate received by Unicatch in a subsequent review, see Opp'n Cmts. at 7–8; *Certain Steel Nails From Taiwan*, 85 Fed. Reg. 14,635, 14,636 (Dep't Commerce Mar. 13, 2020) (final results of antidumping duty admin. review and determination of no shipments; 2017–2018) ("*AR3 Final Results*"), that rate is comparable to the 35.30 percent rate Plaintiffs contest here. While that rate was received in the third administrative review, see *AR3 Final Results*, 85 Fed. Reg. at 14,636, to the extent that Plaintiffs seek to cherry-pick rates from subsequent administrative reviews to further their arguments, the court will not ignore other rates from those reviews that cut against Plaintiffs' contentions.

Plaintiffs also contend that Commerce should have excluded Bonuts' data from its calculation of the non-selected respondents' rate because record evidence showed that Bonuts was not a representative respondent. Opp'n Cmts. at 9. Although Bonuts requested deselection as a mandatory respondent and indicated that it believed that it was "not representative of the business models of Taiwan nails producers," see Request for Deselection (Dec. 27, 2016), PR 55, RCJA Tab 3; see also Third Remand Results at 20, Commerce determined that Bonuts failed to cooperate to the best of its ability—a determination that was not challenged, Third Remand Results at 20. Commerce declined to rely on Bonuts' statement because, absent Bonuts' cooperation, Commerce was not able to verify Bonuts' claim that it was not representative. *Id.* at 20–21. The court finds that Commerce's determination to include Bonuts' data in its calculation of the non-selected respondents' rate is supported by substantial evidence.

Substantial evidence also supports Commerce’s rejection of Pro-Team’s argument that Bonuts’ entries were not classified as the same “entry type” as those made by other Taiwanese exporters of steel nails and, therefore, were not representative. *See* PT’s and Unicatch’s Comments on [CBP] Data (“Respondent Selection Cmts.”) (Oct. 6, 2016), CR 3, PR 30, RCJA Tab 1.<sup>10</sup> Commerce rejected this distinction as irrelevant because both entry types were subject to the antidumping duty order. *See* Selection Mem. at 7–8. Because both entry types are subject to the antidumping duty order, it follows that Commerce would include both in its respondent selection process. The court finds no error in this analysis by Commerce.

Finally, Plaintiffs ask the court to order Commerce to reopen the record to obtain additional data to calculate the non-selected respondent rate. *See* Opp’n Cmts. at 10. While Commerce retains significant discretion to determine whether to reopen the record on remand, in most cases, this is not something the court will require simply based on a plaintiff’s argument that better information is available. It is incumbent upon parties to provide relevant information in accordance with the agency’s procedures and deadlines. The interests of finality suggest that the court should limit interfering with those procedures and deadlines. *See, e.g., Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 554 (1978); *Shandong Rongxin Imp. & Exp. Co. v. United States*, 41 CIT \_\_, \_\_, 203 F. Supp. 3d 1327, 1338 (2017). Having found that substantial evidence supports Commerce’s use of the expected method to calculate the rate for non-individually examined respondents, the court agrees with Commerce’s determination that “no additional information is required for [it] to determine the [Plaintiffs’ rates].”<sup>11</sup> Third Remand Results at

<sup>10</sup> Specifically, Pro-Team noted that it and Unicatch were the two largest importers of nails from Taiwan based on the entry type used for entries subject to antidumping or countervailing duties. Respondent Selection Cmts. at 3. Pro-Team argued that Commerce should not include an additional entry type in its respondent selection analysis. *See id.* at 3–4. It was the inclusion of that additional entry type that moved Bonuts to its rank as the second largest exporter of subject merchandise. *See id.* Pro-Team argued that because Bonuts’ entries were of a different type, Bonuts was not representative and should not be selected as a mandatory respondent. *See id.*

<sup>11</sup> Plaintiffs cite to *MacLean-Fogg Co. v. United States*, 39 CIT \_\_, \_\_, 100 F. Supp. 3d 1349, 1363 (2015), to support its argument that the court should direct Commerce to reopen the record. Opp’n Cmts. at 10. Plaintiffs misread the opinion. First, the court in *MacLean-Fogg* did not mandate that Commerce reopen the record. *MacLean-Fogg Co.*, 100 F. Supp. 3d at 1363. Furthermore, the *MacLean-Fogg* court remanded the final determination in the investigation to Commerce because the court found that necessary data in the form of public summaries and ranged figures in the public version of submissions was absent from the record “due to Commerce’s own failure to fully administer the legal framework.” *Id.* Similar circumstances do not exist here—the court finds that Commerce had all necessary data that it was required to obtain to calculate the non-selected respondents’ rate using the expected method.

