

U.S. Customs and Border Protection



DEPARTMENT OF THE TREASURY

19 CFR PART 12

CBP DEC. 22-11

RIN 1515-AE73

EXTENSION OF IMPORT RESTRICTIONS IMPOSED ON CERTAIN ARCHAEOLOGICAL ARTIFACTS AND ETHNOLOGICAL MATERIAL FROM PERU

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

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect an extension of import restrictions on certain categories of archaeological artifacts and ethnological material of the Republic of Peru. The restrictions, which were originally imposed by Treasury Decision (T.D.) 97-50 and last extended by CBP Decision (CBP Dec.) 17-03, are due to expire on June 9, 2022, unless extended. The Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has made the requisite determinations for extending the import restrictions that previously existed and no cause for suspension exists. Pursuant to the exchange of diplomatic notes to extend the agreement, the import restrictions will remain in effect for an additional five years, and the CBP regulations are being amended to reflect this further extension through June 8, 2027. CBP-Dec. 17-03 contains the Designated List of archeological artifacts and ethnological material from Peru to which the restrictions apply.

DATES: Effective on June 9, 2022.

FOR FURTHER INFORMATION CONTACT: For legal aspects, W. Richmond Beevers, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of

Trade, (202) 325-0084, *ot-otrrculturalproperty@cbp.dhs.gov*. For operational aspects, Julie L. Stoeber, Chief, 1USG Branch, Trade Policy and Programs, Office of Trade, (202) 945-7064, *1USGBranch@cbp.dhs.gov*.

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 Peru (Peru) on June 9, 1997, concerning the imposition of import restrictions on archaeological material from the Pre-Hispanic cultures and certain ethnological material from the Colonial period of Peru (the Memorandum of Understanding (MOU) between the United States of America and the Republic of Peru).

On June 11, 1997, the U.S. Customs Service (U.S. Customs and Border Protection's predecessor agency) published Treasury Decision (T.D.) 97-50 in the **Federal Register** (62 FR 31713), 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. These restrictions continued the protection of archaeological material from the Sipán Archaeological Region forming part of the remains of the Moche culture that were first subject to emergency import restrictions on May 7, 1990 (T.D. 90-37), which were extended on June 27, 1994 (T.D. 94-54).

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 June 11, 1997, the import restrictions were subsequently extended four (4) times. First, on June 6, 2002, following the exchange of diplomatic notes, the former U.S. Customs Service published a final rule (T.D. 02-30) in the **Federal Register** (67 FR 38877) to extend the import restrictions for a period of five years. Second, on June 6, 2007, following the exchange of diplomatic notes, CBP published a final rule (CBP Dec. 07-27) in

the **Federal Register** (72 FR 31176) to extend the import restrictions for an additional five-year period. Third, on June 7, 2012, following the exchange of diplomatic notes, CBP published a final rule (CBP Dec. 12–11) in the **Federal Register** (77 FR 33624) to extend the import restrictions for an additional five-year period. Fourth and lastly, on June 7, 2017, following the exchange of diplomatic notes, CBP published a final rule (CBP Dec. 17–03) in the **Federal Register** (82 FR 26340) to extend the import restrictions for an additional five-year period through June 8, 2022.

On September 13, 2021, the United States Department of State proposed in the **Federal Register** (86 FR 50931) to extend the MOU between the United States and Peru concerning the import restrictions on certain categories of archaeological and ethnological material from Peru. On March 15, 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 the cultural heritage of Peru continues to be in jeopardy from pillage of certain archeological and ethnological material, and that the import restrictions should be extended for an additional five years. Pursuant to the exchange of diplomatic notes to extend the agreement, the import restrictions will remain in effect for an additional five years, and the CBP regulations are being amended to reflect this further extension through June 8, 2027.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions. The restrictions on the importation of archaeological artifacts and ethnological material are to continue to be in effect through June 8, 2027. Importation of such material from Peru 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 “Peru.”

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, 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 Peru to read as follows:

Number 1651–0124 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

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

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

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

Overview of This Information Collection

Title: Cargo Container and Road Vehicle Certification for Transport under Customs Seal.

OMB Number: 1651–0124.

Form Number: N/A.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: The United States is a signatory to several international Customs conventions and is responsible for specifying the technical requirements that containers and road vehicles must meet to be acceptable for transport under Customs seal. U.S. Customs and Border Protection (CBP) has the responsibility of collecting information for the purpose of certifying containers and vehicles for international transport under Customs seal. A certification of compliance facilitates the movement of containers and road vehicles across international territories. The procedures for obtaining a certification of a container or vehicle are set forth in 19 CFR part 115.

The respondents to this information collection are members of the trade community who are familiar with CBP regulations.

Type of Information Collection: Cargo Container/Vehicle Certification.

Estimated Number of Respondents: 25.

Estimated Number of Annual Responses per Respondent: 120.

Estimated Number of Total Annual Responses: 3,000.

Estimated Time per Response: 3.5 hours.

Estimated Total Annual Burden Hours: 10,500.

Dated: June 2, 2022.

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

[Published in the Federal Register, June 8, 2022 (85 FR 34895)]



NOTICE OF OPEN PUBLIC MEETINGS

AGENCY: U.S.-China Economic and Security Review Commission.

ACTION: Notice of open public meetings.

SUMMARY: Notice is hereby given of the following meetings of the U.S.-China Economic and Security Review Commission. Notice is hereby given of meetings of the U.S.-China Economic and Security Review Commission to review and edit drafts of the 2022 Annual Report to Congress. The Commission is mandated by Congress to

investigate, assess, and report to Congress annually on the “the national security implications of the economic relationship between the United States and the People’s Republic of China.” Pursuant to this mandate, the Commission will hold public meetings to review and edit drafts of the 2022 Annual Report to Congress.

DATES: These meetings of the Commission for review and edit of draft reports are called to order or adjourned by the Chairman as needed between the initial opening session on June 23, 2022 and the planned final session to be completed by October 7, 2022. The current schedule for review and edit sessions are planned for Thursday, June 23, 2022, from 9:00 a.m. to 5:00 p.m.; Friday, August 5, 2022, from 9:00 a.m. to 5:00 p.m. (as needed); Thursday, September 8, 2022, from 9:00 a.m. to 5:00 p.m.; Friday, September 9, 2022, from 9:00 a.m. to 5:00 p.m. (as needed); Thursday, October 6, 2022, from 9:00 a.m. to 5:00 p.m.; and Friday, October 7, 2022, from 9:00 a.m. to 5:00 p.m. (as needed). Reach out to the below contact for any updates to this schedule.

ADDRESSES: 444 North Capitol Street NW, Room 231, Washington, DC 20001. Public seating is limited and will be available on a “first-come, first-served” basis. *Reservations are not required to attend the meetings.*

FOR FURTHER INFORMATION CONTACT: Any member of the public seeking further information concerning the meetings should contact Jameson Cunningham, 444 North Capitol Street NW, Suite 602, Washington, DC 20001; telephone: 202–624–1496, or via email at jcunningham@uscc.gov. *Reservations are not required to attend the meetings.*

ADA Accessibility: For questions about the accessibility of the event or to request an accommodation, please contact Jameson Cunningham at 202–624–1496, or via email at jcunningham@uscc.gov. Requests for an accommodation should be made as soon as possible, and at least five business days prior to the event.

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: Pursuant to the Commission’s mandate, members of the Commission will meet to review and edit drafts of the 2022 Annual Report to Congress. The Commission is subject to the Federal Advisory Committee Act (FACA) with the enactment of the Science, State, Justice, Commerce and Related Agencies Appropriations Act, 2006 that was signed into law on November 22, 2005 (Pub. L. 109–108). In accordance with FACA, the Commission’s meetings to make decisions concerning the substance and recommendations of its 2022 Annual Report to Congress are open to the public.

Topics to Be Discussed: Editing and review sessions will cover material prepared for the 2022 Annual Report, including: a review of economics, trade, security and foreign affairs developments in 2022; Chinese Communist Party decision-making; U.S. policies to address China's nonmarket economy practices; China's energy plans and practices; supply chain vulnerabilities and resilience; China's cyber capabilities; China's activities and influence in South and Central Asia; Taiwan; Hong Kong; and other matters within the Commission's mandate as the Commission chooses to take up in deliberation of the Annual Report.

Required Accessibility Statement: These meetings will be open to the public. The Commission may recess the meetings to address administrative issues in closed session. The Commission will also recess the meetings around noon for a lunch break. At the beginning of the lunch break, the Chairman will announce what time the meetings will reconvene.

Authority: Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Pub. L. 106-398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108-7), as amended by Public Law 109-108 (November 22, 2005), as amended by Public Law 113-291 (December 19, 2014).

Dated: June 2, 2022.

DANIEL W. PECK,
Executive Director,
U.S.-China Economic and Security
Review Commission.

[Published in the Federal Register, June 8, 2022 (85 FR 34930)]

PROTEST (CBP FORM 19)

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

ACTION: 60-Day Notice and request for comments; Extension without change of an existing collection of information.

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

DATES: Comments are encouraged and must be submitted (no later than June 8, 2022) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0017 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

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

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

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

Overview of This Information Collection

Title: Protest.

OMB Number: 1651–0017.

Form Number: CBP Form 19.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: U.S. Customs and Border Protection (CBP) Form 19, *Protest*, is filed to seek the review of a CBP decision. This review may be conducted by CBP personnel who participated directly in the underlying decision. This form is also used to request “Further Review,” which means a request for review of the protest to be performed by CBP personnel who did not participate directly in the protested decision or by the Commissioner, or his designee, as provided in the CBP regulations.

The matters that may be protested include: the appraised value of merchandise; the classification and rate and amount of duties chargeable; all charges within the jurisdiction of the Secretary of Homeland Security or the Secretary of the Treasury; exclusion of merchandise from entry or delivery, or demand for redelivery; the liquidation or reliquidation of an entry or any modification of an entry; the refusal to pay a claim for drawback; refusal to reliquidate an entry made before December 18, 2004 under section 520(c) of the Tariff Act of 1930; or refusal to reliquidate an entry under section 520(d) of the Tariff Act of 1930.

The parties who may file a protest or application for further review include: the importer or consignee shown on the entry papers, or their sureties; any person paying any charge or exaction; any person seeking entry or delivery, with respect to a determination of origin under 19 CFR 181 Subpart G any exporter or producer of the merchandise subject to that determination, if the exporter or producer completed and signed a Certification of Origin covering the merchandise as provided for in 19 CR 181.11(a); of any person filing a claim for drawback; or any authorized agent of any of the persons described above.

CBP Form 19 collects information such as the name and address of the protesting party, information about the entry being protested, detailed reasons for the protest, and justification for applying for further review.

The information collected on CBP Form 19 is authorized by sections 514 and 514(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1514 and 1514 (a)) and provided for by 19 CFR part 174 *et seq.* This form is accessible at: https://www.cbp.gov/newsroom/publications/forms?title_1=19.

Type of Information Collection: Protest (Form 19).

Estimated Number of Respondents: 3,750.

Estimated Number of Annual Responses per Respondent: 12.

Estimated Number of Total Annual Responses: 45,000.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 45,000.

Dated: June 2, 2022.

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

[Published in the Federal Register, June 8, 2022 (85 FR 34894)]



CANADIAN BORDER BOAT LANDING PERMIT (CBP FORM I-68)

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

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

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

DATES: Comments are encouraged and must be submitted (no later than August 5, 2022) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0108 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

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

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

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

Overview of This Information Collection

Title: Canadian Border Boat Landing Permit.

OMB Number: 1651-0108.

Form Number: CBP Form I-68.

Current Actions: This submission is being made to extend the expiration date with a decrease to the burden hours. There is no change to the information collected.

Type of Review: Extension (with change).

Affected Public: Individuals or Households.

Abstract: The Canadian Border Boat Landing Permit, U.S. Customs and Border Protection (CBP) Form I-68, generally allows select individuals entering the United States along the northern border by small¹ pleasure boats to report their arrival and make entry without having to travel to a designated port of entry for an inspection by a CBP officer. The information collected on CBP Form I-68 allows eligible individuals to be inspected in person only once during the boating season, rather than each time they make an entry. United States citizens, Lawful Permanent Residents of the United States, Canadian citizens, and Landed Residents of Canada who are nationals of the Visa Waiver Program countries listed in 8 CFR 217.2(a) are eligible to apply for the permit.

CBP has developed a smart phone application known as ROAM that will in certain circumstances allow travelers participating in the I-68 program to report their arrival in the United States through the ROAM application, instead of by telephone. The ROAM app, implementing the I-68 program, will allow CBP officers to remotely conduct traveler interviews with a phone's video chat capability, and replace other technologies used for remote inspections that are obsolete or inefficient.

This information collection is provided for by 8 CFR 235.1(g) and Section 235 of Immigration and Nationality Act. CBP Form I-68 is accessible at: https://www.cbp.gov/newsroom/publications/forms?title_1=I-68.

Type of Information Collection: I-68 Paper Version.

Estimated Number of Respondents: 30.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 30.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 5 hours.

Type of Information Collection: I-68 Roam App.

Estimated Number of Respondents: 20,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 20,000.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 1,666 hours.

¹ Weighing less than five net tons.

Dated: May 31, 2022.

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

[Published in the Federal Register, June 6, 2022 (85 FR 34282)]



HOLDERS OR CONTAINERS WHICH ENTER THE UNITED STATES DUTY FREE

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

ACTION: 60-Day notice and request for comments; extension without change of an existing collection of information.

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

DATES: Comments are encouraged and must be submitted (no later than August 5, 2022) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0035 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

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

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

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

Overview of This Information Collection

Title: Holders or Containers Which Enter the United States Duty Free.

OMB Number: 1651-0035.

Form Number: N/A.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: Subheading 9803.00.50 of the Harmonized Tariff Schedule of the United States (HTSUS), codified as 19 U.S.C. 1202, provide for the release without entry or the payment of duty of certain substantial holders or containers pursuant to the provisions of 19 CFR 10.41b.

Section 19 CFR 10.41b eliminates the need for an importer to file entry documents by instead requiring, among other things, the marking of the containers or holders to indicate the HTSUS numbers that provide for duty-free treatment of the containers or holders.

For U.S. manufactured serially numbered holders or containers which may be released without entry or the payment of duty under

9801.00.10 HTSUS, 19 CFR 10.41b requires the owner to place the following markings on the holder or container: 9801.00.10, HTSUS (unless the holder or container has a permanently attached metal tag or plate showing, among other things, the name and address of the U.S. manufacturer); the name of the owner; and the serial number assigned by the owner. For serially numbered holders or containers of foreign manufacture for which may be released without entry or payment of duty under 9803.00.50 HTSUS, 19 CFR 10.41b requires the owner to place markings containing the following information: 9803.00.50 HTSUS; the district and port code numbers of the port of entry; the entry number; the last two digits of the fiscal year of entry covering the importation of the holders and containers on which duty was paid; the name of the owner; and the serial number assigned by the owner.

This collection of information applies to the importing and trade community which is familiar with import procedures and with the CBP regulations.

Type of Information Collection

Holders/Containers Entering U.S. Duty-Free

Estimated Number of Respondents: 20.

Estimated Number of Annual Responses per Respondent: 18.

Estimated Number of Total Annual Responses: 360.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 90.

Dated: May 31, 2022.

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

[Published in the Federal Register, June 6, 2022 (85 FR 34283)]

U.S. Court of Appeals for the Federal Circuit

USP HOLDINGS, INC., SUBSTITUTED FOR UNIVERSAL STEEL PRODUCTS, INC.,
PSK STEEL CORPORATION, DAYTON PARTS, LLC, BORUSAN MANNESMANN
PIPE U.S. INC., JORDAN INTERNATIONAL COMPANY, Plaintiffs-
Appellants v. UNITED STATES, JOSEPH R. BIDEN, JR., PRESIDENT OF THE
UNITED STATES, GINA M. RAIMONDO, SECRETARY OF COMMERCE, TROY
MILLER, SENIOR OFFICIAL PERFORMING THE DUTIES OF THE
COMMISSIONER FOR U.S. CUSTOMS AND BORDER PROTECTION,
Defendants-Appellees

Appeal No. 2021–1726

Appeal from the United States Court of International Trade in No. 1:19-cv-00209-GSK-MMB-LMG, Senior Judge Leo M. Gordon, Judge Gary S. Katzmann, Judge M. Miller Baker.

Decided: June 9, 2022

LEWIS LEIBOWITZ, The Law Office of Lewis E. Leibowitz, Washington, DC, argued for plaintiffs-appellants.

MEEN GEU OH, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendants-appellees. Also represented by BRIAN M. BOYNTON, TARA K. HOGAN, PATRICIA M. MCCARTHY, ANN MOTTO.

Before DYK, MAYER, and CHEN, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* DYK, in which *Circuit Judge* MAYER joins, and in which *Circuit Judge* CHEN joins except as to footnote 4.

Additional views filed by *Circuit Judge* CHEN.

DYK, *Circuit Judge*.

The Trade Expansion Act of 1962 authorizes the President to adjust imports—if he concurs with a determination by the U.S. Secretary of Commerce (“Secretary”) “that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security”—and to “determine the nature and duration” of the corrective action. 19 U.S.C. § 1862(c)(1)(A).

Based on an investigation under § 1862, the Secretary here determined that excessive steel imports threatened to impair the national security. The President concurred and issued a series of proclamations beginning with Proclamation 9705 on March 8, 2018. With those proclamations, the President imposed a twenty-five percent tariff on steel imports from a number of countries.

Appellants challenged the actions of both the President and the Secretary in the Court of International Trade (“Trade Court”), contending that the President’s and Secretary’s finding of a threat to national security and the President’s imposition of a tariff for an indefinite duration conflicted with the statute. The Trade Court granted the government’s motion for judgment on the pleadings. We affirm.

BACKGROUND

I

Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, authorizes the President to adjust imports that threaten national security. Section 1862 includes, as relevant here, three subsections.

Section 1862(b) directs the Secretary, on the request of an adversely affected party or an agency or department head, or on his own, to “immediately initiate an appropriate investigation to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion.” § 1862(b)(1)(A). After the investigation is concluded, the Secretary must submit “a report on the findings of such investigation” to the President. § 1862(b)(3)(A). The report must include the Secretary’s finding, if one is made, that an “article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security” and “the recommendations of the Secretary for action or inaction” regarding such a finding. *Id.*

Section 1862(c) provides that, thereafter, the President must determine if he agrees with the Secretary’s threat finding and, if so, what action is necessary:

[If] the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall—

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

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

§ 1862(c)(1)(A).

Section 1862(d)¹ provides nonexclusive factors for the President and the Secretary to consider regarding the threat to national security determination:

For the purposes of this section, *the Secretary and the President shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.*

§ 1862(d) (emphasis added).

II

On April 19, 2017, the Secretary initiated an investigation under § 1862 to determine the effects of steel imports on national security. *See* Publication of a Report on the Effect of Imports of Steel on the National Security, 85 Fed. Reg. 40,208 (July 6, 2020). The Secretary provided his report and recommendation to the President on January 11, 2018. *See id.* at 40,202. The report included the Secretary's findings:

The Secretary has determined that the displacement of domestic steel by excessive imports and the consequent adverse impact of those quantities of steel imports on the economic welfare of the domestic steel industry, along with the circumstance of global

¹ The statute includes two instances of subsection (d), which is a typographical error. We refer to the first instance of subsection (d).

excess capacity in steel, are “weakening our internal economy” and therefore “*threaten to impair*” the national security as defined in Section 232.

Id. at 40,224 (emphasis added). In view of these findings, the Secretary made the following recommendation:

Due to the threat of steel imports to the national security, as defined in Section 232, the Secretary recommends that the President take immediate action by adjusting the level of imports through quotas or tariffs on steel imported into the United States, as well as direct additional actions to keep the U.S. steel industry financially viable and able to meet U.S. national security needs. The quota or tariff imposed should be sufficient, after accounting for any exclusions, to enable the U.S. steel producers to be able to operate at about an 80 percent or better of the industry’s capacity utilization rate based on available capacity in 2017.

Id. at 40,225.

The President concurred with the Secretary’s threat finding and decided to take action in response. He announced those actions in multiple presidential proclamations between March 8, 2018, and May 19, 2019. The President issued Proclamation 9705 on March 8, 2018, and established a twenty-five percent tariff on imports of steel articles from all countries, except Canada and Mexico, to take effect March 23, 2018. Proclamation No. 9705, 83 Fed. Reg. 11,626–27 (Mar. 15, 2018). Proclamation 9705 also invited “[a]ny country with which [the United States] ha[s] a security relationship . . . to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country.” *Id.* at 11,626.

From March 22, 2018, to May 19, 2019, the President issued a series of additional proclamations excluding various countries from the twenty-five percent tariff, again including Canada and Mexico. *See* Proclamation No. 9711 of March 22, 2018, 83 Fed. Reg. 13,361–62 (Mar. 28, 2018); Proclamation No. 9740 of April 30, 2018, 83 Fed. Reg. 20,683–84 (May 7, 2018); Proclamation No. 9759 of May 31, 2018, 83 Fed. Reg. 25,857–58 (June 5, 2018); Proclamation No. 9777 of August 29, 2018, 83 Fed. Reg. 45,025–26 (Sept. 4, 2018); Proclamation No. 9894 of May 19, 2019, 84 Fed. Reg. 23,987 (May 23, 2019). Many other countries remained subject to the tariff.²

² On August 10, 2018, the President issued Proclamation 9772 increasing the tariffs for steel from Turkey from twenty-five to fifty percent. Proclamation No. 9772, 83 Fed. Reg. 40,429, ¶ 6 (Aug. 15, 2018). That increase was the subject of *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021).

Appellants USP Holdings, Inc., PSK Steel Corporation, Dayton Parts, LLC, Jordan International Company, and Borusan Mannesmann Pipe U.S. Inc. (collectively, “USP” or “Appellants”) are all U.S. corporations primarily engaged in the import of steel products. USP filed suit with the Trade Court seeking a determination that the President’s and the Secretary’s threat determinations violated § 1862, that the imposition of the tariff was therefore unlawful, and that the indefinite duration of the tariff also violated § 1862. As to the threat determination, USP argued that the statute required a finding of an “impending threat,” a finding neither the Secretary nor the President made. J.A. 17. As to the President’s determination to impose a tariff indefinitely, USP challenged only the President’s action because the Secretary did not make any finding or recommendation as to the duration. USP argued that the statutory requirement that the President “determine the nature and *duration* of the action,” § 1862(c)(1)(A)(ii) (emphasis added), required the President to set a termination or end date, which he failed to do. Appellants alleged they had paid the steel tariffs the President imposed in various amounts ranging from \$500,000 to nearly \$35 million.

The government moved for judgment on the pleadings, which the Trade Court granted. See *Universal Steel Prods., Inc. v. United States*, 495 F. Supp. 3d 1336 (Ct. Int’l Trade 2021). The Trade Court held that Proclamation 9705 and the subsequent proclamations imposing tariffs did not violate § 1862. However, the court also held that the Secretary’s report was not a final, reviewable action under the Administrative Procedure Act (“APA”). Judge Katzmann, joined by Judge Gordon, concurred separately. Judge Baker concurred in part and dissented in part, arguing that the court should dismiss the President as a party because it did not have jurisdiction “to enter relief against the President” directly. *Id.* at 1360–61. USP subsequently filed an unopposed motion for entry of partial judgment under Rule 54(b), which the Trade Court granted.

USP appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

DISCUSSION

On appeal, “[w]e review a judgment on the pleadings from the Court of International Trade *de novo*.” *Forest Lab’ys, Inc. v. United States*, 476 F.3d 877, 881 (Fed. Cir. 2007).

I

We first address the determinations by the President and the Secretary that steel imports threaten to impair the national security. USP challenges both determinations. We consider the review ability of this determination as to both the President and the Secretary.

Under the Constitution, Congress has exclusive authority to regulate international commerce. U.S. Const. art. I, § 8, cl. 3. However, Congress is permitted to delegate that authority to the Executive under appropriate circumstances. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–30 (1935). The Supreme Court has considered the specific delegation of authority to control imports in § 1862 and upheld the statute. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976). Approving the delegation to the President, the Supreme Court noted that § 1862 satisfies the “intelligible principle” requirement because “[i]t establishes clear preconditions to Presidential action—*inter alia*, a finding by the Secretary. . . [that imports] threaten to impair the national security.” *Id.* (quoting § 1862(b)(3)(A)).

The Supreme Court has held that the “President’s actions may [] be reviewed for constitutionality.” *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). But USP does not assert a constitutional challenge here because “claims simply alleging that the President has exceeded his statutory authority are not ‘constitutional’ claims, subject to judicial review under the exception recognized in *Franklin*.” *Dalton v. Specter*, 511 U.S. 462, 473–74 (1994).

Nonetheless, claims that the President’s actions violated the statutory authority delegated to him in § 1862 are reviewable. Such review is available to determine whether the President “clear[ly] misconstru[ed]” his statutory authority. *Corus Grp. PLC v. Int’l Trade Comm’n*, 352 F.3d 1351, 1356 (Fed. Cir. 2003); *see Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1361 (Fed. Cir. 2006) (en banc) (explaining that courts may consider whether “the President has violated an explicit statutory mandate”).³

Although we conclude the President’s actions beyond his statutory authority are reviewable, we must also consider the appropriateness of bringing suit against the President directly. The Trade Court held that the President himself could be named as a defendant in the complaint because no relief was sought against him. As noted in Judge Baker’s concurrence at the Trade Court, the President cannot be sued directly to challenge his threat determination under the statute. As we held in *Corus*, the jurisdictional statute here, 28 U.S.C. § 1581(i), “does not authorize proceedings directly against the Presi-

³ But the scope of this review is limited. *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018) (“[T]here are limited circumstances when a presidential action may be set aside if the President acts beyond his statutory authority, but such relief is only rarely available.”); *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (“For a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.”).

dent.” *Corus*, 352 F.3d at 1359. The Trade Court should have dismissed the President. Nonetheless, we have jurisdiction to consider challenges to the President’s actions in suits against subordinate officials who are charged with implementing the presidential directives, such as the Secretary of Commerce and Customs. *See Corus*, 352 F.3d at 1359–60.

USP also alleges that the Secretary’s action violated the statute. USP argues that the Secretary’s threat finding constitutes a final agency action that is subject to review under the APA. *See* 5 U.S.C. § 704. The Trade Court held that the Secretary’s report was not a final, reviewable action under the APA because the “imposition of tariffs, which is the action that gave rise to the legal consequences that Plaintiffs challenge, was an action taken by the President, and not by the Secretary,” such that the report did not carry legal consequences itself. J.A. 23.

The Trade Court’s decision in this respect is incorrect. We have held that “an agency recommendation is subject to judicial review” if it constitutes a final agency action, i.e., “if ‘the action . . . mark[s] the consummation of the agency’s decisionmaking process,’ and ‘the action [is] one by which rights or obligations have been determined, or from which legal consequences will flow.’” *Corus*, 352 F.3d at 1358 (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). In reference to the first prong, the government does not appear to dispute that the Secretary’s threat determination is the consummation of the agency’s decisionmaking process.

As to the second (legal consequences) prong, we addressed in *Corus* a statute where “the President does not have complete discretion under the statute” and his authority to act under the statute only arose “if the Commission [made] ‘an affirmative finding regarding serious injury.’” *Corus*, 352 F.3d at 1359 (quoting 19 U.S.C. § 2253(a)(1)(A)). Because the agency report with an affirmative finding of a serious injury was a predicate to the President’s authority to act in that case, we concluded that there were sufficient legal consequences for a reviewable, final agency action. *Id.* That conclusion was driven in large part by the Supreme Court’s decision in *Bennett*, where the Court held that an opinion by the Fish and Wildlife Service that had “powerful coercive effect,” “alter[ed] the legal regime” and had “direct and appreciable legal consequences.” 520 U.S. at 158–59, 169, 178.

Here, the Supreme Court held that an earlier version of § 1862 “establishes clear preconditions to Presidential action” that include the Secretary’s finding that imports threaten to impair national se-

curity. *Algonquin*, 426 U.S. at 549. And in the specific context of § 1862 as relevant here, we have explained:

The statute indisputably incorporates a congressional judgment that *an affirmative finding of threat by the Secretary is the predicate for presidential action*, while also incorporating a congressional judgment that how to address the problem identified in the finding is a matter for the President, whose choices about remedy are not constrained by the Secretary’s recommendations.

Transpacific, 4 F.4th at 1323 (emphasis added). This precondition to presidential action brings this case within *Corus*.⁴

⁴ Judge Chen suggests that the decision in *Corus* is inconsistent with *Franklin* and *Dalton*. There is no inconsistency. The Supreme Court itself in *Bennett* (where the deciding authority could not act without a recommendation) explicitly distinguished *Franklin* and *Dalton* as resting on the advisory nature of the recommendations:

[T]he Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions. In this crucial respect the present case is different from the cases upon which the Government relies, *Franklin v. Massachusetts*, 505 U.S. 788 (1992), and *Dalton v. Specter*, 511 U.S. 462 (1994). In the former case, the agency action in question was the Secretary of Commerce’s presentation to the President of a report tabulating the results of the decennial census; our holding that this did not constitute “final agency action” was premised on the observation that the report carried “no direct consequences” and served “more like a tentative recommendation than a final and binding determination.” 505 U.S., at 798. And in the latter case, the agency action in question was submission to the President of base closure recommendations by the Secretary of Defense and the Defense Base Closure and Realignment Commission; our holding that this was not “final agency action” followed from the fact that the recommendations were in no way binding on the President, who had absolute discretion to accept or reject them. 511 U.S., at 469–471. Unlike the reports in *Franklin* and *Dalton*, which were purely advisory and in no way affected the legal rights of the relevant actors, the Biological Opinion at issue here has direct and appreciable legal consequences.

Bennett, 520 U.S. at 178. The Secretary’s finding here is not merely advisory. As the Supreme Court held in *Algonquin*, the Secretary’s threat finding is a “clear precondition[] to Presidential action.” 426 U.S. at 559.

Nor is this a situation where the challenge is based on procedural flaws in Commerce’s approach. The absence of such procedural flaws was not a condition of presidential action in *Dalton*:

The President’s authority to act is not contingent on the Secretary’s and Commission’s fulfillment of all the procedural requirements imposed upon them by the 1990 Act. Nothing in [the relevant statute] requires the President to determine whether the Secretary or Commission committed any procedural violations in making their recommendations, nor does [the relevant statute] prohibit the President from approving recommendations that are procedurally flawed.

511 U.S. at 476. See *Silfab Solar*, 892 F.3d at 1347 (confirming that presidential action is not invalidated by procedural problems in a recommendation); *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1341 (Fed. Cir. 2010) (same); see also *Motions Sys.*, 437 F.3d at 1362 (“[B]ecause the acts of the Trade Representative were not final actions, the Court of International Trade also lacked jurisdiction to review those acts. Instead, the Trade Representative’s actions were analogous to those of the Secretary in *Franklin*, a case in which the Secretary’s report was ‘like a tentative recommendation’ or ‘the ruling of a subordinate official’ because it was the President who carried the responsibility of transmitting the final report to Congress.”).

The Trade Court’s effort to distinguish *Corus*—on the ground that 19 U.S.C. § 2253(a)(1)(A) in *Corus* “does not give the President the option to accept or reject the finding of the Commission” but § 1862(c)(1)(A) (at issue here) does—is not well taken. *Universal Steel*, 495 F. Supp. 3d at 1345. That supposed distinction does not exist. Section 2253, like § 1862, gives the President the option to take no action, as demonstrated by the requirement that the President send a report to Congress when he decides not to act. *See* § 2253(b)(2). Thus, here as in *Corus*, the President is not compelled to act upon the recommendation of the Secretary, but an affirmative threat finding is a predicate to the President’s authority to act under the statute. *See* § 1862(c)(1)(A); § 2253(b)(2); *Corus*, 352 F.3d at 1359. The fact that the Secretary’s determination is not reviewable if the President takes no action does not defeat review of the Secretary’s determination when the President does act based on the Secretary’s report finding a threat to national security.⁵

Other cases have acknowledged that a predicate affirmative agency finding of an injury or threat, as in *Corus*, is reviewable. In *Silfab Solar*, we distinguished the International Trade Commission’s “affirmative finding regarding serious injury or the threat thereof,” which was a “condition necessary for the President to take action” that was reviewable under *Corus*, from a remedy recommendation that was not a predicate to the President’s authority to act and was not reviewable. *Silfab Solar*, 892 F.3d at 1346.

The situation here, where the Secretary’s affirmative finding of a national security threat is a predicate to presidential authority, is distinguishable from the cases where the relevant statute lacked this type of condition on presidential action. *See, e.g., Dalton*, 511 U.S. at 465–66; *Franklin*, 505 U.S. at 791–92. In the former, the agency action is reviewable; in the latter, it is not.

We conclude that the Secretary’s threat determination under § 1862 is a reviewable final action because it is a predicate to the President’s delegated authority to act under the statute.

⁵ As noted in *Silfab Solar*, review does not extend to cover procedural violations in the Secretary’s determinations. *Silfab Solar*, 892 F.3d at 1347 (noting that “[n]othing in [the relevant statute] requires the President to determine whether the Secretary or Commission committed any procedural violations in making their recommendations, nor does [the relevant statute] prohibit the President from approving recommendations that are procedurally flawed”) (alterations in original) (quoting *Dalton*, 511 U.S. at 476).

II

USP argues that the threat determination by both the President and the Secretary was contrary to the clear language of § 1862.⁶ USP argues the “threat” must be “imminent” or “near at hand” and “likely to happen soon.” Appellants’ Br. at 31, 35–36. In other words, USP argues that the threat determination “inherently requires a serious risk near in time.” Reply Br. at 11. USP relies on dictionary definitions to argue that the ordinary meaning of the term “threat” encompasses a “sense of likely harm” that is impending and does not include “improbable, slight or remote risk[s].” Appellants’ Br. at 30–31 (citing Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/threat>; Collins Dictionary, <https://www.collinsdictionary.com/dictionary/english/threaten>).

Section 1862 imposes no imminence requirement. The factors that the President and Secretary are directed to consider in making their determinations do not mention imminence but focus instead on long term health of and adverse effects on the relevant domestic industry. § 1862(d). The identification of such factors in § 1862 is inconsistent with the notion that the threat must be imminent.