19. There is a “statutorily supported assumption that the data from the largest exporters may be viewed as representative of all exporters.” *PrimeSource*, 2022 WL 2176270, at \*4; *see also Albemarle*, 821 F.3d at 1353; *Changzhou Haud*, 848 F.3d at 1012. As discussed above, 19 U.S.C. § 1677f-1(c) permits Commerce to engage in respondent selection when certain conditions have been met, and no party challenges that decision. Having determined to examine the largest exporters by volume in this review, Commerce was under no statutory obligation to solicit or obtain additional information from the non-selected respondents.

### CONCLUSION

Based on the foregoing, the court will sustain Commerce’s Third Remand Results. Judgment will enter accordingly.

Dated: July 15, 2022

New York, New York

*/s/ Mark A. Barnett*

MARK A. BARNETT, CHIEF JUDGE

## Slip Op. 22–85

CYBER POWER SYSTEMS (USA) INC., Plaintiff, v. UNITED STATES, Defendant, UNITED STATES, Counterclaimant, v. CYBER POWER SYSTEMS (USA) INC., Counterclaim Defendant.

Before: Claire R. Kelly, Judge  
Court No. 21–00200

[Redenominating the United States’ counterclaim as a defense under U.S. Court of International Trade Rule 8(d)(2) and denying Cyber Power Systems (USA) Inc.’s motion to dismiss the counterclaim as moot.]

Dated: July 20, 2022

*John M. Peterson* and *Richard F. O’Neill*, Neville Peterson, LLP, of New York, NY, and *Patrick B. Klein*, Neville Peterson, LLP, of Seattle, WA, argued for plaintiff Cyber Power Systems (USA) Inc.

*Beverly A. Farrell*, Senior Trial Attorney, and *Elisa S. Solomon*, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of New York, NY, argued for defendant United States. Also on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office.

**OPINION AND ORDER****Kelly, Judge:**

Before the court is Plaintiff/Counterclaim Defendant Cyber Power Systems (USA) Inc.’s (“Cyber Power”) motion to dismiss Defendant/Counterclaimant United States’ (“Defendant”) counterclaim. Pl.’s Mot. to Dismiss Def.’s Countercl., Jan. 11, 2022, ECF No. 17 (“Pl. Mot.”); *see also* Memo. of Points and Authorities in Supp. of [Pl. Mot.], Jan. 11, 2022, ECF No. 17–2 (“Pl. Br.”); Ans. & Countercl. of [Def.], Dec. 21, 2021, ECF No. 14 (the “Counterclaim”). In the Counterclaim, Defendant asks the court to re-classify under Harmonized Tariff Schedule of the United States (“HTSUS”) subheading 8544.42.90 subject merchandise entered by Cyber Power and order U.S. Customs and Border Protection (“CBP”) to reliquidate the merchandise at a rate of 2.6% *ad valorem*.<sup>1</sup> Countercl. ¶¶ 18, Prayer for Relief.

Cyber Power argues the court should dismiss the Counterclaim because (i) Defendant fails to allege a cause of action; (ii) the liquidation of the subject merchandise is final; and (iii) allowing Defendant to prosecute the Counterclaim, violates Cyber Power’s rights under the Equal Protection Clause of the United States Constitution. Pl. Br. at 3–25. Defendant argues that Cyber Power’s motion should be denied because (i) the Counterclaim states a claim for increased

<sup>1</sup> CBP liquidated the subject merchandise under HTSUS subheading 8544.42.20. Countercl. ¶ 7. Merchandise classified under HTSUS subheading 8544.42.20 normally enter the United States duty free. *Id.* at ¶ 9.

duties under 19 U.S.C. §§ 1202, 1503, and 1514(a); and (ii) liquidation is not final because Cyber Power protested the classification of the subject merchandise and the amount of duties assessed. [Def.'s] Memo. in Opp'n to [Pl. Mot.], 4–5, 11 n.4, Mar. 15, 2022, ECF No. 25 (“Def. Br.”). For the following reasons, the Counterclaim is redenominated as a defense under United States Court of International Trade Rule 8(d)(2) and Cyber Power’s motion to dismiss the Counterclaim is denied as moot.