USP relies on *Goss Graphics Systems, Inc. v. United States*, 216 F.3d 1357, 1362 (Fed. Cir. 2000), and *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994), both of which recognized an imminence requirement. Appellants’ Br. at 31. But those cases involved a different statute, which specifically required that “the threat of material injury is real and that actual injury is imminent.” *Suramerica*, 44 F.3d at 983 (quoting 19 U.S.C. § 1677(7)(F)(ii) (1993)); *Goss*, 216 F.3d at 1362. That statute has no relevance here. If anything, it shows that when Congress wanted to impose an imminence requirement, it said so explicitly.

Because § 1862 provides no basis to impose an imminence requirement, USP’s argument that the President’s and the Secretary’s determinations violated the statute is unsupported.

USP does not challenge the President’s determination for any reason other than the alleged statutory violation.⁷ Nor could it because § 1862 commits to the President the discretion to “determine whether

⁶ In its brief, USP also argued at length regarding the timing requirements imposed on the Secretary and President in § 1862. However, at oral argument, USP’s counsel admitted that the timing requirements were complied with. Oral Arg. at 1:42–2:51.

⁷ The President’s actions “are not reviewable under the APA” because “the President is not an ‘agency.’” *Dalton*, 511 U.S. at 470; see *Franklin*, 505 U.S. at 796 (“We hold that the final action complained of is that of the President, and the President is not an agency within the meaning of the Act. Accordingly, there is no final agency action that may be reviewed under the APA standards.”); *Motions Sys. Corp.*, 437 F.3d at 1359 (“Motion Systems acknowledges that it cannot challenge the President’s actions under the APA because the President is not an ‘agency.’”).

[he] concurs” with the Secretary’s threat finding. § 1862(c)(1)(A)(i). Such determinations committed to the President’s discretion are beyond our jurisdiction to review. See *Dalton*, 511 U.S. at 474; *United States v. George S. Bush & Co.*, 310 U.S. 371, 379–80 (1940); *Silfab Solar*, 892 F.3d at 1349. Because § 1862(c) grants the President discretion, how he “chooses to exercise the discretion Congress has granted him is not a matter for our review.” *Dalton*, 511 U.S. at 476.

USP separately criticizes the Secretary’s threat determination as unsupported by substantial evidence. But the Secretary’s threat determination is not reviewable under the APA arbitrary and capricious standard. This is so because the standard governing the Secretary’s action is the same as for the President’s action (i.e., the existence of a “threat”), and the President’s action is only reviewable for compliance with the statute. Under such circumstances, the threat determinations of the President and the Secretary are reviewed together as a single step using an identical test under the Supreme Court’s decision in *Bush*. As explained in *Bush*, where the Court addressed the requirements of a statute similar to § 1862, “the action of the Commission and the President is but one stage of the legislative process.” 310 U.S. at 379. The Supreme Court in *Bush* applied the same deference to both the Tariff Commission’s report and the President’s determination. *Id.* at 380. We must do so here as well. The Secretary’s threat determination is not subject to review except to determine compliance with the statute.

III

USP alleges that the President failed to satisfy the “nature and duration” requirement in § 1862(c)(1)(A) with Proclamation 9705. Unlike the threat determination, which included the Secretary’s predicate finding, the nature and duration of the action is committed to the President, and the Secretary plays no part. § 1862(c). Thus, we review only the President’s action. As discussed above, we review the President’s action for compliance with the statutory authority delegated to him by Congress.

The statute here grants the President discretion to “determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports” to address imports that threaten national security. § 1862(c)(1)(A)(ii).⁸ USP argues that the President’s action failed to satisfy the requirements of § 1862(c)(1)(A)

⁸ USP suggests that the change in the statutory text in 1988 from “take such action, and for such time” to “determine the nature and duration of the action” indicates an intention to restrict the President’s authority. Appellants’ Br. at 20–28; Appellees’ Br. at 30. In *Transpacific*, we held that this change was “stylistic.” 4 F.4th at 1326, 1329 (quoting *Jama v. Immigr. & Customs Enf’t*, 543 U.S. 335, 343 n.3 (2005)).

because “Proclamation 9705 did not indicate any kind of time period during which these import adjustments would last” and failed to set an end date or other criteria. Appellants’ Br. at 29. The statute includes no limits on the duration of the action.

This court recently addressed the President’s authority to act under § 1862(c) in *Transpacific*. There, following the same investigation, report, and Proclamation 9705 for steel imports at issue here, the President issued a later proclamation that doubled the tariff on steel imports from Turkey. *Transpacific*, 4 F.4th at 1309–10. *Transpacific* challenged whether the timing requirements in § 1862(c)(1) “permit[] the President to announce a continuing course of action within the statutory time period and then modify the initial implementing steps in line with the announced plan of action by adding impositions on imports to achieve the stated implementation objective.” *Id.* at 1318–19. This court upheld the increased tariff on Turkish steel and explained:

[W]e conclude that the best reading of the statutory text of § 1862 . . . is that the authority of the President *includes authority to adopt and carry out a plan of action that allows adjustments of specific measures*, including by increasing import restrictions, in carrying out the plan over time.

Id. at 1319 (emphasis added). Thus, under *Transpacific*, § 1862(c)(1)(A) permits the President to adjust actions after taking the “first step” in a continuing course of action. 83 Fed. Reg. 11,625, ¶ 11.

Given our holding that the President has the “authority to adopt and carry out a plan of action” and to adjust his ongoing approach under § 1862(c), we see no reason why the duration requirement in § 1862(c)(1)(A) must be fixed by an end date or termination criteria. *Transpacific*, 4 F.4th at 1319. If the President has authority to undertake a plan of action that includes adjusting tariffs overtime, then the President must also have authority to undertake a plan of action that includes imposing a tariff indefinitely and removing it at a later time once the President determines that it is no longer necessary. Section 1862 commits the determination of the “nature and duration of the action” to the “judgment of the President.” § 1862(c)(1)(A)(ii). And Congress intended that authority to be “continuing.” H.R. Rep. No. 84–745, at 7 (1955). The statute does not limit the President’s authority to establishing a set term, and the proclamations here do not violate the statute. The amendments to § 1862 in 1988 imposing strict time limits on the President’s action were enacted in response to prior failures to act decisively and in a timely manner and do not suggest that the President lacks authority to revise his actions at a later time.

USP does not argue that the President’s action, if consistent with the statute, is impermissible. Again, this is a matter committed to the President’s discretion, and the President’s exercise of his judgment to “determine the nature and duration” of the action he believes necessary is beyond the scope of our review. *See Dalton*, 511 U.S. at 474; *Bush*, 310 U.S. at 379–80; *Transpacific*, 4 F.4th at 1319; *Silfab Solar*, 892 F.3d at 1349.

CONCLUSION

We have authority to review the determinations by both the President and the Secretary that steel imports threaten national security and the determination by the President to set a steel tariff for an indefinite duration. We find no violations of the statute.

AFFIRMED

COSTS

No costs.

USP HOLDINGS, INC., SUBSTITUTED FOR UNIVERSAL STEEL PRODUCTS, INC., PSK STEEL CORPORATION, DAYTON PARTS, LLC, BORUSAN MANNESMANN PIPE U.S. INC., JORDAN INTERNATIONAL COMPANY, Plaintiffs-Appellants v. UNITED STATES, JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, GINA M. RAIMONDO, SECRETARY OF COMMERCE, TROY MILLER, SENIOR OFFICIAL PERFORMING THE DUTIES OF THE COMMISSIONER FOR U.S. CUSTOMS AND BORDER PROTECTION, Defendants-Appellee

Appeal No. 2021–1726

Appeal from the United States Court of International Trade in No. 1:19-cv-00209-GSK-MMB-LMG, Senior Judge Leo M. Gordon, Judge Gary S. Katzmann, Judge M. Miller Baker.

CHEN, *Circuit Judge*, additional views.

As to the question of whether the Commerce Secretary’s threat determination under 19 U.S.C. § 1862 is a judicially reviewable final agency action, I agree with the panel’s decision because the relevant facts are essentially the same as facts in *Corus Group. Corus Grp. PLC v. Int’l Trade Comm’n*, 352 F.3d 1351, 1359 (Fed. Cir. 2003). However, I write separately to express concern that *Corus Group* is inconsistent with Supreme Court precedents on the non-finality of a Secretary’s or Commission’s tentative report and recommendation to the President.

The “core question” for determining finality is “whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.” *Dalton v. Specter*, 511 U.S. 462, 470 (1994) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992)). In both *Franklin* and *Dalton*, the Supreme Court held that the Secretary’s or Commission’s report and recommendations to the President did not constitute final agency action, reviewable under the APA, because those recommendations were not themselves binding actions that directly affected the parties.

In *Franklin*, the Commerce Secretary’s decennial census report had “no direct effect on reapportionment until the President [took] affirmative steps to calculate and transmit the apportionment to Congress.” 505 U.S. at 799. The President was not bound by the data in the Secretary’s report; rather, the decennial census was a “moving target” subject to correction by the President. *Id.* at 797. The Court observed that the report, therefore, “carrie[d] no direct consequences for the reapportionment of Representatives” and “serve[d] more like a tentative recommendation than a final binding determination,” like a “ruling of a subordinate official.” *Id.* at 798 (internal quotation marks omitted). The Court distinguished the situation from *Japan Whaling Ass’n*, where the Secretary’s certification “automatically triggered sanctions . . . regardless of any discretionary action the President himself decided to take.” *Id.* at 798–99 (citing 478 U.S. 221 (1996)). Under *Franklin*, a Secretary’s report and recommendation to the President is not reviewable final agency action if presidential action is necessary to cause the ultimate entitlement or impact on rights and where the President has discretion to revise the Secretary’s findings.

In *Dalton*, the Supreme Court again found that recommendations to the President were not reviewable final agency action. With the Defense Base Closure and Realignment Act of 1990, Congress designed an elaborate selection process for the fair and timely closure and realignment of military bases. *Dalton*, 511 U.S. at 464. The process involved the Defense Base Closure and Realignment Commission submitting a report that recommended base closings and realignments. *Id.* at 465. The President was required to either approve or disapprove the Commission’s recommendations “in their entirety.” *Id.* If the President disapproved, the Commission could prepare a new report to submit to the President. *Id.* If the President again disapproved, no bases could be closed that year. *Id.* In *Dalton*, the Commission had recommended closing the Philadelphia Naval Shipyard and the President approved. *Id.* at 466. The Supreme Court held that the Commission’s report was unreviewable because, as in *Franklin*, the report carried “no direct consequences for base clos-

ings.” *Id.* at 469. The Court found “immaterial” the fact that the President was constrained to either entirely approving or disapproving the Commission’s recommendation. *Id.* at 470–71. The Court emphasized: “Without the President’s approval, no bases are closed under the Act” and, furthermore, “the Act, in turn, does not by its terms circumscribe the President’s discretion to approve or disapprove the Commission’s report.” *Id.* at 470. “[M]ore fundamentally,” with regard to the action that “will directly affect the parties,” it is “the President, not the Commission, [who] takes the final action that affects the military installations.” *Id.* (internal quotation marks omitted). *Dalton*, in short, reaffirmed that a report or recommendation to the President is not a final agency action if no direct consequences occur without the President’s action and if the President has discretion in whether to take action.

Setting aside *Corus Group*, our case would be a straightforward application of *Franklin* and *Dalton*. Before any action “to adjust the imports of the article and its derivatives” is taken, the President must concur with the Secretary of Commerce’s finding that the imported article threatens to impair the national security and determine the appropriate duration or action. 19 U.S.C. §1862(c)(1)(A). But the President can choose to disagree with the Secretary’s findings and refuse to take action. *Id.* § 1862(c)(1)(A)(i) (“whether the President concurs with the finding of the Secretary”); *id.* § 1862(c)(1)(A)(ii) (“if the President concurs”); *id.* § 1862(c)(2) (“the President shall submit to the Congress a written statement of the reasons why the President has . . . refused to take action”). In which case, there are no direct consequences from the Secretary’s report and recommendation regarding the imported article and the imposition of tariffs. Further, even when the President concurs and takes action, there are almost no limits to the President’s discretion except that the President give consideration to certain factors—more discretion than the President had in *Dalton*. See Oral Arg.17:30–17:49; 19 U.S.C. § 1862(d) (listing factors the President “shall . . . give consideration to”). Because the Secretary’s report and recommendation by themselves carry no direct consequences for or effect on any party, under *Franklin* and *Dalton*, the report and recommendation should constitute unreviewable, non-final agency action.

But in *Corus Group*, this court held that the Commission’s report and recommendation under a very similar statute, 19 U.S.C. § 2253, was reviewable because “the statute only gives the President authority to impose a duty if the Commission makes ‘an affirmative finding regarding serious injury.’” *Corus Grp.*, 352 F.3d at 1359 (quoting 19 U.S.C. § 2253(a)(1)(A)). The court held that this “affirmative finding”

prerequisite to presidential action meant the Commission's report and recommendation had "direct and appreciable legal consequences" and the President's action was nondiscretionary, thus making the Commission's report and recommendation reviewable. *Id.* at 1358–59. Because *Corus Group* held as such, and because the statute in this case is identically structured, where the Commerce Secretary must make an affirmative finding of a threatened impairment to national security before the President can act, I join the panel opinion. Nevertheless, by treating one particular type of Secretary or Commission recommendation report differently from all other Secretary or Commission recommendation reports for purposes of reviewability, I view *Corus Group's* reasoning inconsistent with the analysis in *Dalton* and *Franklin*. *Dalton*, in particular, demonstrates the fact that the President lacks the authority to act (to close bases) absent prerequisite findings and recommendation by a Secretary or Commission is immaterial to determining whether the Secretary's or Commission's findings and recommendation is a final action. 511 U.S. at 470–71. The Supreme Court's test of whether the action "will directly affect the parties" does not involve looking at whether the President's authority to act is affected. *Id.* at 469.

Nor does the Supreme Court's *Bennett* decision, which *Corus Group* relied on, suggest otherwise. *Corus Grp.*, 352 F.3d at 1359 ("We conclude also that this case is controlled by *Bennett*, rather than by *Dalton* and *Franklin*. . . ."). Unlike *Franklin* and *Dalton*, *Bennett* did not involve an agency making a tentative recommendation to the President but a determination of one agency's entitlement by another. In *Bennett*, the Fish and Wildlife Services (FWS) issued a determination on another agency's actions and their impact on threatened and endangered species of animals. FWS's determination created a legal burden and specific liabilities that, thereby, determined the other agency's rights and obligations. *Bennett v. Spear*, 520 U.S. 154, 169–70 (1997) (explaining that once a biological opinion issues, the agency subject to the opinion "bears the burden of 'articulating in its administrative record its reasons for disagreeing with the conclusions of a biological opinion'" and though free to disregard the biological opinion, the agency "does so at its own peril" subject to substantial civil and criminal penalties including imprisonment); *id.* at 178 (finding the action is "one by which rights or obligations have been determined" because the "Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions"). Accordingly, the Supreme

Court found that FWS's determination was a final agency action, specifically distinguishing it from the reports and recommendations to the President in *Franklin* and *Dalton*, which were "more like a tentative recommendation than a final and binding determination." *Id.* at 177–78 (internal quotation marks omitted).

We have applied *Franklin* and *Dalton*, in other cases involving tentative reports and recommendations to the President, to find that the reports and recommendations are non-final and thus unreviewable. In our en banc decision in *Motions Systems*, we held that the acts of the Trade Representative under 19 U.S.C. § 2451, involving recommendations on the prevention or remedy of market disruption, which the President had ultimate discretion over, were not final actions. *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1359, 1362 (Fed. Cir. 2006) (en banc). Similarly, in *Michael Simon Design*, the International Trade Commission's report and recommendations to the President regarding modifications to the Harmonized Tariff Schedule of the United States (HTSUS) were non-final and unreviewable. *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1338–40 (Fed. Cir. 2010). Like in our case, the report and recommendations were "purely advisory" and did not "contain terms or conditions that circumscribe the President's authority to act," "limit the President's potential responses," nor "directly modify the HTSUS" and, therefore, did not "directly impact legal rights or alter any legal regime"—even if 19 U.S.C. § 3006 required the President to receive recommendations from the Commission before proclaiming any modification. *Id.* at 1336, 1339–40; 19 U.S.C. § 3006(a) ("The President may proclaim modifications, based on the recommendations by the Commission . . .").

Accordingly, although I agree that this panel is bound by *Corus Group*, I write to express concern that *Corus Group* was, and our decision in this case is, incorrectly decided under Supreme Court precedents *Franklin* and *Dalton*.

U.S. Court of International Trade

Slip Op. 22–58

BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S. and GULF COAST EXPRESS PIPELINE, LLC, Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge
Court No. 21–00186
PUBLIC VERSION

[Granting defendant’s motion to dismiss for lack of subject matter jurisdiction.]