## BACKGROUND<sup>2</sup>

Cyber Power is the importer of record of the ten entries at issue in this action covering seven types of cables (the “Subject Cables”) entered at the Port of Minneapolis, Minnesota in 2019, and classified by CBP at the time of liquidation under HTSUS subheading 8544.42.20.<sup>3</sup> Countercl. ¶¶ 3, 5–7; *see also* Compl. ¶ 6, Oct. 22, 2021, ECF No. 11. However, pursuant to Section 301 of the U.S. Trade Act of 1974, merchandise classified under HTSUS subheading 8544.42.20 originating from the People’s Republic of China (“China”) may also be further classified under temporary HTSUS subheading 9903.88.03 and assessed additional duties at a rate of 10 percent *ad valorem* if entered before May 10, 2019, and 25 percent *ad valorem* if entered on or after May 10, 2019 (the “Section 301 Duties”). Countercl. ¶ 9; *see also* Def. Br. at 2–3 (summarizing events leading to the creation and assessment of the Section 301 Duties). CBP imposed Section 301 Duties on the Subject Cables. Countercl. ¶ 10.

On September 11, 2020, Cyber Power protested the liquidation of the Subject Cables under temporary HTSUS subheading 9903.88.03 and the assessment of the Section 301 Duties.<sup>4</sup> Memo. of Points and Authorities in Supp. of Protest of [Cyber Power], July 9, 2021, ECF No. 9–1 (“Protest”); Countercl. ¶ 11. In its protest, Cyber Power argued that the Subject Cables fall within an exclusion to the Section 301 Duties and are therefore properly classified under temporary

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<sup>2</sup> The facts set forth in this background section are taken from the Counterclaim and are assumed to be true for the purposes of this motion.

<sup>3</sup> HTSUS subheading 8544.42.20 covers:

Insulated (including enameled or anodized) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors; optical fiber cables, made up of individually sheathed fibers, whether or not assembled with electric conductors or fitted with connectors: Other electric conductors, for a voltage not exceeding 1,000 V: Fitted with connectors: Other: Of a kind used for telecommunications.

Countercl. ¶¶ 8.

<sup>4</sup> Cyber Power did not challenge CBP’s classification of the Subject Cables under HTSUS subheading 8544.42.20. Memo. of Points and Authorities in Supp. of Protest of [Cyber Power] 10, July 9, 2021, ECF No. 9–1 (“Protest”).

HTSUS subheading 9903.88.33,<sup>5</sup> not temporary subheading 9903.88.03. Compl. ¶¶ 8–14; Countercl.; Answer ¶¶ 8–14; Protest at 5–11; *see also* Def. Br. at 1–2. On November 4, 2020, CBP denied Cyber Power’s Protest, stating that Cyber Power failed to demonstrate that the Subject Cables meet the definition of telecommunications cables for HTSUS subheading 8544.42.20, and “[t]herefore CBP has determined that the correct classification for the [Subject] [C]ables is HTSUS 8544.42.9090.”<sup>6</sup> Countercl. ¶ 12. Merchandise classified under HTSUS subheading 8544.42.90 is subject to a duty rate of 2.6% *ad valorem* in addition to applicable Section 301 Duties. *See id.* ¶¶ 17–20. The parties do not allege that CBP reclassified or re-liquidated the Subject Cables under HTSUS subheading 8544.42.90 when CBP denied Cyber Power’s protest. *See generally* Countercl.; Compl.; *see also* Def. Br. at 3 (stating CBP did not reclassify or re-liquidate the Subject Cables under HTSUS subheading 8544.42.90).

On April 28, 2021, Cyber Power commenced this action by filing a summons challenging CBP’s denial of Cyber Power’s protest. Countercl. ¶ 13; *see also* Summons, Apr. 28, 2021, ECF No. 1. On December 21, 2021, Defendant filed the Counterclaim. *See* Countercl. On January 11, 2022, Cyber Power filed the present motion to dismiss the Counterclaim. *See* Pl. Mot. Parties briefed the motion and Cyber Power requested oral argument. Def. Br.; Pl.’s Reply in Supp. of [Pl. Mot.], Apr. 5, 2022, ECF No. 27; Pl.’s Mot. for Oral Arg. on [Pl. Mot.], Apr. 7, 2022, ECF No. 28. The court heard oral argument on May 25, 2022. *See* Oral Arg., May 25, 2022, ECF No. 32.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over the Counterclaim pursuant to 28 U.S.C. § 1583, which grants the U.S. Court of International Trade jurisdiction over counterclaims involving the imported merchandise that is the subject matter of a civil action pending in the Court. 28 U.S.C. § 1583. Rule 8(a)(2) of the Rules of the U.S. Court of International Trade (collectively, the “Rules”, and individually, “Rule”) re-

<sup>5</sup> Goods classified under HTSUS subheading 8544.42.20 are excluded from the assessment of the Section 301 Duties if they are “[i]nsulated electric conductors for a voltage not exceeding 1,000V, fitted with connectors of a kind used for telecommunications, each valued over \$0.35 but not over \$2.” Protest at 25; *see also* Countercl. ¶ 18.