Dated: June 1, 2022

Julie C. Mendoza, R. Will Planert, Edward J. Thomas III, Morris, Manning & Martin, LLP, of Washington, D.C., argued for plaintiff Borusan Mannesmann Boru Sanayi ve Ticaret A.S. With them on the brief were Donald B. Cameron, Jr., Brady W. Mills, Mary S. Hodgins, Jordan L. Fleischer, and Nicholas C. Duffey. Jonathan T. Stoel, and Jared R. Wessel, Hogan Lovells US LLP, of Washington, D.C., argued for plaintiff Gulf Coast Express Pipeline, LLC. With him on the brief were Nicholas W. Laneville.

Guy R. Eddon, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for defendant United States. With him on the brief were Brian M. Boynton, Acting Assistant Attorney General, Patricia M. McCarthy, Director, Aimee Lee, Assistant Director, and Justin R. Miller, Attorney-in-Charge. Of counsel on the brief was Alexandra Khrebtukova, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

OPINION

Reif, Judge:

The action before the court involves a motion to dismiss for lack of subject matter jurisdiction pursuant to United States Court of International Trade (“USCIT”) Rule 12(b)(1). Plaintiffs, Borusan Mannesmann Boru Sanayi Ticaret A.S. (“BMB”) and Gulf Coast Express Pipeline LLC (“GCX”), initiated this action to challenge the denial of Protest No. 531221100010 by U.S. Customs and Border Protection (“Customs”) and contest Customs’ denial of administrative refunds of tariffs on 19 entries of imported Turkish steel pipe. Compl. ¶ 1, ECF No. 7. Defendant, the United States (“defendant”), moves to dismiss this action for lack of subject matter jurisdiction because the subject entries are unliquidated. Def.’s Mot. to Dismiss (“Def. Mot.”) at 1–2, ECF No. 21.

BACKGROUND

On March 8, 2018, and pursuant to section 232 of the Trade Expansion Act of 1962 (“Section 232”), 19 U.S.C. § 1862 (2018),¹ the President issued Presidential Proclamation 9705.² See Proclamation 9705 of March 8, 2018, *Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 11,625 (Mar. 15, 2018) (“Proclamation 9705”). Proclamation 9705 introduced Heading 9903.80.01, imposing a 25 percent *ad valorem* tariff on U.S. imports of certain steel products.³ See *id.* at 11,626. Proclamation 9705 authorized the U.S. Department of Commerce (“Commerce”) to grant exclusions from Section 232 duties “for any steel article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality and . . . to provide such relief based upon specific national security considerations.” *Id.* at 11,627. The Bureau of Industry and Security of the U.S. Department of Commerce (“BIS”) established procedures for processing exclusion requests. The procedures provide that:

The Department will grant properly filed exclusion requests which meet the requisite criteria, receive no objections, and present no national security concerns. After an exclusion request’s 30-day comment period . . . BIS will work with [Customs] to ensure that the requester provided an accurate HTSUS statistical reporting number. If so, BIS will immediately assess the request for satisfaction of the requisite criteria and any national security concerns. If BIS concludes that the request satisfies the criteria and identifies no national security concerns with granting the request, BIS will expeditiously post a decision on regulations.gov granting the exclusion request.

Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum, 83 Fed. Reg. 46,026, 46,043 (Dep’t Commerce Sept. 11, 2018); see also *Requirements for Submissions Requesting Exclusions from the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel into the United States and Adjusting Imports of Aluminum into the United States; and the Filing*

¹ Further citations to the U.S. code are to the 2018 edition.

² Presidential Proclamation 9705 went into effect on March 23, 2018. See Proclamation 9705 at 11,628.

³ On August 10, 2018, the President issued Presidential Proclamation 9772. See Proclamation 9772, *Adjusting Imports of Steel into the United States*, 158 Fed. Reg. 40,429 (Aug. 10, 2018). Proclamation 9772 introduced Heading 9903.80.02 of the HTSUS, increasing the rate of duty on applicable steel products to 50 percent. See *id.* The 50 percent tariff rate was lifted on May 21, 2019. See Proclamation 9886, *Adjusting Imports of Steel into the United States*, 84 Fed. Reg. 23,421, 23,422 (May 16, 2019).

of Objections to Submitted Exclusion Requests for Steel and Aluminum, 83 Fed. Reg. 12,106, 12,110 (Dep't Commerce Mar. 19, 2018).

Once a product has been granted an exclusion, the importer may apply for a refund of the Section 232 tariffs with Customs. Customs, through its Cargo Systems Messaging Service (“CSMS”), notified the public of the procedures for “submitting retroactive claims for Section 232 . . . product exclusions to Customs.” See U.S. Customs and Border Prot., CSMS # 42566154 – *Section 232 and Section 301 – Extensions Requests, PSCs, and Protests*, <https://content.govdelivery.com/accounts/USDHSCBP/bulletins/289820a> (May 1, 2020, 5:05 PM) (“CSMS # 42566154”); U.S. Customs and Border Prot., CSMS # 39633923 – *UPDATE Submitting Imports of Products Excluded from Duties on Imports of Steel or Aluminum*, <https://content.govdelivery.com/accounts/USDHSCBP/bulletins/25cc403> (Sept. 3, 2019, 11:08 AM) (“CSMS # 39633923”). Customs explained:

If a product exclusion has been granted, an importer of record (IOR) may request a refund by filing a corrective action with [Customs] by filing a post summary correction (PSC) for unliquidated entries or file a protest for entries that have liquidated but where the liquidation is not final and the protest period has not expired.

When a product exclusion is granted, an importer may submit a PSC to request a refund on unliquidated entries up to 15 days prior to the scheduled liquidation date (generally within 300 days from the date of entry summary filing). If an entry summary is set to liquidate in less than 15 days or has already liquidated, the entry summary is beyond the PSC filing period. However, the importer may file a protest so long as the protest is filed within the 180-day period following liquidation of the impacted entry summary(ies).

CSMS # 42566154; *see also* CSMS # 39633923 (“To request an administrative refund for previous imports of duty-excluded products granted by [Commerce], importers may file a Post Summary Correction (PSC) and provide the product exclusion number in the Importer Additional Declaration Field. If the entry has already liquidated, importers may protest the liquidation.”).

This action covers 19 entries of certain welded line pipe from Turkey entered into the United States by BMB from August 5, 2018, through February 7, 2019. See Compl. ¶¶ 1, 26. BMB is the importer of record of the subject merchandise and GCX is the “consignee of the merchandise.” *Id.* ¶¶ 6–7. The subject merchandise is specialized X70 large diameter welded line pipe manufactured by BMB in Turkey. *Id.*

¶ 22. BMB imported the subject merchandise for the construction of the Gulf Coast Express Pipeline. *Id.*

On April 24, 2018, GCX submitted two exclusion requests to BIS covering the two different sizes of specialized X70 pipe. *Id.* ¶ 25. Between August 5, 2018, and February 7, 2019, BMB imported 20 entries of specialized X70 alloy steel pipe and paid the Section 232 tariffs on each entry. *Id.* ¶ 26.⁴ On May 22, 2020, BIS granted GCX the exclusions. *Id.* ¶¶ 22, 32. The exclusions had retroactive effect back to April 24, 2018, the date on which GCX submitted the initial requests. *Id.* ¶ 32; Pls'. Resp. to Mot. to Dismiss ("Pls. Resp."), ECF No. 28, at Ex. 1, Attach. 5.

On June 18 and 19, 2020, BMB submitted to Customs post-summary corrections ("PSCs") to apply the GCX product exclusions to the 19 entries. Compl. ¶ 33. BMB included in its submissions "extensive documentation" demonstrating that the 19 entries of the subject merchandise fell within the category of Section 232 exclusions granted by BIS. Pls. Resp. at 9, Ex. 2, Attach. 8. The documentation also confirmed that all entries entered the United States between August 5, 2018, and February 7, 2019, and, therefore, entered during the time period for which GCX's exclusions were effective (April 24, 2018, through May 21, 2021). *Id.* On June 30, 2020, the Customs specialist reviewing the PSCs:

[A]dvised BMB that BMB needed to file a request for [sic] administrative refund in order to receive the requested refunds of the Section 232 tariffs prior to liquidation. BMB complied and filed a written request for administrative refund for all of the entries, enabling [Customs] to refund the tariffs prior to liquidation.⁵

Compl. ¶ 35.

During the administrative refund process, the liquidation of 18 of the 19 entries at issue was enjoined due to two separate cases before the Court — *Transpacific Steel LLC v. United States* and *Borusan*

⁴ The twentieth entry is not subject to this action. See Compl. ¶¶ 1, 41–42. This entry was not subject to the litigation that suspended the liquidation of the other 19 entries. See discussion of litigation *infra* pp. 6–8 and notes 6–8; see also Compl. ¶¶ 41–42. Accordingly, the twentieth entry liquidated on October 11, 2019. Compl. ¶ 41. BMB subsequently challenged the liquidation of the twentieth entry. *Id.* On November 4, 2020, the USCIT approved a stipulated judgment on agreed statement of the facts. The stipulated judgment stated that the twentieth entry "is not classifiable in heading 9903.80.02, HTSUS, because it is subject to exclusions determined and announced by the Department of Commerce." Order entered on 11/4/2020, Form 9 stipulation on agreed statement of facts granted, Ct. No. 20–00145 (CIT Nov. 4, 2020), ECF No. 14; see Compl. ¶¶ 41–42.

⁵ The correspondence between BMB and the Customs import specialist on June 30, 2020, is not provided for in the attachments to the complaint or the parties' briefings; however, defendant does not challenge this correspondence.

Mannesmann Boru Sanayi ve Ticaret A.S. v. United States. See line of cases captioned *Transpacific Steel LLC v. United States*;⁶ the line of cases captioned *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*.⁷ Accordingly, the liquidation for these 18 entries is suspended during the pendency of the litigation of those cases, including any appeals.⁸ Def. Reply Mem. in Further Support of its Mot. to Dismiss (“Def. Reply Mem.”) at 5–6, ECF No. 33; Pls. Resp. at 9–10. The nineteenth entry, no. 002–7131800–8, is not subject to the litigation described above; however, the entry remains unliquidated as liquidation for this entry has been extended until August 5, 2022.⁹ Def. Reply Mem. at 7–8; see Compl. ¶ 13, n.1.

On September 10, 2020, Customs denied the PSCs submitted by BMB and denied the request for administrative refunds. Pls. Resp. at 10, Ex. 2, Attach. 10.¹⁰ On March 8, 2021, BMB and GCX filed jointly

⁶ See *Transpacific Steel LLC v. United States*, 44 CIT __, 466 F. Supp. 3d 1246 (2020); *Transpacific Steel LLC v. United States LLC v. United States*, 44 CIT __, 474 F. Supp. 3d 1332 (2020); *Transpacific Steel LLC. V. United States*, 44 CIT __, 481 F. Supp. 3d 1326 (2020); *Transpacific Steel LLC v. United States*, 840 Fed. Appx. 517 (Fed. Cir. 2020); *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021), *cert. denied*, __ U.S. __, 142 S.Ct. 1414, __ L.Ed.2d __ (2022).

⁷ *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 44 CIT __, 426 F. Supp. 3d 1395 (2020); *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, Slip Op. 20–71, 2020 WL 2613345 (CIT May 22, 2020), *rev'd*, 5 F.4th 1367 (Fed. Cir. 2021); *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 2021, Slip Op. 21–174, 2021 WL 6123540 (CIT Dec. 28, 2021), *appeal docketed*, Consol. Ct. No. 2022–1502 (Fed. Cir. Mar. 1, 2022).

⁸ The litigation in *Transpacific* has concluded. The USCIT issued its decision on July 14, 2020. *Transpacific Steel LLC v. United States*, 44 CIT __, 466 F. Supp. 3d 1246. On July 13, 2021, the U.S. of Court of Appeals for the Federal Circuit (“Federal Circuit”) reversed and remanded the case back to the USCIT. *Transpacific Steel LLC. V. United States*, 4 F.4th 1306 (Fed. Cir. 2021). On March 28, 2022, the U.S. Supreme Court denied the petition for writ of certiorari. *Transpacific Steel LLC v. United States*, __ U.S. __, 142 S.Ct. 1414, __ L.Ed.2d __ (2022). The litigation in *Borusan* is ongoing. On December 28, 2021, the USCIT issued an order and a slip opinion concerning the second remand redetermination by the Republic of Turkey. See *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, Slip Op. 21–174, 2021 WL 6123540 (CIT Dec. 28, 2021); Order, *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, ECF No. 125 (Dec. 28, 2021) (“ORDERED that the entries subject to the statutory injunction issued in this matter shall be liquidated in accordance with the final court decision in this action, including all appeals and remand proceedings, as provided in 19 U.S.C. § 1516a(e).”) On May 1, 2022, consolidated plaintiffs and defendant-intervenors filed an appeal to the Federal Circuit. Appeal of Slip-Op 21–174 & Judgment docketed on 3/1/2022 by the CAFC as appeal no. 2022–1502, Consol. Ct. No. 19–00056 (CIT Mar. 1, 2022), ECF No. 128; see *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, Slip Op. 21–174, 2021 WL 6123540 (CIT Dec. 28, 2021), *appeal docketed*, Consol Ct. No. 2022–1502 (Fed. Cir. Mar. 1, 2022).

⁹ The liquidation of the nineteenth entry has been extended three times. Def. Reply Mem. at 7. Customs initiated the first extension. The second and third extensions were requested by the importer and granted by Customs. *Id.*

¹⁰ In an e-mail, Customs explained:

For clarification, BIS approves exclusions, [Customs] enforces them and in this case we have determined that there was insufficient information provided to indicate that the

Protest Number 531221100010 (“the Protest”) to challenge Customs’ decision to deny the administrative refunds. Compl. ¶ 15. On April 6, 2021, Customs denied the Protest.¹¹ *Id.* ¶ 45. On April 22, 2021, plaintiffs commenced this action under 28 U.S.C. § 1581(a) to challenge Customs’ denial of the Protest and administrative refunds.

STANDARD OF REVIEW

When the Court’s jurisdiction is challenged, “the burden rests on plaintiff to prove that jurisdiction exists.” *Pentax Corp. v. Robison*, 125 F.3d 1457, 1462 (Fed. Cir. 1997), *modified in part*, 135 F.3d 760 (Fed. Cir. 1998) (citation omitted); *see Intercontinental Chemicals, LLC v. United States*, 44 CIT __, __, 483 F. Supp. 3d 1232, 1236 (2020); *see also Wally Packaging, Inc. v. United States*, 7 CIT 19, 20, 578 F. Supp. 1408, 1410 (1984).

“When, as here, the ‘motion challenges a complaint’s allegations of jurisdiction, the factual allegations in the complaint are not controlling and only uncontroverted factual allegations are accepted as true.” *Nat’l Nail Corp. v. United States*, 42 CIT __, __, 335 F. Supp. 3d 1321, 1325 (2018) (quoting *Shoshone Indian Tribe of Wind River Rsrv., Wyo. v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012)). “To ‘resolv[e] these disputed predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings.” *Id.*

LEGAL FRAMEWORK

Plaintiffs assert jurisdiction under 28 U.S.C. § 1581(a). Compl. ¶ 5. The statute grants this Court “exclusive jurisdiction” over “any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.” 28 U.S.C. § 1581(a). “[A] prerequisite to the Court’s 28 U.S.C. § 1581(a) jurisdiction is the filing of a valid protest under the protest statute, 19 U.S.C. § 1514.” *Ford Motor Co. v. U.S.*, 30 CIT 788, 793, 435 F. Supp. 2d 1324, 1330 (2006) (citing *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1365 (Fed. Cir. 2006)).

importation was within the scope of the approved exclusion. If BIS wishes to speak to us, they are able to contact us directly as they are a partner government agency. . . . [W]e have enough information to make a determination. If you’d like to further explain or provide additional information, you may do so via the protest process. Your additional information can be reviewed and considered at that time.

Pls. Resp. at Ex. 2, Attach. 10 at 1.

¹¹ In an e-mail, Customs denied the Protest providing the following explanation:
[[

]] Pls. Resp. at Ex. 2, Attach. 13.

19 U.S.C. § 1514(a) states:

Except as provided in subsection (b) of this section, section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by domestic interested parties), section 1520 of this title (relating to refunds) . . . any clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in an electronic transmission, adverse to the importer, in any entry, liquidation, or reliquidation, and, decisions of [Customs], including the legality of all orders and findings entering into the same, as to —

- (1) the appraised value of merchandise;
- (2) the classification and rate and amount of duties chargeable;
- (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
- (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
- (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation of an entry, pursuant to either section 1500 of this title or section 1504 of this title;
- (6) the refusal to pay a claim for drawback; or
- (7) the refusal to reliquidate an entry under subsection (d) of section 1520 of this title;

shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed by section 2636 of that title.

19 U.S.C. § 1514(a).

Section 1514(c)(3) provides that a protest of a decision, order or finding by Customs “shall be filed with [Customs] within 180 days after but not before . . . (A) date of liquidation or reliquidation, or (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.” 19 U.S.C. § 1514(c)(3).

DISCUSSION

Plaintiffs assert that this Court has subject matter jurisdiction over this case for two reasons: (1) Customs' denial of the administrative refunds constitutes a protestable decision as to a charge or exaction within the meaning of § 1514(a)(3); and (2) pursuant to § 1514(c)(3)(B), liquidation is inapplicable, and, therefore, the protest became ripe on the "date of the decision as to which [the] protest is made." Pls. Resp. at 16–25 (quoting 19 U.S.C. § 1514(c)(3)(B)). Defendant moves to dismiss this action, arguing that plaintiffs' challenge to Customs' denial of the Protest is "premature" because the subject entries are unliquidated. Def. Mot. at 4. Accordingly, defendant maintains that the Court lacks jurisdiction over this action. *Id.* at 1–2; Def. Reply Mem. at 1–2. The court determines that it lacks subject matter jurisdiction over this case.

I. Whether the administrative refund constitutes a charge or exaction under 19 U.S.C § 1514(a)(3)

A. Positions of parties

Plaintiffs argue that Customs' "denial of BMB's administrative refund request amounts to the withholding of a *pre-liquidation* administrative refund to which BMB is entitled by law," and, therefore, constitutes a "charge or exaction" within the meaning of § 1514(a)(3). Pls. Resp. at 16. Plaintiffs assert that the Court has held that a "charge" has a broad definition including "an obligation or duty, a liability, an expense or the price of an object; an entry in an account of what's due from one party to another." *Id.* at 17 (quoting *Brother Int'l Corp. v. United States*, 27 CIT 1, 4, 246 F. Supp. 2d 1318, 1322 (2003)). Plaintiffs note further that the Court has defined "exaction" as "the wrongful demand for payment under color of official authority, where no payment is due; an unjust compulsory levy." *Id.* (quoting *Brother Int'l*, 27 CIT at 4, 246 F. Supp. 2d at 1322).

Plaintiffs argue that the U.S. of Court of Appeals for the Federal Circuit ("Federal Circuit") and its predecessor, the U.S. Court of Customs and Patent Appeals ("CCPA), have held that "the denial of a requested refund constitutes an exaction within the meaning of Section 1514(a)(3)." *Id.* at 17–18 (citing *Eurasia Imp. Co. v. United States*, 31 CCPA 202, 211–212 (1944)). Specifically, plaintiffs argue that the Federal Circuit has held that the denial of a refund request for the Harbor Maintenance Tax ("HMT") constituted a protestable decision under § 1514(a)(3). *Id.* at 18 (citing *Swisher Int'l Inc. v. United States*, 205 F.3d 1358, 1365–1367 (Fed. Cir. 2000)).

Plaintiffs argue further that the denied administrative refunds constitute an “involuntarily tendered payment” because at the time of entry plaintiffs were required by law to pay Section 232 tariffs. *Id.* Moreover, plaintiffs maintain that the Court has held that “compliance with a statutory obligation requiring the payment of duties cannot be viewed as a voluntary act.” *Id.* at 19 (quoting *General Motors Corp. v. United States*, 10 CIT 569, 574, 643 F. Supp. 1139, 1143 (1986)). In sum, plaintiffs argue that Customs’ decision to deny the administrative refunds to which BMB was entitled because of the exclusions, constitutes a “charge or exaction” and, as such, the decision is protestable under § 1514(a)(3). *Id.*

Defendant asserts that there are no “charges or exactions” at issue in this case. Rather, defendant argues that plaintiffs’ Protest relates to the “classification and rate and amount of duties chargeable’ under § 1514(a)(2).” Def. Reply Mem. at 10–12 (quoting 19 U.S.C. § 1514(a)(2)). Defendant argues that “[p]ursuant to 19 U.S.C. § 1505(a), [BMB] was required to deposit the estimated duties . . . under headings 9903.80.02 or 9903.80.01.” *Id.* at 10–11. Defendant argues that BMB filed PSCs “seeking to change the applicable HTSUS classification provision” *Id.* at 11. As such, defendant maintains that plaintiffs’ Protest is “precisely a challenge to the tariff classification of the merchandise; either duties are due at the *ad valorem* tariff rates provided under headings 9903.80.02 and 9903.80.01, HTSUS, or they are not, depending on the correct classification of the merchandise.” *Id.*

Defendant argues that this Protest is not distinct from other protests “involving the classification and applicable rate of duty for any imported merchandise.” *Id.* at 12. Specifically, defendant notes: “In all such protest cases, the importer must deposit the estimated duties at the rate applicable under the HTSUS classification provision under which the merchandise is entered, and in all such cases [Customs] has until liquidation to fix the final classification and rate of duty.” *Id.* (citing 19 U.S.C. §§ 1505(a), 1500(b)-(d), 1514(a)(2)). Defendant asserts that “an importer’s deposit of estimated duties . . . under the HTSUS classification . . . as required by law, is not an exaction.” *Id.* at 15 (citing 19 U.S.C. § 1505(a)). Defendant argues further that if “‘charges or exactions,’ under § 1514(a)(3), were interpreted to include estimated duty deposits collected in accordance with the HTSUS classifications provided on the entry summary, . . . then ‘charges or exactions’ under § 1514(a)(3) would essentially subsume the separate provision for protesting ‘the classification and rate and amount of duties chargeable’ . . . thereby impermissibly rendering § 1514(a)(2) meaningless.” *Id.* at 11–12.

Finally, defendant argues that the administrative refunds are not exactions because plaintiffs are not “‘entitled by law’ to pre-liquidation refunds.” *Id.* at 17 (citing Pls. Resp. at 16). Defendant notes that the statute requires Customs to issue refunds “as determined on a liquidation or reliquidation.” *Id.* (emphasis omitted) (quoting 19 U.S.C. § 1505(b)). In contrast, defendant asserts that “the statute authorizes [Customs] to issue pre-liquidation refunds,” but Customs is not required to do so. *Id.* (citing 19 U.S.C. § 1520(a)(4)). Defendant argues that Customs’ exercise of its discretion under the statute is not protestable. *Id.* at 17–18.

B. Analysis

Plaintiffs assert jurisdiction under 28 U.S.C. § 1581(a). Compl. ¶ 5. “[T]here are procedural prerequisites to obtaining that jurisdiction,” and “[s]ection 1514 provides those prerequisites necessary to establish a valid challenge of a protest denial.” *Acquisition 362, LLC v. United States*, 45 CIT __, __, 517 F. Supp. 3d 1318, 1323 (2021). Specifically, § 1514(a) lists seven enumerated categories of decisions by Customs that can be subject to protest, including “all charges or exactions” and “the classification and rate and amount of duties chargeable.” 19 U.S.C. § 1514(a)(2)-(3).

Plaintiffs argue that Customs’ “refusal to effectuate GCX’s Section 232 exclusions by denying BMB’s administrative refund request constitutes a ‘charge or exaction’ within the meaning of 19 U.S.C. § 1514(a)(3).” Pls. Resp. at 16. The Court has defined a “charge” as “encompass[ing] a broad range of meanings including: an obligation or duty, a liability, an expense or the price of an object; an entry in an account of what’s due from one party to another.” *Syva Co. v. United States*, 12 CIT 199, 202, 681 F. Supp. 885, 888 (1988) (citing *West’s Law & Commercial Dictionary in Five Languages* 237 (1985); *Webster’s Third New Int’l Dictionary* 377 (1981); *Black’s Law Dictionary* 211 (5th ed. 1979)).¹² Similarly, an “exaction” is “the wrongful demand for payment under color of official authority, where no payment is due; an unjust compulsory levy.” *Id.* (citing *Webster’s Third New Int’l Dictionary* 790 (1981); *Black’s Law Dictionary* 500 (5th ed. 1979); *Carlingswitch, Inc. v. United States*, 85 Cust. Ct. 63, 66, C.D. 4873, 500 F. Supp. 223, 226–27 (1980), *aff’d* 68 CCPA 49, C.A.D. 1264, 651 F.2d 768 (1981))¹³; *see also Brother Int’l*, 27 CIT at 4, 246 F. Supp. 2d

¹² The most recent edition of *Black’s Law Dictionary* defines a charge as: “An encumbrance, lien, or claim” or a “[p]rice, cost, or expense <free of charge>.” *Charge*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹³ The most recent edition of *Black’s Law Dictionary* defines an exaction as: “The act of demanding more money than is due; extortion” or “[a] fee, reward, or other compensation,

at 1322 (quoting *Syva Co.*, 12 CIT at 202, 681 F. Supp. at 888). Plaintiffs assert that Customs' denial of the administrative refunds, to which plaintiffs maintain BMB is entitled pursuant to the Section 232 exclusions, constitutes an "involuntarily tendered payment." Pls. Resp. at 18–19. Accordingly, plaintiffs argue that Customs' decision constitutes a protestable decision as to a "charge or exaction" under 19 U.S.C. § 1514(a)(3). *Id.* at 19.

Plaintiffs argue that the Federal Circuit and its predecessor, the CCPA have held that "the denial of a requested refund constitutes an exaction within the meaning of Section 1514(a)(3)"; however, the cases cited by plaintiffs — *Swisher International, Inc. v. United States* and *Eurasia Import Co. v. United States*—are inapposite. See Pls. Resp. at 17–18 (citations omitted). In *Eurasia*, the CCPA determined that Customs' denial of refunds *after* liquidation constituted an "exaction" protestable under the statute.¹⁴ *Eurasia Imp. Co. v. United States*, 31 CCPA at 209–10 ("The transaction here involved was not completed until the collector made liquidation. Prior to that date there was no opportunity for the transferee to protest or take action of any character (other than giving notice which it did) to protect whatever of legal rights it may have had, nor could the transferor have done so."). In *Swisher*, the Federal Circuit determined that a failure to refund the HMT constituted an exaction protestable under § 1514, *Swisher Int'l, Inc.*, 205 F.3d 1358, 1369 (Fed. Cir. 2000); however, the Federal Circuit's holding does not support directly plaintiffs' argument that importers are entitled to refunds prior to liquidation. The Federal Circuit in *Swisher* explained:

In fact, it is not at all clear that refunds on import duties, which comprise the vast majority of the money collected by Customs, *would or could be requested outside of the bounds of the liquidation or reliquidation procedures.* With regard to imports, most

whether properly, arbitrarily, or wrongfully demanded." *Exaction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹⁴ In *Eurasia*, the CCPA examined an earlier version of § 1514 and held:

It is our view that the statute by its very terms became retroactive from its effective date both as to the right to protest classification after liquidation subsequent to that date and as to the right to receive any refund of excessive duties resulting from a liquidation based upon reclassification.

Eurasia Imp. Co. v. United States, 31 CCPA 202, 210 (1944). The Court noted further:

There is, of course, no express provision authorizing a protest against the collector's refusal to refund excessive duties collected as a part of the estimated duties before liquidation, such as is expressly provided, for example, in the case of the collector's refusal "to pay any claim for drawback." That it is the duty of the collector to make such refunds, however, is so well understood that no citation of statutory provisions concerning it and judicial decisions based thereon is necessary.

Id. at 211–12. The court notes that the interpretation by the CCPA was based on a previous version of the statute that did not include the exclusionary language for refunds under 19 U.S.C. § 1520 present in the current version of the statute. See *Tariff Act of 1930*, ch. 497, title IV, § 514, 46 Stat. 734 (1940) (current version at 19 U.S.C. § 1514).

fees, including the HMT, are collected at liquidation. Any fee collected at liquidation is considered merged with the liquidation.

Id. at 1368 n.8 (emphasis supplied) (citing *Thomson Consumer Electronics, Inc. v. United States*, 23 CIT 586, 62 F. Supp. 2d 1182 (1999), *rev'd*, 247 F.3d 1210 (Fed. Cir. 2001)).

Decisions by Customs to issue refunds prior to liquidation are covered by 19 U.S.C. § 1520. Section 1520(a)(4) provides that: “The Secretary of the Treasury is authorized to refund duties or other receipts . . . [p]rior to the liquidation of an entry or reconciliation, whenever an importer of record declares or it is ascertained that excess duties, fees, charges, or exactions have been deposited or paid.” 19 U.S.C. § 1520(a)(4). Accordingly, § 1520(a)(4) provides Customs with the authority to issue pre-liquidation refunds, but the agency is not required to do so. *Id.*

In this case, after reviewing the PSC, Customs “determined that there was insufficient information provided to indicate that the importation was within the scope of the approved exclusion.” Pls. Resp. at Ex. 2, Attach. 10 at 1. In other words, Customs, acting within its discretion pursuant to § 1520, concluded that the agency could not determine that the Section 232 exclusions applied to BMB’s entries. As such, Customs could not “ascertain[] that excess duties, fees, charges, or exactions have been deposited or paid” and did not issue the administrative refunds. *See* 19 U.S.C. § 1520(a)(4); Pls. Resp. at Ex. 2, Attach. 10.

Plaintiffs assert that Customs “established a framework via several CSMS messages to enable importers to file PSCs ‘to receive refunds prior to liquidation of an entry.’” Pls. Resp. at 7 (emphasis omitted) (quoting Commercial Customs Operations Advisory Committee (COAC) Intelligent Enforcement Subcommittee, *AD/CVD Working Group Background Document* at 3 (July 15, 2020) (provided at Pls. Resp. at Ex. 1, Attachment 6)). Defendant argues that Customs’ CSMS messages provide no such framework. Def.’s Written Resps. to the Court’s Questions for Oral Arg. (“Def. Resps. Oral Arg.”) at 4–5, ECF No. 41. Rather, defendant maintains that “[t]he PSC ensures that [Customs] has the relevant information at the time of liquidation; if the corrected information submitted via PSC lowers the duties, a refund will be issued *upon liquidation*, thereby averting the need to file a protest.”¹⁵ *Id.* Customs in its instructions for retroactive refunds states:

¹⁵ Defendant notes further that the “Federal Register notice announcing PSCs states that when a filer submits a PSC and [Customs] makes no further changes, ‘the entry will liquidate’ with the corrected entry data.” Def. Resps. Oral Arg. at 4. The Federal Register notice states:

If a product exclusion has been granted, an importer of record (IOR) may request a refund by filing a corrective action with [Customs] by filing a post summary correction (PSC) for unliquidated entries or file a protest for entries that have liquidated but where the liquidation is not final and the protest period has not expired.

See CSMS # 42566154; Pls. Resp. at Ex. 1, Attach. 2.

The language of the CSMS message does not establish that importers who file a PSC are entitled to pre-liquidation refunds; rather, the language of the message indicates that, unless otherwise issued by Customs under § 1520, refunds of Section 232 duties are generally issued at liquidation.¹⁶ Further, plaintiffs have not exhausted all administrative remedies. Plaintiffs can file an additional PSC,¹⁷ and, if, upon liquidation, Customs does not issue the refund, plaintiffs may protest that decision under § 1514(a), and, if necessary, bring an action before the Court.

Plaintiffs have failed to demonstrate that Customs' decision not to issue the administrative refunds prior to liquidation constitutes a protestable decision as to charges or exactions under § 1514(a). It is undisputed that the subject entries are unliquidated; therefore, plaintiffs are asserting that they are entitled to a refund of the deposits made by BMB at the time of entry. To interpret a "charge" or "exaction" to include Customs' decision to not issue administrative refunds of deposits prior to liquidation is contrary to the protest statute which excludes explicitly decisions by Customs as to refunds under § 1520. The statute states:

For non-type 03 entries, when a filer changes the entry summary data via PSC, and [Customs] makes no further changes to that data, the entry will liquidate "no change" as entered. A status of "no change" on the bulletin notice of liquidation will signify that [Customs] did not change the data submitted on the last accepted PSC. A type 03 entry will not be liquidated until the Department of Commerce issues liquidation instructions to [Customs] covering that entry.

Post-Summary Corrections to Entry Summaries Filed in ACE Pursuant to the ESAR IV Test ("Post-Summary Corrections"), 76 Fed. Reg. 37,136, 37,138 (CBP June 24, 2011).

¹⁶ The court acknowledges that correspondence between plaintiffs' counsel and a Customs officer may have led plaintiffs to believe that they were entitled to a refund of Section 232 tariffs prior to liquidation. The Customs officer explained:

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Pls. Resp. at Ex. 2, Attach. 11 at 6.

The miscommunication by Customs, while unfortunate, does not alter the agency's discretion under the statute to decide whether to issue refunds prior to liquidation.

¹⁷ The Federal Register notice announcing the creation of PSCs explains: "There are no limitations to the number of PSCs that can be submitted for any one entry so long as the PSC is not within the disallowed timeframe and all other requirements are met." *Post-Summary Corrections*, 76 Fed. Reg. at 37,137.

Except as provided in. . . section 1520 of this title (relating to refunds). . . any . . . decisions of the Customs Service . . .

. . . .

shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade

19 U.S.C. § 1514(a) (emphasis supplied).

Plaintiffs assert that the court in *Power-One Inc. v. United States*, 23 CIT 959, 83 F. Supp. 2d 1300 (1999), held that the exclusionary language in § 1514(a) cannot be understood to mean that Customs' decisions under § 1520 cannot be protested. Oral Arg. Tr. at 42:6–43:18, ECF No. 40; Pls.' Reply Comments to Def.'s Written Resps. to the Court's Questions for Oral Arg. ("Pls. Reply Oral Arg.") at 3–4, ECF No. 42 (citing *Power-One Inc.*, 23 CIT at 962 n.11, 83 F. Supp. 2d at 1303 n.11). Plaintiffs rely solely on a footnote in *Power-One* in which the court explained:

A cursory brief reading of § 1514 might indicate that a § 1520(d) petition denial is not a protestable final decision of Customs.

. . . .