<sup>6</sup> HTSUS subheading 8544.42.90 covers

Insulated (including enameled or anodized) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors; optical fiber cables, made up of individually sheathed fibers, whether or not assembled with electric conductors or fitted with connectors: Other electric conductors, for a voltage not exceeding 1,000 V: Fitted with connectors: Other: Other.

*Id.* ¶ 16.

quires that a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(a)(2). Further, Rule 8(d)(2) provides that when a party mistakenly designates a defense as a counterclaim, the “court must, if justice requires, treat the pleading as though it were correctly designated.” Rule 8(d)(2).

To survive a motion to dismiss for failure to state a claim upon which relief can be granted brought under Rule 12(b)(6), a pleading “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).<sup>7</sup> When considering a motion to dismiss a counterclaim, the court assumes all well-pleaded factual allegations in the counterclaim to be true and draws all reasonable inferences in favor of the non-moving party. *Wanxiang Am. Corp. v. United States*, 12 F.4th 1369, 1373 (Fed. Cir. 2021).

## DISCUSSION

Cyber Power’s motion to dismiss asks the court to answer one question: What statutory authority does Defendant have for asserting the Counterclaim? Defendant argues that 19 U.S.C. §§ 1202, 1503, and 1514(a) give it authority to assert the Counterclaim and to seek reliquidation from CBP under a different classification. Def. Br. at 4–5, 11 n.4. Yet none of the sections of the U.S. Code cited by Defendant provide a basis for the Counterclaim. Section 1202 only sets forth the HTSUS; nothing in Section 1202 can be read to imply a cause of action for the United States to assert a counterclaim.<sup>8</sup> See 19 U.S.C. § 1202. Section 1503 provides that “if reliquidation is required pursuant to a final judgment or order of the U.S. Court of International Trade which includes a reappraisal of imported merchandise, the basis for such assessment shall be the final appraised value determined by such court.” *Id.* § 1503. Section 1503 relates to the value of merchandise, not the classification, and, in any event, that section only states that the Court has the power to order reliquidation

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<sup>7</sup> *Twombly* and *Iqbal* discuss the standard courts use on motions to dismiss under the Federal Rules of Civil Procedure, not the Rules; however, Rules 8(a)(2) and 12(b)(6) are identical in both the Rules and the Federal Rules of Civil Procedure, so Supreme Court decisions analyzing the Federal Rules of Civil Procedure apply to analyzing the Rules. Compare Fed. R. Civ. P. 8(a)(2), 12(b)(6) with Rules 8(a)(2), 12(b)(6); see also *Sioux Honey Ass’n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1062–63 (Fed. Cir. 2012) (applying *Twombly* and *Iqbal* to the Rules).

<sup>8</sup> Even if one could view Section 1202 as implicitly empowering CBP to reclassify merchandise, the statutory scheme explicitly requires CBP to do so prior to liquidation or reliquidation. See 19 U.S.C. §§ 1501, 1504.



based on a reappraisal of the value of imported merchandise; nothing in Section 1503 grants the United States a cause of action to assert a counterclaim. *Id.* Finally, Section 1514(a) provides importers with a mechanism to protest liquidation; it does not provide the government with an avenue to assert counterclaims contesting CBP's classification. *Id.* § 1514(a). That a timely protest suspends the finality of liquidation for all parties, including the United States, does not imply that the United States may assert a counterclaim. *Id.*

Congress enacted a comprehensive scheme governing import duties, including multiple provisions, detailing specific remedies, allowing CBP to classify, re-classify, and collect duties on goods imported into the United States. *See* 19 U.S.C. §§ 1500, 1501, 1504, 1505, 1509, 1515, 1581–1631; 28 U.S.C. § 1592; *see generally* Title 19, Ch. 4 of the U.S. Code. Nowhere in that comprehensive scheme did Congress explicitly authorize the United States to assert a counterclaim challenging CBP's classification. Furthermore, a counterclaim contesting CBP's classification of merchandise upon liquidation requires the United States to make a claim against itself. CBP, a federal agency, classified and liquidated the entry that the defendant, United States, now seeks to have reliquidated. In light of the multitude of specific remedies available to CBP to classify merchandise and to fix and collect duties, the court declines to read into the applicable statutes an implied cause of action to assert a counterclaim challenging CBP's classification. *See Consol. Edison Co. of N.Y. v. O'Leary*, 117 F.3d 538, 543–44 (Fed. Cir. 1997) (refusing to read implied rights of action into the Economic Stabilization Act because of the specific remedies set forth in the Act).

In its opposition, Defendant attempts to cobble together an implied cause of action based on three statutory provisions, 19 U.S.C. §§ 1202, 1503, and 1514(a).<sup>9</sup> *See* Def. Br. at 4–5, 11–12. Nothing in the provisions of the statute upon which Defendant relies gives the United States a cause of action to assert a counterclaim challenging CBP's

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<sup>9</sup> Defendant also asserts that 19 U.S.C. § 1505(b) authorizes CBP to collect increased duties after reliquidation. Def. Br. at 5 n.2. However, as Defendant concedes, that section authorizes CBP to collect such duties as part of CBP's "administrative responsibilities," and is relevant only after the U.S. Court of International Trade orders reliquidation. *See id.*; 19 U.S.C. § 1505(b). Nothing in 19 U.S.C. § 1505(b) authorizes the United States to assert a counterclaim for increased duties resulting from a different classification.

classification.<sup>10</sup> See 19 U.S.C. §§ 1202, 1503, and 1514(a). Indeed, none of those sections of the statute was materially amended at the time Congress granted the U.S. Court of International Trade jurisdiction to hear counterclaims and the power to determine the correct classification of merchandise. See Customs Courts Act of 1980, Pub. L. 96–417, 94 Stat. 1727, 1744–45, §§ 601(4)–(5), 605(a)–(b).

Defendant primarily relies on 19 U.S.C. § 1202, which Defendant contends “charge[s] CBP] with enforcing the tariff in accordance with its terms, which includes collecting the proper amount of duties based on the correct classification of imported merchandise.” Def. Br. at 4. However, Section 1202 sets forth the provisions of the HTSUS.<sup>11</sup> See 19 U.S.C. § 1202. Nothing in the plain, unambiguous terms of Section 1202 permits the United States to challenge CBP’s classification via a counterclaim. Therefore, Section 1202 does not provide Defendant with a cause of action.

Likewise, Section 1503 does not give Defendant a cause of action. Section 1503 covers reliquidations ordered by the U.S. Court of International Trade including reappraisements of the value of imported merchandise. *Id.* § 1503. Section 1503 relates to valuation, not classification; thus, Section 1503 is not relevant to Defendant’s claim that the merchandise should be classified differently. Moreover, even if Section 1503 did apply to classification instead of valuation, that section does not grant Defendant a cause of action to assert a counterclaim for a different classification. Section 1503 states that CBP must reliquidate merchandise based on the U.S. Court of International Trade’s judgment. *Id.* Given that the Court has the power to order all appropriate relief, including reliquidation, it is unsurprising that Congress directed CBP to follow the Court’s instructions. See 28 U.S.C. § 2643.

Defendant’s reliance on Section 1514(a) is also misplaced. Although Defendant is correct that Cyber Power’s protest suspended the finality of liquidation for all parties, including Defendant, that fact is

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<sup>10</sup> As discussed below, the legislative history of 28 U.S.C. § 1583 demonstrates that Congress intended to give the U.S. Court of International Trade jurisdiction over counterclaims, but this Court’s jurisdiction is not disputed. Moreover, Congress’ stated intent in legislative history cannot overcome the unambiguous meaning of the statutes it enacts. See *Bull v. United States*, 479 F.3d 1365, 1376 (Fed. Cir. 2007); see also *Sharp v. United States*, 580 F.3d 1234, 1238 (Fed. Cir. 2009) (“To overcome the plain meaning of the statute, the party challenging it by reference to legislative history must establish that the legislative history embodies ‘an extraordinary showing of contrary intentions’” (some internal quotation marks omitted) (emphasis in original)). Sections 1583 and 2643 unambiguously grant powers to the Court, not to litigants before the Court. 28 U.S.C. §§ 1583, 2643.