The confusion dissipates when the consequences of such reasoning are examined. If the opening clause of § 1514(a) excludes from finality, and therefore protestability, Customs decisions made under § 1520, then it also excludes decisions made under the other sections listed in that opening clause. Those sections are 1501 (voluntary reliquidations), 1516 (petitions by domestic interested parties), and, formerly, 1521 (reliquidations on account of fraud).

23 CIT at 962 n.11, 83 F. Supp. 2d at 1303 n.11; see Oral Arg. Tr. at 42:6–43:18; Pls. Reply Oral Arg. at 3–4.

The court does not find plaintiffs' argument compelling for two reasons. First, the court in *Power-One* examined Customs' denial of a post-entry NAFTA claim under § 1520(d). See *Power-One Inc.*, 23 CIT at 959–60, 83 F. Supp. 2d at 1301–02. Section 1520(d) states that Customs "may . . . *reliquidate* an entry to refund any excess duties (including any merchandise processing fees) paid on a good qualifying under the rules of origin set out in [the implementing legislation for various named free trade agreements and 19 U.S.C. § 4531]." 19 U.S.C. § 1520(d). The circumstance provided for in § 1520(d) is distinct from Customs' exercise of its discretion to issue pre-liquidation

refunds of deposits at issue in this case. Second, the Federal Circuit has held consistently that 28 U.S.C. § 1581(a) “provides no jurisdiction for protests outside the [] exclusive categories’ listed in 19 U.S.C. § 1514(a).” *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1191 (Fed. Cir. 2018) (quoting *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994)). This statement by the Federal Circuit along with the clear exclusion of § 1520 refunds from § 1514(a) decisions subject to protest supports the conclusion that Customs’ decision to not issue an administrative refund for the Section 232 tariffs is not a protestable decision under § 1514(a), and, therefore, the court does not have 28 U.S.C. § 1581(a) jurisdiction over this matter.

Finally, the court notes that at oral argument plaintiffs explained that they protested Customs’ decision in response to instructions by Customs to file a protest. Oral Arg. Tr. at 10:23–11:22. Indeed, in its e-mail explaining that there was “insufficient information” to conclude that the entries were subject to the Section 232 exclusion, Customs stated that if plaintiffs wished to “provide additional information, you may do so via the protest process. Your additional information can be reviewed and considered at that time.” Pls. Resp. at Ex. 2, Attach. 10 at 1. Moreover, when Customs denied the protest, the agency provided the following information:

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Pls. Resp. at Ex. 2, Attach. 13 at 1. This unclear communication by Customs led apparently to plaintiffs filing prematurely a protest, and, subsequently, this action before the Court. *See* Oral Arg. Tr. at 10:23–11:22.

As stated previously, as the subject merchandise remains unliquidated the administrative process is incomplete. Customs has not made a “final and conclusive” decision as to a charge or exaction or any other decision within the seven categories under § 1514(a). Accordingly, Customs has not made a protestable decision that has triggered the Court’s jurisdiction, and the court dismisses the case for lack of subject matter jurisdiction.

II. Timeliness of plaintiffs’ protest

Plaintiffs argue that their protest is timely under 19 U.S.C. § 1514(c)(3)(B). Plaintiffs note that § 1514(c)(3)(B) provides that in circumstances where liquidation is “inapplicable,” the protest shall be filed with Customs within 180 days of the “date of the decision as to which protest is made.” Pls. Resp. at 19–20 (citing 19 U.S.C. § 1514

(c)(3)(B)). Plaintiffs maintain that Customs' decision to deny the administrative refunds constitutes an "exaction," and, therefore, the decision is unrelated to the liquidation of the 19 entries. *Id.* at 22. Accordingly, plaintiffs argue that "the timeliness of [the] protest is governed by § 1514(c)(3)(B) because liquidation is 'inapplicable' to the exaction being protested." *Id.* at 19.

Defendant argues that 19 U.S.C. § 1514(c)(3)(B) does not apply because "the essence of [p]laintiffs' challenge is to the classification and rate and amount of duties chargeable for the merchandise in the subject entries, all of which will be finally determined by [Customs] upon liquidation." Def. Mot. at 10. Accordingly, defendant maintains that this action does not present any "circumstances where [the date of liquidation or reliquidation] is inapplicable," and, as such, defendant argues that plaintiffs can protest Customs' decision only after liquidation. *Id.* (citing 19 U.S.C. § 1514(c)(3)(B)).

Section 1514(c)(3) states:

A protest of a *decision, order, or finding described in [19 U.S.C. § 1514(a)]* shall be filed with the Customs Service within 180 days after but not before —

(A) date of liquidation or reliquidation, or

(B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

19 U.S.C. § 1514(c)(3) (emphasis supplied).

The court concludes that Customs did not make a decision protestable under § 1514(a). Therefore, the court does not address the parties' arguments as to the timeliness of plaintiffs' protest under § 1514(c)(3).

CONCLUSION

Gilda Radner and Chevy Chase were two of the original seven members of the Not Ready for Prime Time Players on Saturday Night Live. The incomparable Radner wound up creating a gaggle of memorable characters, such as Roseanne Roseannadanna, Emily Litella and Lisa Loopner. Here, as Litella (a hard-of-hearing elderly woman),¹⁸ is an exchange she had with Chase in a Weekend Update segment on May 8, 1976.¹⁹

¹⁸ Naomi Blumberg, *Gilda Radner*, ENCYCLOPEDIA BRITANNICA (May 16, 2022), <https://www.britannica.com/biography/Gilda-Radner>.

¹⁹ Saturday Night Live, *Weekend Update: Emily Litella on Television Violins – SNL*, YOUTUBE (Aug. 31, 2017), <https://www.youtube.com/watch?v=fZLeaSWY37I> (NBC television broadcast May 8, 1976).

Chase (Anchor, in light colored blazer with wide lapels and wider yet tie): “Weekend Update recognizes its obligation to present responsible opposing viewpoints to our editorials. Here with an editorial reply is Miss Emily Litella.”

Litella (Radner, hunched over, thick glasses, right palm pounding alternately the table and the air, pretending to read from a piece of paper): “What’s all this fuss I keep hearing about violins on television? Now, why don’t parents want their children to see violins on television? Why, I thought the Leonard Bernstein [mispronounced as “steen”] concerts were just lovely. Now, if they only show violins after 10 o’clock at night, the little babies will all be asleep and they won’t learn any music appreciation. Why, they’ll end up wanting to play guitar and bongo drums and go to Africa and join these rock and roll outfits. And they won’t drink milk!” Fist pounding the table for emphasis. “I say there should be *more* violins on television. And less game shows.” Chase is tapping her left shoulder gently, seeking to interrupt. “It’s terrible the way they” Turns to Chase. “What? What?!”

Chase: “Miss Litella, that’s *violence* on television, not violins.” Making gesture with his thumb and index finger for a tiny violin. “Violence,” he repeats. Smiles at her.

Litella: “Oh.” Puzzled look. “That’s different.”

Chase: “Yes.”

Litella: “Never mind.” Smiles sweetly.

* * *

For the foregoing reasons, defendant’s motion to dismiss for lack of subject matter jurisdiction is **GRANTED**. Judgment will enter accordingly.

Dated: June 1, 2022

New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

Slip Op. 22–59

BYUNGMIN CHAE, Plaintiff, v. JANET YELLEN, UNITED STATES SECRETARY OF THE TREASURY, ALEJANDRO MAYORKAS, UNITED STATES SECRETARY OF HOMELAND SECURITY, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, and UNITED STATES, Defendants.

Before: Timothy M. Reif, Judge
Court No. 20–00316

[Denying plaintiff’s motion for judgment on the agency record.]

Dated: June 6, 2022

Matthew C. Moench, King Moench Hirniak & Mehta, LLP, of Morris Plains, N.J., argued for plaintiff.

Marcella Powell, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for defendants. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office, and *Aimee Lee*, Assistant Director. Of counsel on the brief was *Mathias Rabino-vitch*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

* * *

Reif, Judge:

Plaintiff, Byungmin Chae, brings this action pursuant to U.S. Court of International Trade (“USCIT” or the “Court”) Rule 56.1 to challenge the decision of U.S. Customs and Border Protection (“Customs”) upholding the denial of plaintiff’s appeal of his result on the Customs Broker License Exam (“CBLE” or “exam”).¹ Am. Compl., ECF No. 20; Br. in Supp. of Pl.’s Mot. for J. on the R. (“Pl. Br.”), ECF No. 39; Reply (“Pl. Reply Br.”), ECF No. 43; section 641(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1641(e) (2018).² Customs denied plaintiff’s appeal based on his failure to attain a passing score of 75% or higher on the CBLE held on April 25, 2018 (“April 2018 exam”). Def.’s Opp. to Pl.’s Mot. for J. on the R. (“Def. Resp. Br.”), ECF No. 40; 19 C.F.R. § 111.11(a)(4).

Plaintiff appeals to the court Customs’ decision to deny plaintiff credit for five questions on the April 2018 exam.³ See Pl. Reply Br. at 2. Should plaintiff receive credit for three of the five contested questions, he would attain a passing score of 75%. Plaintiff contends also that he is eligible to receive attorney fees and other expenses under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d). See Pl. Br. at 13

Defendants oppose plaintiff’s motion and argue that Customs’ decision to deny plaintiff credit for each contested question was sup-

¹ The court notes with appreciation the participation of Matthew C. Moench as pro bono counsel in this action.

² Further citations to the Tariff Act of 1930, as amended, are also to the relevant portions of Title 19 of the U.S. Code, 2018 edition.

³ Plaintiff appealed initially Customs’ decision to deny plaintiff credit for seven questions on the exam. See Pl. Br. at 1; Am. Compl. Following the filing of defendants’ memorandum in opposition to plaintiff’s motion, however, plaintiff “concede[d] to the Government’s interpretation and explanation” of two questions on the exam, and consequently withdrew his challenges to those questions. Pl. Reply Br. at 2. Accordingly, plaintiff contends that he should receive credit for five questions: questions 5, 27, 33, 39 and 57. *Id.*

ported by substantial evidence. *See* Def. Resp. Br. at 8; Def.’s Answer to First Am. Compl., ECF No. 27. On this basis, defendants assert that plaintiff did not attain a passing score of 75% or higher on the April 2018 exam and, consequently, that Customs’ “decision not to grant plaintiff a license due to his failure to attain a passing score . . . was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Def. Resp. Br. at 5–6, 2223; 5 U.S.C. § 706(2)(A). Defendants contest also plaintiff’s argument that he is entitled to attorney fees and other expenses under the EAJA. *See id.* at 21–23.

For the reasons discussed below, plaintiff’s motion is denied.

BACKGROUND

Plaintiff sat for the CBLE on April 25, 2018. *See* Am. Admin. R., Ex. A, ECF No. 51. On May 18, 2018, Customs notified plaintiff that he had received a score of 65% — 10% below the passing score of 75%. *See id.* Plaintiff appealed this result, and the Broker Management Branch (“BMB”) of Customs notified plaintiff on August 23, 2018, that, upon further review, his score had improved by two questions, resulting in a score of 67.5% — still short of the 75% score required to pass. *See* Am. Admin. R., Exs. B, C. Plaintiff then initiated with Customs’ Executive Assistant Commissioner (“EAC”) a review of the BMB’s decision. *See* Am. Admin. R., Ex. D. By letter dated May 23, 2019, the EAC informed plaintiff that his score had improved by three additional questions, resulting in a 71.25% score — again, short of 75%. *See* Am. Admin. R., Ex. L.

Plaintiff inquired how to appeal the EAC’s decision but was informed that “[t]here is no 3rd appeal.” Am. Admin. R., Ex. M. Plaintiff learned subsequently, however, that he had been able to appeal his result to the USCIT and attempted to file a complaint on March 4, 2020. *See* Pl. Br. at 2. The Court docketed plaintiff’s complaint on September 11, 2020.⁴

In a decision dated May 7, 2021, the court denied defendants’ motion to dismiss plaintiff’s complaint, granted plaintiff leave to amend his complaint to bring it into compliance with the procedural requirements of USCIT Rule 10(a), and sua sponte invited plaintiff to amend his complaint to bring it into compliance with the substantive requirements of USCIT Rule 12(b)(6). *Chae I*, 45 CIT at ___, 518 F. Supp. 3d at 1389–90. On July 6, 2021, plaintiff filed an amended

⁴ “It is unclear what exactly precipitated such a lengthy delay between [plaintiff’s] filing and the Court’s docketing; however, the court notes that plaintiff’s original filing coincided with the onset of the COVID-19 pandemic.” *Chae v. Sec’y of the Treasury (Chae I)*, 45 CIT ___, ___, 518 F. Supp. 3d 1383, 1390 (2021).

complaint seeking review of Customs' decision to deny plaintiff's appeal. *See* Am. Compl. at 1–2.

LEGAL FRAMEWORK

I. Application for a customs broker's license

Customs brokers are responsible for the application of statutes and regulations “governing the movement of merchandise into and out of the customs territory of the United States.” *Dunn-Heiser v. United States*, 29 CIT 552, 553, 374 F. Supp. 2d 1276, 1278 (2005). Pursuant to 19 U.S.C. § 1641(b)(2), the Secretary of the Treasury is vested with “broad powers” with respect to the licensing of customs brokers. *DePersia v. United States*, 33 CIT 1103, 1105, 637 F. Supp. 2d 1244, 1247 (2009). 19 U.S.C. § 1641(b)(2) provides:

The Secretary may grant an individual a customs broker's license only if that individual is a citizen of the United States. Before granting the license, the Secretary may require an applicant to show any facts deemed necessary to establish that the applicant is of good moral character and qualified to render valuable service to others in the conduct of customs business. In assessing the qualifications of an applicant, the Secretary may conduct an examination to determine the applicant's knowledge of customs and related laws, regulations and procedures, book-keeping, accounting, and all other appropriate matters.

19 U.S.C. § 1641(b)(2).

Customs has promulgated several regulations to implement this statute. For instance, 19 C.F.R. § 111.11(a) details the “[b]asic requirements” for an individual to obtain a customs broker's license:

(a) INDIVIDUAL. In order to obtain a broker's license, an individual must:

- (1) Be a citizen of the United States on the date of submission of the application . . . and not an officer or employee of the United States Government;
- (2) Attain the age of 21 prior to the date of submission of the application . . . ;
- (3) Be of good moral character; and
- (4) Have established, by attaining a passing (75 percent or higher) grade on an examination taken within the 3-year period before submission of the application . . . that he has sufficient knowledge of customs and related laws, regulations

and procedures, bookkeeping, accounting, and all other appropriate matters to render valuable service to importers and exporters.

19 C.F.R. § 111.11(a)(1)-(4). Further, 19 C.F.R. § 111.12(a) provides information with respect to the submission of an application for a customs broker's license, and 19 C.F.R. § 111.13 regulates the examination that is described in 19 C.F.R. § 111.11(a)(4). *See* 19 C.F.R. §§ 111.12(a), 111.13.

II. Customs Broker License Exam

Customs' regulations provide that "[t]he examination for an individual broker's license" — referred to as the CBLE — is "designed to determine the individual's knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters necessary to render valuable service to importers and exporters." *Id.* § 111.13(a); *see* 19 U.S.C. § 1641(b)(2). The fact that this "comprehensive written licensing exam" constitutes one of the requirements to obtain a customs broker's license reflects the "complex[ity]" of the applicable statutes and regulations as well as the "integral role [of customs brokers] in international trade." *Dunn-Heiser*, 29 CIT at 553–54, 374 F. Supp. 2d at 1278.

Customs administers the CBLE twice each year, in April and October. 19 C.F.R. § 111.13(b). The exam consists of 80 multiple choice questions. *See* Am. Admin. R., Ex. N, at *1. In addition, "[t]he exam is open book," and applicants are advised to bring certain specified materials to which they may refer during the exam, including the Harmonized Tariff Schedule of the United States ("HTSUS") and Title 19 of the Code of Federal Regulations ("CFR").⁵ *Dunn-Heiser*, 29 CIT at 554, 374 F. Supp. 2d at 1278.

As noted, an applicant is required to attain a score of 75% or higher to pass the CBLE. 19 C.F.R. § 111.11(a)(4); 19 U.S.C. § 1641(b)(2). However, an applicant who does not attain a passing score is entitled to retake the exam without penalty. 19 C.F.R. § 111.13(e). In addition, an applicant who does not attain a passing score is entitled to appeal this result to the BMB. *Id.* § 111.13(f). Should the BMB affirm the result, the applicant is entitled to request that the EAC review the BMB's decision. *Id.* Should the EAC uphold the BMB's decision, the applicant is then entitled to appeal the EAC's decision to the USCIT. 19 U.S.C. § 1641(e)(1) ("[An] applicant . . . may appeal . . . by filing in

⁵ *See also Customs Broker License Exam (CBLE)*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/trade/programs-administration/customs-brokers/licenseexamination-notice-examination> (last visited June 1, 2022) (providing a list of permitted reference materials).

the Court of International Trade, within 60 days after the issuance of the decision or order, a written petition requesting that the decision or order be modified or set aside in whole or in part.”).

STANDARD OF REVIEW

This Court has jurisdiction to hear plaintiff’s appeal pursuant to 28 U.S.C. § 1581(g)(1) (“The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review . . . any decision of the Secretary of the Treasury to deny a customs broker’s license.”).