<sup>11</sup> CBP is charged with fixing the classification and duty rate of imported merchandise pursuant to 19 U.S.C. § 1500(b). See *id.* § 1500(b). However, nothing in Section 1500(b) implies that the United States may assert a counterclaim challenging the classification and duty rate determined by CBP for imported merchandise. See *id.*

merely a truism. Liquidation is not final as to the United States and its officers because when an importer protests liquidation and/or challenges a denial of such protest, the possibility remains that CBP made an error and the imported merchandise must be liquidated at a different rate than CBP initially determined. If liquidation were final as to the United States and its officers, then those same officers would potentially be powerless to fix any such error.<sup>12</sup> Thus, liquidation is not final when an importer challenges CBP's determinations. However, it does not follow that Section 1514(a) authorizes Defendant to assert a counterclaim challenging CPB's classification.<sup>13</sup> Section 1514(a) provides importers with the right to protest CBP's determinations, and Section 1515 provides that CBP must review and either "allow or deny" the protest. 19 U.S.C. §§ 1514(a), 1515. There is nothing in the language of Section 1514 or 1515 that gives rise to an implied right of the United States to assert a counterclaim. Defendant's attempt to impute an additional right from these sections—the right to bring a cause of action against itself—simply because liquidation is not final, fails.

Finally, Defendant relies in part on 28 U.S.C. § 1583. *See* Def. Br. at 12; Countercl. ¶ 1 ("Defendant brings this counterclaim pursuant to

<sup>12</sup> Indeed, here, upon review of the protest, CBP concluded that the Subject Cables should be classified under HTSUS subheading 8544.42.90 when it considered the Protest, but did not grant in part, and deny in part the Protest, in order to reclassify the Subject Cables even though at that time of the Protest, liquidation was not final. *See* Def. Br. at 3. At oral argument Plaintiff argued that the protest mechanism only permits challenges that would lower the duty rate; therefore, despite the suspension of liquidation pending the determination of a protest, CBP would be without authority to reclassify the Subject Cables under HTSUS subheading 8544.42.90. Oral Arg. at 38:00–40:52. Because CBP did not reclassify the Subject Cables after reviewing the Protest, the court cannot address CBP's authority to do so here.

<sup>13</sup> Defendant's theory that it is authorized to challenge CBP's classification via the Counterclaim rests in part on Defendant's unsupported assertion that "[i]f, in reaching th[e] correct result, the Court determines that a different classification requiring additional duties is applicable, it could only award relief to the Government if the Government has asserted a counterclaim." Def. Br. at 11. Defendant cites no support for this assertion. Although it is not necessary to the court's conclusion that Defendant lacks authority to assert a counterclaim, Defendant's theory seems to be contradicted by 28 U.S.C. § 2643(b)–(c)(1). Section 2643(b) mandates that the U.S. Court of International Trade must "reach the correct decision" in any civil action. *Id.* § 2643(b). Section 2643(c)(1) states that the U.S. Court of International Trade "may . . . order any other form of relief that is appropriate in a civil action." *Id.* § 2643(c)(1). The U.S. Court of Appeals for the Federal Circuit interpreted 28 U.S.C. § 2643(b) to require the U.S. Court of International Trade to determine the correct classification of protested entries of merchandise. *See Jarvis Clark, Inc. v. United States*, 733 F.2d 873, 877–78 (Fed. Cir. 1984). Indeed, it would seem if the court were to accept Defendant's interpretation of the statute, then the Court would not be permitted to "reach the correct decision" or order "appropriate" relief unless Defendant chose to assert a counterclaim. *See* 28 U.S.C. § 2643(b)–(c)(1). This interpretation cannot be correct, as the Court's statutory mandates would be dependent on a discretionary decision by the United States. This problem is illustrated by *Jarvis Clark*, in which the court rejected both parties' proposed classifications. *Jarvis Clark*, 733 F.2d at 880. Cases contesting classifications are decided *de novo* by this Court. *See* 28 U.S.C. § 2640(a)(1).

28 U.S.C. §§ 1583(1) & 2643(b)"). However, Section 1583 does not provide Defendant with a cause of action to assert the Counterclaim. Congress appears to have believed that 28 U.S.C. § 1583 would provide the United States with the ability to assert counterclaims arguing for a higher rate of duty. *See, e.g.*, H.R. Rep. No. 96–1235, 36, 1980 U.S.C.C.A.N. 3729, 3748 (1980) (stating that Section 1583 would permit the United States to “assert[] a claim that would allow the court to make the proper determination and accordingly would enable the Government to collect the full amount of duties”). However, the plain language of Section 1583 establishes that it is jurisdictional. It provides “[i]n any civil action in the Court of International Trade, the court shall have exclusive jurisdiction to render judgment upon any counterclaim . . . .” 28 U.S.C. § 1583. It does not create any substantive cause of action that did not exist before Congress enacted the Customs Courts Act of 1980.<sup>14</sup> Thus, although Congress may have intended Section 1583 to provide the United States with an avenue to assert counterclaims for higher rates of duty, Congress only provided the U.S. Court of International Trade with jurisdiction to hear such counterclaims, to the extent such claims are properly brought as counterclaims. As explained above, Congress did not provide the United States with any statutory authority to assert counterclaims challenging the liquidated classification and duty rate.<sup>15</sup>

<sup>14</sup> Defendant does not contend that Section 1583 provides it with a cause of action. *See* Def. Br. at 18. However, Defendant in its responsive brief asks the court for leave to amend or to submit additional briefing on the issue of whether Section 1583 is solely jurisdictional. *Id.* (“Our counterclaim does not request the Court to interpret section 1583 as creating a separate cause of action. Therefore, we do not address Cyber Power’s speculative and premature argument. *See* Mot. at 20–25. However, should the Court find that our counterclaim fails to state a claim, we respectfully request an opportunity to amend our counterclaim to address the Court’s findings, including, if appropriate, whether section 1583 provides a cause of action”). Cyber Power dedicated approximately one quarter of its moving brief to this issue. *See* Pl. Br. at 14–20. Defendant chose not to address Plaintiff’s argument in its opposition and thus waived its opportunity to present argument on the issue. *See* *Promega Corp. v. Life Technologies Corp.*, 875 F.3d 651, 661 (Fed. Cir. 2017). At oral argument Defendant proposed that Section 1583 gave the United States “a jurisdictional right in a counterclaim to seek a different classification.” Oral Arg. at 10:50–10:55. When pressed at to what exactly that statement meant counsel conceded that “arguably it doesn’t create a cause of action, it provides an opportunity for the government to file a counterclaim.” *Id.* 12:17–12:24. As discussed, the plain meaning of Section 1583 is clear and the statute is purely jurisdictional.

<sup>15</sup> Defendant’s reliance on *Cormorant Shipholding Corp. v. United States* is unpersuasive because that court analyzed whether the U.S. Court of International Trade had jurisdiction over the United States’ counterclaim pursuant to 28 U.S.C. § 1583. *See* Def. Br. at 12 (citing *Cormorant Shipholding Corp. v. United States*, 33 CIT 440, 447 n.17 (2009)). As discussed, the Court’s jurisdiction is clear and undisputed; the only issue is whether the Counterclaim states a claim. Thus, cases such as *Cormorant* that analyze the extent of the U.S. Court of International Trade’s jurisdiction under Section 1583 are irrelevant.

Although this court has previously sanctioned the government's use of a counterclaim to assert a cause of action for reliquidation under a different classification, it has not squarely faced the question of the authority for such a claim. See *Tomoegawa (U.S.A.), Inc. v. U.S.*, 15 CIT 182 (1991) ("*Tomoegawa II*"). In *Tomoegawa II*, the government sought to amend its answers to add a counterclaim in cases removed from the suspension calendar, following an earlier decision in the designated test case. *Id.* at 183; see generally *Tomoegawa (U.S.A.), Inc. v. U.S.*, 12 CIT 112 (1988) ("*Tomoegawa I*"). In *Tomoegawa I*, the government amended its answer to include a counterclaim without objection from the plaintiff. *Tomoegawa II*, 15 CIT at 183; see generally *Tomoegawa I*, 12 CIT 112 *aff'd in part, vacated in part sub nom. Tomoegawa U.S.A., Inc. v. United States*, 861 F.2d 1275 (Fed. Cir. 1988) (holding that the imported merchandise was classifiable in accordance with the counterclaim asserted by the government). Subsequently, in *Tomoegawa II*, the plaintiff objected to the government's effort to amend its answer to add a counterclaim as untimely. *Tomoegawa II*, 12 CIT at 185. The court ruled that the addition of the counterclaim was timely and therefore did not address the authority for the counterclaim. *Id.* at 190. The court referenced, without analysis, Section 1583 as the statutory basis for the counterclaims, noting that the legislative history of the Customs Court Act of 1980 contemplated that the United States could recover "the proper amount of import duties." *Id.* In the very next sentence, the court invoked *Jarvis Clark* and its admonition that the court find the correct result. *Id.* Thus, the issue of the government's statutory authority to assert a counterclaim does not appear to have been squarely before the court. Instead, the concern appears to have been the right of the United States to recover duties owed as a result of the Court's obligation to reach the correct result, a right addressed by *Jarvis Clark*. Thus, *Tomoegawa II* does not address the lack of authority to assert counterclaims for classifications with higher rates of duty.