The U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) has determined that two elements of review apply with respect to the appeal of an applicant’s result on the CBLE. *See Kenny v. Snow*, 401 F.3d 1359, 1361 (Fed. Cir. 2005). The first element addresses whether Customs’ decision to deny an applicant credit for a contested question was supported by “substantial evidence.” *Id.* at 1361–62 (concluding that the “decision to deny credit [for the contested question] [was] supported by substantial evidence”) (citing 19 U.S.C. § 1641(e)(3)). The second element addresses whether, on the basis of an applicant’s failure to attain a passing score on the CBLE, Customs’ decision to deny the applicant a customs broker’s license was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* at 1361 (citing 5 U.S.C. § 706).

I. “Substantial evidence”

In reviewing Customs’ decision to deny an applicant credit for a contested question on the CBLE, the Court must determine whether the decision was supported by “substantial evidence.” 19 U.S.C. § 1641(e)(3). In *Kenny*, a case involving the appeal of an applicant’s result on the CBLE, the Federal Circuit stated:

Underpinning a decision to deny a license arising from an applicant’s failure to pass the licensing examination are factual determinations grounded in examination administration issues . . . which are subject to limited judicial review because “[t]he findings . . . as to the facts, if supported by substantial evidence, shall be conclusive.”

Kenny, 401 F.3d at 1361 (citing 19 U.S.C. § 1641(e)(3)). “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Id.* (citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Further, “the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s finding from being supported by substantial evidence.” *De-Persia*, 33 CIT at 1104, 637 F. Supp. 2d at 1247.

With respect to the appeal of questions on the CBLE, the substantial evidence standard does not require that Customs draft perfect questions. See *Di Iorio v. United States*, 14 CIT 746, 748–49 (1990) (“While not perfect, the question was adequate so that, as to this question, plaintiff’s appeal was rejected reasonably.”); *Harak v. United States*, 30 CIT 908, 922–23 (2006) (“[A] question or answer choice need not reflect the precise wording of the regulation in order to be valid. . . . Though the question is not a perfect reflection of the regulation’s language, it is not inadequate.”). For instance, in *Di Iorio*, the court reviewed the plaintiff’s appeal of a question concerning copyright infringement as provided in 19 C.F.R. § 133.43(a):

(a) NOTICE TO THE IMPORTER. If the district director has any reason to believe that an imported article may be an infringing copy or phonorecord of a recorded copyrighted work, he shall withhold delivery, notify the importer of his action, and advise him that if the facts so warrant he may file a statement denying that the article is in fact an infringing copy and alleging that the detention of the article will result in a material depreciation of its value, or a loss or damage to him. The district director also shall advise the importer that in the absence of receipt within 30 days of a denial by the importer that the article constitutes an infringing copy or phonorecord, it shall be considered to be such a copy and shall be subject to seizure and forfeiture.

19 C.F.R. § 133.43(a) (1989); see *Di Iorio*, 14 CIT at 748. The question that the plaintiff contested stated:

Your client, who is just starting to import toy stuffed dinosaurs, has a shipment under detention by Customs for possible copyright violation. Following your advice, he wrote to the District Director of Customs asserting that: (1) the articles are not piratical copies, and (2) because the dinosaurs are sold seasonally, continued detention will force him out of business. The District Director will:

- A. Release the shipment to the importer unconditionally because they are seasonal and the District Director has authority to determine if they violate the copyright.
- B. Furnish the copyright owner with a sample and release the shipment if he does not respond within 30 days.
- C. Release the shipment if the importer agrees to post an additional bond.
- D. Consider the goods to be restricted and seize the shipment.

Id. The plaintiff selected answer choice (D), whereas Customs designated answer choice (B) as the correct response. *See id.*

In support of his appeal, the plaintiff argued that the contested question was ambiguous because the question required an applicant to make three assumptions: (1) the District Director of Customs “actually received” a written statement from the client; (2) the District Director received such a statement within 30 days; and (3) such a statement constituted “an acceptable denial” within the meaning of 19 C.F.R. § 133.43(a). *Id.* According to the plaintiff, Customs “erred in rejecting [his] appeal because requiring the examinee to leap through these assumptions in arriving at the correct answer placed an unreasonable burden on any test-taker.” *Id.*

In rejecting this appeal, the court stated that the question, “[w]hile not perfect” in view of the absence of the foregoing information, nonetheless provided the applicant with sufficient information to apply 19 C.F.R. § 133.43(a) and to select the correct answer choice. *Id.* at 748–49. On this basis, the court concluded that Customs’ decision to deny the plaintiff credit for this question was reasonable. *See id.*

The Court’s standard of review with respect to questions on the CBLE is one of reasonableness. *See Rudloff v. United States*, 19 CIT 1245, 1249 (1995), *aff’d*, 108 F.3d 1392 (Fed. Cir. 1997) (“[T]he question is fair as it reasonably tests ‘an applicant’s knowledge of customs and related laws, regulations and procedures.’” (citing 19 U.S.C. § 1641(b)(2))); *Di Iorio*, 14 CIT at 747 (“[T]his court notes that, as a general matter, it will not substitute its own judgment on the merits of the Customs examination, but will examine decisions made in connection therewith on a reasonableness standard.”). The Court “must necessarily conduct some inquiry into plaintiff’s arguments and defendant’s responses concerning each of the . . . challenged test questions.” *Di Iorio*, 14 CIT at 747. However, the Court is not “some kind of final reviewer” of the CBLE, *id.* at 752, and Customs is “entitled to certain latitude in the design and scoring of” the exam. *Dunn-Heiser*, 29 CIT at 556, 374 F. Supp. 2d at 1280.

In determining whether Customs’ position with respect to a contested question is reasonable and meets the substantial evidence standard, the Court previously has stated that “susceptibility of different meanings” does not necessarily render a question or term used therein ambiguous, and that the meaning of the question or term “may be colored by the context in which it is used.” *DePersia*, 33 CIT at 1110–12, 637 F. Supp. 2d at 1251. Further, the fact that a question or term is susceptible of more than one interpretation will fail to meet the substantial evidence standard only in limited circumstances. *See*,

e.g., *Harak*, 30 CIT at 928; *O’Quinn v. United States*, 24 CIT 324, 328, 100 F. Supp. 2d 1136, 1140 (2000). These circumstances include that: (1) the omission of relevant statutory or regulatory language would result in the question falsely characterizing the applicable provision, *see Harak*, 30 CIT at 928 (citing *Carrier v. United States*, 20 CIT 227, 232 (1996)); (2) the inclusion or omission of language would result in “the question’s incorrect use of” a relevant term, *O’Quinn*, 24 CIT at 328, 100 F. Supp. 2d at 1140; or (3) the inclusion or omission of language would result in the question “not contain[ing] sufficient information [for an applicant] to choose an answer.” *Id.*

II. “Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”

Customs’ regulations list four requirements for an individual to obtain a customs broker’s license, one of which is that the applicant “attain[] a passing (75 percent or higher) grade on” the CBLE. 19 C.F.R. § 111.11(a)(1)-(4). In reviewing Customs’ decision to deny a customs broker’s license, the Court must determine whether such a decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see Kenny*, 401 F.3d at 1361; *Dunn-Heiser*, 29 CIT at 555, 374 F. Supp. 2d at 1279; *Di Iorio*, 14 CIT at 747.

Should the Court determine that Customs’ decision to deny an applicant credit for contested questions on the CBLE was supported by substantial evidence, and consequently that an applicant attained less than a 75% score on the exam, then Customs’ denial of a customs broker’s license will not have been “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

DISCUSSION

The court concludes that Customs’ decision to deny plaintiff credit for questions 5, 27, 33 and 39 on the April 2018 exam was supported by substantial evidence, but that Customs’ decision with respect to question 57 was not supported by substantial evidence. On this basis, plaintiff does not establish that he scored 75% or higher on the April 2018 exam. Accordingly, the court concludes that Customs’ decision to deny plaintiff a customs broker’s license was not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The court concludes also that plaintiff is not entitled to receive attorney fees and other expenses under the EAJA. 28 U.S.C. § 2412(d).

I. Customs' denial of credit for the contested questions

A. Question 5

First, plaintiff appeals Customs' decision to deny plaintiff credit for question 5 on the April 2018 exam. *See* Pl. Br. at 4. Question 5 states:

Which of the following customs transactions is **NOT** required to be performed by a licensed customs broker?

A. Temporary Importation under Bond

B. Transportation in bond

C. Permanent Exhibition Bond

D. Trade Fair Entry

E. Foreign Trade Zone Entry

Am. Admin. R., Ex. N, at *5.

1. Positions of the parties

Customs designated answer choice (B) as the correct response to question 5. *See* Def. Resp. Br. at 8. Plaintiff selected answer choice (E) but does not contest that answer choice (B) is also correct. *See* Pl. Br. at 4. Accordingly, the parties dispute only whether Customs' decision to deny plaintiff credit for his selection of answer choice (E) was supported by substantial evidence. *See id.* at 5; Def. Resp. Br. at 9–10.

Plaintiff contends that Customs' decision to deny plaintiff credit for his selection of answer choice (E) was not supported by substantial evidence. *See* Pl. Br. at 5. Plaintiff argues that answer choice (E) is correct because "Foreign Trade Zone Entry" is *not* required to be performed by a licensed customs broker. *See id.* at 4. Plaintiff applies a "common understanding" of the term "entry" and contends that the process of "admission" set forth in 19 C.F.R. § 146.32(a)(1) — which does not require a customs broker's license pursuant to 19 C.F.R. § 111.2(a) — constitutes a type of "Foreign Trade Zone Entry." *Id.*

Plaintiff points first to 19 C.F.R. § 146.32(a)(1). *See id.* This regulation provides:

§ 146.32 APPLICATION AND PERMIT FOR ADMISSION OF MERCHANDISE.

(a)(1) APPLICATION ON CBP FORM 214 AND PERMIT. Merchandise may be admitted into a zone only upon application on a uniquely and sequentially numbered CBP Form 214 ("Application for Foreign Trade Zone Admission and/or Status Designation") and the issuance of a permit by the port director. . . . The applicant for admission shall present the application to the port director and shall include a statistical copy on CBP Form 214-A for trans-

mittal to the Bureau of Census, unless the applicant has made arrangements for the direct transmittal of statistical information to that agency.

19 C.F.R. § 146.32(a)(1). Plaintiff and defendants agree that the process of admission set forth in this provision does not constitute “customs business” that is required to be performed by a licensed customs broker. *See* Pl. Br. at 4; Oral Arg. Tr. at 4:3–9, ECF No. 52; 19 C.F.R. §§ 111.1 (defining “customs business”), 111.2(a)(2)(vi) (providing that an activity such as admission into a foreign trade zone, which does not “involve the transfer of merchandise to the customs territory of the United States,” is not required to be performed by a licensed customs broker).

Next, plaintiff argues that the process of “admission” set forth in 19 C.F.R. § 146.32(a)(1) falls within a “common understanding” of the term “entry,” which plaintiff asserts to be “the act of entering or the acting of making or entering a record.” Pl. Br. at 5. Plaintiff contends that the use of this “common understanding” is appropriate because answer choice (E) — “Foreign Trade Zone Entry” — is not a term of art that appears in Customs’ regulations.⁶ *See id.* at 4; Oral Arg. Tr. at 20:9–13 (contending that use of a “common understanding” of a term is appropriate if the term is “not otherwise defined”).

In support of his interpretation of the term “entry,” plaintiff refers also to an article on Customs’ website, of which plaintiff requests that the court take judicial notice. *See* Pl. Reply Br. at 4–5 n.1; Oral Arg. Tr. at 9:18–10:19. Plaintiff points to the use in this article of the term “entry” to challenge defendants’ “hyper-technical distinction between ‘admission’ and ‘entry.’” *See* Oral Arg. Tr. at 10:15–17.

On this basis, plaintiff argues that, applying a “common understanding” of the term “entry,” the process of “admission” set forth in 19 C.F.R. § 146.32(a)(1) constitutes a type of “Foreign Trade Zone Entry” that does not require a customs broker’s license pursuant to 19 C.F.R. § 111.2(a). Pl. Br. at 4–5. Accordingly, plaintiff contends that answer choice (E) is also correct. *See id.* at 4.

Defendants argue that answer choice (E) is not correct. *See* Def. Resp. Br. at 8–10. According to defendants, plaintiff applies mistakenly a “common understanding” of the term “entry,” which leads

⁶ In addition, plaintiff argues in his memorandum in support of his motion for judgment on the agency record that the use of a “common understanding” of the term “entry” is appropriate because the phrase in answer choice (E) is not capitalized. *See* Pl. Br. at 4. At oral argument, however, plaintiff notes that the parties learned subsequent to the submission of their respective briefs that the phrase in answer choice (E) — “Foreign Trade Zone Entry” — had in fact been capitalized in the April 2018 exam. *See* Oral Arg. Tr. at 11:21–14:6. The record has since been corrected to include the full exam. *See* Am. Admin. R., Ex. N. Accordingly, plaintiff withdraws his argument with respect to the capitalization of the term “entry.”

plaintiff to rely incorrectly upon 19 C.F.R. § 146.32(a)(1). *See id.* Rather, defendants argue that plaintiff should have but did not rely upon 19 C.F.R. § 146.62 in responding to the question. *See id.*

To start, defendants refer to 19 C.F.R. § 146.62, which provides: § 146.62 ENTRY.

(a) GENERAL. Entry for foreign merchandise that is to be transferred from a zone, or removed from a zone for exportation or transportation to another port, for consumption or warehouse, will be made by filing an in-bond application pursuant to part 18 of this chapter, CBP Form 3461, CBP Form 7501, or other applicable CBP forms. If entry is made on CBP Form 3461, the person making entry shall file an entry summary for all the merchandise covered by the CBP Form 3461 within 10 business days after the time of entry.

19 C.F.R. § 146.62(a); *see id.* § 146.63–146.64. Defendants note that Customs’ regulations provide that the process of “entry” set forth in 19 C.F.R. § 146.62 constitutes “customs business” that is required to be performed by a licensed customs broker. *See* Def. Resp. Br. at 10; 19 C.F.R. §§ 111.1, 111.2(a)(1). According to defendants, plaintiff should have relied upon 19 C.F.R. § 146.62 in responding to question 5, as the phrase in answer choice (E) — “Foreign Trade Zone Entry” — “reasonably refers” to the process of “transferring or removing merchandise from an FTZ” that is described in the regulation. Def. Resp. Br. at 9–10.

Defendants argue that, rather than relying upon 19 C.F.R. § 146.62, plaintiff applies mistakenly a “common understanding” of the term “entry.” *See id.* Defendants contend that this “common understanding” leads plaintiff to rely incorrectly upon the process of “admission” set forth in 19 C.F.R. § 146.32(a)(1). *See id.* at 9.

Defendants point to the substantive differences between the process of “admission” set forth in 19 C.F.R. § 146.32(a)(1) and the process of “entry” set forth in 19 C.F.R. § 146.62. *See id.* According to defendants, “admission” as set forth in 19 C.F.R. § 146.32(a)(1) concerns the process through which “an importer brings merchandise into a [foreign trade zone].” *Id.* In contradistinction, defendants note that “entry” as set forth in 19 C.F.R. § 146.62 concerns the process through which “merchandise is transferred or removed from a zone for consumption or warehouse.” *Id.* To emphasize further this distinction, defendants note that 19 C.F.R. § 146.32(b)(2), a subsection of the regulation to which plaintiff points, itself distinguishes “admission” from “entry.” *See* Oral Arg. Tr. at 8:1–8 (citing 19 C.F.R. § 146.32(b)(2)) (“The applicant for *admission* shall submit with the application a document similar to that which would be required as evidence of the

right to make *entry* for merchandise in Customs territory.”) (emphasis supplied)).

On this basis, defendants argue that plaintiff conflates erroneously “admission” pursuant to 19 C.F.R. § 146.32(a)(1) with “entry” pursuant to 19 C.F.R. § 146.62. *See* Def. Resp. Br. at 8–9. According to defendants, the proper interpretation and application of 19 C.F.R. § 146.62 supports the conclusion that “Foreign Trade Zone Entry” is required to be performed by a licensed customs broker and, consequently, that answer choice (E) is not correct. *See id.* at 8–10.

Accordingly, defendants argue that Customs’ decision to deny plaintiff credit for question 5 was supported by substantial evidence. *Id.* at 10.

2. Analysis

Customs’ decision to deny plaintiff credit for question 5 was supported by substantial evidence.

Plaintiff’s position with respect to question 5 is not persuasive for three reasons. First, plaintiff applies mistakenly a “common understanding” of the term “entry” in arguing that answer choice (E) is correct. Second, the article on Customs’ website to which plaintiff refers does not support his position with respect to question 5. Third, plaintiff conflates erroneously the process of “admission” set forth in 19 C.F.R. § 146.32(a)(1) with the process of “entry” set forth in 19 C.F.R. § 146.62.

First, plaintiff applies mistakenly a “common understanding” of the term “entry.” The Court previously has stated that an applicant is required to consult “customs and related laws, regulations and procedures” in responding to questions on the CBLE. *Rudloff*, 19 CIT at 1249 (citing 19 U.S.C. § 1641(b)(2)). Provided that a contested question “reasonably tests” an applicant’s knowledge of the foregoing authorities, the Court will accord “a measure of deference” to Customs’ determination with respect to the question. *Id.*; *Dunn-Heiser*, 29 CIT at 556, 374 F. Supp. 2d at 1280.