Nonetheless, the rules of this Court recognize that the Court must, if justice requires, redenominate a mistaken designation in a pleading. Rule 8(d)(2) ("If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so"). Here, Defendant seeks reliqui-

dition pursuant to a classification with a higher rate of duty.<sup>16</sup> The court treats the Counterclaim as a defense within its Answer; therefore, the motion to dismiss is denied as moot.

### CONCLUSION

In accordance with the foregoing, it is

**ORDERED** that the Counterclaim is redenominated as a defense; and it is further

**ORDERED** that the motion to dismiss is DENIED as moot.

Dated: July 20, 2022

New York, New York

*/s/ Claire R. Kelly*

CLAIRE R. KELLY, JUDGE

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<sup>16</sup> Defendant is not barred from arguing for a different classification at a higher duty rate. See, e.g., *Dollar Trading Corp. v. United States*, 67 Cust. Ct. 308, 315–16 (1971). Even prior to the Customs Courts Act of 1980, the United States repeatedly argued for alternative classifications. See, e.g., *id.* at 315–16 (citing *United States v. White Sulphur Springs Co.*, 21 C.C.P.A. 203 (1933); *United States v. R.J. Saunders & Co.*, 42 C.C.P.A. 128 (1955); *Bendix Corp. v. United States*, 57 Cust. Ct. 184 (1966); *J.M. Rodgers Inc. v. United States*, 59 Cust. Ct. 91 (1967), *judgment amended on other grounds*, 60 Cust. Ct. 42 (1968)). Although the dual burden of proof generally resulted in dismissal of cases where the plaintiff failed to prove the correctness of its proffered classification, there has never been any ban on the United States arguing for classifications different from CBP's.

# Index

*Customs Bulletin and Decisions*  
*Vol. 56, No. 30, August 3, 2022*

## *U.S. Customs and Border Protection* *CBP Decisions*

	CBP No.	Page
Extension and Amendment of Import Restrictions on Archaeological and Ethnological Material From Cyprus . . . . .	22–15	1

## *General Notices*

	Page
Announcement of the Modification of the National Customs Automation Program (NCAP) Test Concerning the Automated Commercial Environment (ACE) Portal Accounts To Establish the Vessel Agency Portal Account and To Decommission the Cartman and Lighterman Portal Accounts . . . . .	18
Revocation of One Ruling Letter and Revocation of Treatment Relating to the Tariff Classification of a Fluorescence Confocal Microscope . . . . .	27
Proposed Revocation of One Ruling Letter and Proposed Revocation of Treatment Relating to the Tariff Classification of Insulated Lunch Bags .	34
Copyright, Trademark, and Trade Name Recordations (No. 04 2022) . . . . .	43
Copyright, Trademark, and Trade Name Recordations (No. 05 2022) . . . . .	50

## *U.S. Court of International Trade* *Slip Opinions*

	Slip Op. No.	Page
Tau-Ken Temir LLP, and JSC NMC Tau-Ken Samruk, Plaintiffs, and Ministry Of Trade And Integration Of The Republic Of Kazakhstan, Plaintiff-Intervenor, v. United States, Defendant, and Globe Specialty Metals, Inc., and Mississippi Silicon LLC, Defendant-Intervenors. . . . .	22–82	61
Universal Tube And Plastic Industries, Ltd., THL Tube And Pipe Industries LLC, And KHK Scaffolding And Framework LLC, Plaintiffs, v. United States, Defendant, and Wheatland Tube Company, Defendant-Intervenor. . . . .	22–83	82

Pro-Team Coil Nail Enterprise, Inc. And PT Enterprise Inc., Plaintiffs, Unicatch Industrial Co., Ltd, TC International, Inc., Hor Liang Industrial Corp., Romp Coil Nails Industries Inc., And Primesource Building Products, Inc., Consolidated Plaintiffs, and S.T.O. Industries, Inc., Plaintiff-Intervenor, v. United States, Defendant, and Mid Continent Steel & Wire, Inc., Defendant-Intervenor. . . . .	22-84	98
Cyber Power Systems (USA) Inc., Plaintiff, v. United States, Defendant, United States, Counterclaimant, v. Cyber Power Systems (USA) Inc., Counterclaim Defendant. . . . .	22-85	111