Plaintiff argues that his use of a “common understanding” of the term “entry” is appropriate because the phrase “Foreign Trade Zone Entry” is not a term of art that appears as a standalone phrase in Customs’ regulations. *See* Pl. Br. at 4–5. This argument, however, is not consistent with the Court’s standard for evaluating questions on the CBLE. A phrase in a contested question is not required to appear in Customs’ regulations for the phrase to refer “reasonably” to the regulations. *See Harak*, 30 CIT at 922 (“[A] question or answer choice need not reflect the precise wording of the regulation in order to be

valid.”); *Di Iorio*, 14 CIT at 748–49 (“While not perfect, the question was adequate so that, as to this question, plaintiff’s appeal was rejected reasonably.”).

With respect to question 5, the phrase in answer choice (E) — “Foreign Trade Zone Entry” — “reasonably test[ed]” plaintiff’s ability to identify the relevance of and to apply 19 C.F.R. § 146.62. *See Rudloff*, 19 CIT at 1249. 19 C.F.R. § 146.62 concerns the process of “[e]ntry for foreign merchandise that is to be transferred from a zone, or removed from a zone for exportation or transportation to another port, for consumption or warehouse.”⁷ 19 C.F.R. § 146.62(a) (emphasis supplied). Further, 19 C.F.R. § 146.62, which is entitled “Entry,” is located in Part 146, “Foreign Trade Zones,” of Title 19 of the CFR. Based on the language of 19 C.F.R. § 146.62 and the context within which the provision is located in Customs’ regulations, Customs concluded reasonably that the phrase in answer choice (E) — “Foreign Trade Zone Entry” — is drafted in a manner that indicates its reference to this provision. Am. Admin. R., Ex. N, at *5. Consequently, Customs determined reasonably that the use of a “common understanding” of the term “entry” is not appropriate in responding to question 5.

Turning to plaintiff’s second argument, plaintiff does not establish that the article on Customs’ website supports his position with respect to question 5. *See* Pl. Reply. Br. at 4–5 n.1. Plaintiff requests that the court take judicial notice of this article pursuant to Federal Rule of Evidence (“FRE”) 201(b)(2), which provides that a “court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2); 28 U.S.C. § 2641(a).

Other federal courts have taken judicial notice of information published by a government agency on a government website on the basis that such a website constitutes a “source[] whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2); *see Lopez v. Bank of Am., N.A.*, 505 F. Supp. 3d 961, 970 (N.D. Cal. 2020) (“The Court will . . . take judicial notice . . . of the document . . . as it is clear on the face of the document — and the Court has independently confirmed — that it comes from a government agency website.”); *Dark Storm Indus. LLC v. Cuomo*, 471 F. Supp. 3d 482, 490 n.2 (N.D.N.Y. 2020), *appeal dismissed, cause remanded sub nom. Dark Storm Indus. LLC v. Hochul*, No. 20–2725-CV, 2021 WL 4538640 (2d Cir. Oct.

⁷ *See* 19 C.F.R. § 146.1(a) (defining terms used in Part 146 of Title 19 of the CFR) (citing 19 U.S.C. § 81a(i) (“The term ‘zone’ means a ‘foreign-trade zone.’”)).

5, 2021). In such circumstances, courts have “considered separately” the “relevan[ce]” of the information of which judicial notice is taken. *Michael v. New Century Fin. Servs.*, 65 F. Supp. 3d 797, 804 (N.D. Cal. 2014).

The article to which plaintiff points is featured on the “Information Center” section of Customs’ website, and it is “clear on the face of” the article that it was published by Customs. *Lopez*, 505 F. Supp. 3d at 970. The “accuracy” of Customs’ website “cannot reasonably be questioned,” and consequently the court concludes that this article meets the standard for judicial notice. Fed. R. Evid. 201(b)(2).

However, the court concludes that this article does not support plaintiff’s argument with respect to question 5. The article, which is entitled, “Do I need a Customs Broker to clear my goods through Customs and Border Protection (CBP)?” states that “[t]here is no legal requirement for you to hire a Customs Broker to clear your goods.” Pl. Reply Br. at Ex. A. In addition, the article cites to a publication by Customs, entitled “Importing into the United States,”⁸ which provides more comprehensive information to individuals who “choose to file [their] own customs entry.” *Id.* However, this publication expressly states that “the information provided [therein] is for general purposes only” and that “reliance solely on th[is] information . . . may not meet the ‘reasonable care’ standard required of importers.” Customs Importing Publication at 12; see 19 U.S.C. § 1484(a)(1) (requiring the use of “reasonable care” in providing Customs with “documentation” or “information” with respect to the entry of merchandise). Moreover, the CBLE expressly directs applicants to refer to the following materials: the HTSUS, Title 19 of the CFR, the Instructions for the Preparation of Customs Form 7501, and the Right to Make Entry Directive 3530–002A. See Am. Admin. R., Ex. N, at *1.

The third reason that plaintiff’s argument with respect to question 5 is not persuasive is that plaintiff conflates erroneously the processes set forth in 19 C.F.R. § 146.32(a)(1) and 19 C.F.R. § 146.62. 19 C.F.R. § 146.32(a)(1) concerns the process to apply and secure a permit for the “admission of merchandise” into a foreign trade zone. 19 C.F.R. § 146.1 defines “admit” as “to bring merchandise into a zone with zone status.” In contradistinction, 19 C.F.R. § 146.62 concerns the process of “[e]ntry for foreign merchandise that is to be transferred from a zone, or removed from a zone for exportation or transportation to another port, for consumption or warehouse.” Pursuant to 19 C.F.R.

⁸ *Importing into the United States*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/sites/default/files/documents/Importing%20into%20the%20U.S.pdf> (last revised 2006) (“Customs Importing Publication”).

§§ 111.1 and 111.2, this process of entry constitutes “customs business” that is required to be performed by a licensed customs broker. *See* 19 C.F.R. § 111.1 (providing that activities that “concern[] the entry . . . of merchandise” constitute “customs business”).

In sum, 19 C.F.R. § 146.32(a)(1) involves bringing merchandise *into* a foreign trade zone, while 19 C.F.R. § 146.62 involves “transferr[ing]” or “remov[ing]” merchandise *from* a foreign trade zone for “consumption or warehouse.” *Compare id.* § 146.32(a)(1) *with id.* § 146.62. The provisions regulate distinct administrative processes that question 5 reasonably called upon an applicant to distinguish. Plaintiff’s counsel presented the most effective possible arguments in briefing and at oral argument; however, ultimately, the arguments cannot save the choice plaintiff made during the exam. Customs’ decision to deny plaintiff credit for question 5 was supported by substantial evidence.

B. Question 27

Second, plaintiff appeals Customs’ decision to deny plaintiff credit for question 27 on the April 2018 exam. *See* Pl. Br. at 5. Question 27 states:

Which of the following mail articles are not subject to examination or inspection by Customs?

A. Bona-fide gifts with an aggregate fair retail value not exceeding \$800 in the country of shipment

B. Mail packages addressed to officials of the U.S. Government containing merchandise

C. Diplomatic pouches bearing the official seal of France and certified as only containing documents

D. Personal and household effects of military and civilian personnel returning to the United States upon the completion of extended duty abroad

E. Plant material imported by mail for purposes of immediate exportation by mail

*Am. Admin. R., Ex. N, at *13.*

1. Positions of the parties

Customs designated answer choice (C) as the correct response to question 27. *See* Def. Resp. Br. at 10. Plaintiff selected answer choice (B), but does not contest that answer choice (C) is correct. *See* Pl. Br. at 6. Accordingly, the parties dispute only whether Customs’ decision to deny plaintiff credit for his selection of answer choice (B) was

supported by substantial evidence. *See id.*; Def. Resp. Br. at 11–12.

Plaintiff advances two arguments with respect to question 27. First, plaintiff contends that question 27 is ambiguous because the question does not indicate “where the mail packages are coming from.” Pl. Br. at 6. Answer choice (B) points to “[m]ail packages addressed to officials of the U.S. Government containing merchandise.” Am. Admin. R., Ex. N, at *13. Plaintiff argues that if the mail packages are sent from a domestic source, then the packages described in this answer choice would not be subject to examination or inspection by Customs. *See* Pl. Br. at 6. Without this information, however, plaintiff argues that the question is ambiguous. *See id.*

Second, plaintiff contends that answer choice (B) also is correct. *See id.*; Pl. Reply Br. at 6. In support of this contention, plaintiff points to two of Customs’ regulations. *See* Pl. Br. at 6. To start, 19 C.F.R. § 145.2(b)(1) provides that “[m]ail known or believed to contain only official documents addressed to officials of the U.S. Government” is not “subject to Customs examination.” Plaintiff next turns to 19 C.F.R. § 145.37. *See* Pl. Reply Br. at 6. This regulation provides that certain “[b]ooks . . . and engravings, etchings, and other articles . . . shall be passed free of duty without issuing an entry when they are addressed to the Library of Congress or any department or agency of the U.S. Government.” *Id.* (quoting 19 C.F.R. § 145.37(b)). Plaintiff contends that the articles described in 19 C.F.R. § 145.37(b) constitute “[m]ail packages addressed to officials of the U.S. Government containing merchandise” that shall be passed free of duty. *See id.*; Am. Admin. R., Ex. N, at *13. On this basis, plaintiff argues that answer choice (B) is correct. *See* Pl. Br. at 6; Pl. Reply Br. at 6–7.

Defendants contest both of plaintiff’s arguments. *See* Def. Resp. Br. at 10–12. First, defendants challenge plaintiff’s contention that the mail articles described in question 27 might be sent from a domestic source. *See id.* at 11–12. According to defendants, question 27 “reasonably assumes that all mail articles identified are imported into the United States” because “[i]f the merchandise was not imported . . . then custom laws would not apply” to the question. *Id.* at 11. Defendants argue that the question and answer choice (B) as drafted reasonably “test the [applicant’s] ability to distinguish between imports that require examination or inspection and those that do not.” *Id.*

Second, defendants challenge plaintiff’s reliance upon 19 C.F.R. § 145.2(b)(1) and 19 C.F.R. § 145.37. *See id.* at 10–11. With respect to 19 C.F.R. § 145.2(b)(1), defendants note that this provision excepts from examination by Customs “[m]ail known or believed to contain *only*

official documents addressed to officials of the U.S. Government.” *See id.* at 11 (citing 19 C.F.R. § 145.2(b)(1)) (emphasis in original). According to defendants, the plain language of this provision contradicts plaintiff’s conclusion that “[m]ail packages addressed to officials of the U.S. Government containing *merchandise*” are not subject to examination or inspection by Customs. Am. Admin. R., Ex. N, at *13 (emphasis supplied); *see* Def. Resp. Br. at 11.

Defendants then turn to 19 C.F.R. § 145.37. *See* Def. Resp. Br. at 11. Defendants raise two points with respect to this regulation. First, defendants note that 19 C.F.R. § 145.37(c) distinguishes mail articles that contain “only official documents” from articles that contain “merchandise.” *See id.* According to defendants, this regulation provides that articles that contain “only official documents[] shall be passed free of duty without issuing an entry.” 19 C.F.R. § 145.37(c). In contrast, defendants note that articles that contain “merchandise[] shall be treated in the same manner as other mail articles of merchandise.” *Id.* Accordingly, defendants assert that 19 C.F.R. § 145.37(c) indicates that articles that contain “merchandise” shall be subject to examination by Customs. *See* Def. Resp. Br. at 11. On this basis, defendants contend that answer choice (B) is not correct. *See id.* at 10–12.

In the alternative, defendants note that 19 C.F.R. § 145.37 does not concern “Customs’ examination” of the subject articles, but rather concerns how the articles “should be treated . . . for duty purposes.” Oral Arg. Tr. at 27:12–16. According to defendants, the articles described in 19 C.F.R. §§ 145.37(b) and (c) “still would be subject to Customs’ examination” even if those articles are “passed free of duty.” *Id.* at 27:13–14; 19 C.F.R. § 145.37(b)-(c). On this basis, defendants contend that 19 C.F.R. § 145.37 is not responsive to question 27 and consequently does not support plaintiff’s selection of answer choice (B). *See* Def. Resp. Br. at 11; Oral Arg. Tr. at 27:12–16.

Accordingly, defendants argue that Customs’ decision to deny plaintiff credit for question 27 was supported by substantial evidence. *See* Def. Resp. Br. at 12.

2. Analysis

Customs’ decision to deny plaintiff credit for question 27 was supported by substantial evidence.

To start, Customs determined reasonably that question 27 presumes that the mail articles described in the question are imported into the United States. This presumption is reasonable based on the fact that the CBLE is designed to examine an applicant’s ability to interpret and apply “customs and related laws, regulations and pro-

cedures.” *Rudloff*, 19 CIT at 1249 (citing 19 U.S.C. § 1641(b)(2)). Without the presumption that the mail articles described in question 27 are imported into the United States, the foregoing authorities would not apply to this question. In view of the purpose of the CBLE, Customs engaged in “reasoned decision-making” in concluding that question 27 is drafted in a manner that indicates Customs’ intention to examine whether an applicant is able to distinguish imports that are subject to examination or inspection by Customs from imports that are not subject to such examination or inspection. *Harak*, 30 CIT at 919. For this reason, the court accords Customs a “measure of deference” with respect to Customs’ “design” of question 27 and concludes that the question is not ambiguous. *Dunn-Heiser*, 29 CIT at 556, 374 F. Supp. 2d at 1280.

Next, Customs determined reasonably that 19 C.F.R. § 145.2(b)(1) and 19 C.F.R. § 145.37 do not support plaintiff’s conclusion that answer choice (B) is correct. 19 C.F.R. § 145.2(b)(1) excepts from examination by Customs “[m]ail known or believed to contain *only official documents* addressed to officials of the U.S. Government.” 19 C.F.R. § 145.2(b)(1) (emphasis supplied). This regulation does *not* except from examination or inspection by Customs the articles described in answer choice (B) — “[m]ail packages addressed to officials of the U.S. Government containing *merchandise*.” Am. Admin. R., Ex. N, at *13 (emphasis supplied). Further, “official documents” under 19 C.F.R. § 145.2(b)(1) do not constitute “merchandise” within the meaning of Customs’ regulations. *See, e.g.*, 19 C.F.R. § 145.37(c) (distinguishing mail articles that contain “official documents” from mail articles that contain “merchandise”). Accordingly, the plain language of 19 C.F.R. § 145.2(b)(1) contradicts plaintiff’s argument with respect to his selection of answer choice (B).

Turning to 19 C.F.R. § 145.37, this provision is not responsive to question 27, which instructs the applicant to determine “[w]hich of the following mail articles are not *subject to examination or inspection by Customs*.” Am. Admin. R., Ex. N, at *13 (emphasis supplied). 19 C.F.R. § 145.37 does not address whether certain mail articles are subject to “examination” or “inspection” by Customs. Rather, this provision addresses whether the articles “shall be passed free of duty without issuing an entry.” 19 C.F.R. § 145.37(b)-(c). Whether an article “shall be passed free of duty” is a distinct question from whether an article “shall be subject to examination or inspection by Customs.” *Id.*; Am. Admin. R., Ex. N, at *13. On this basis, 19 C.F.R. § 145.37 does not support plaintiff’s selection of answer choice (B).

Accordingly, Customs’ decision to deny plaintiff credit for question 27 was supported by substantial evidence.

C. Question 33

Third, plaintiff appeals Customs' decision to deny plaintiff credit for question 33 on the April 2018 exam. *See* Pl. Br. at 7. Question 33 states:

What is the **CLASSIFICATION** of current-production wall art depicting abstract flowers and birds that is mechanically printed, via lithography, onto sheets of paper, the paper measuring .35 mm in thickness that have been permanently mounted onto a backing of .50 mm thick paperboard?

A. 4911.91.2040

B. 4911.91.3000

C. 4911.99.6000

D. 9701.10.0000

E. 9702.00.0000

Am. Admin. R., Ex. N, at *14.

1. Positions of the parties

Customs designated answer choice (B) as the correct response to question 33. *See* Def. Resp. Br. at 12. Plaintiff selected answer choice (E). *See* Pl. Br. at 7.

Plaintiff argues that Customs' decision to deny plaintiff credit for question 33 was not supported by substantial evidence. *See id.* Plaintiff does not contend that his selection of answer choice (E) is correct; rather, plaintiff argues that question 33 is ambiguous. *See id.*

Question 33 describes the subject merchandise as "current-production wall art . . . that is mechanically printed, via lithography, onto sheets of paper, the paper measuring .35 mm in thickness that have been permanently mounted onto a backing of .50 mm thick paperboard." Am. Admin. R., Ex. N, at *14. Customs designated answer choice (B) as the correct response to question 33. *See* Pl. Br. at 7. Answer choice (B) points to subheading 4911.91.3000 of the HTSUS,⁹ which applies to "[l]ithographs on paper or paperboard" that are "[o]ver 0.51 mm in thickness" and that were "[p]rinted not over 20 years at the time of importation." HTSUS, 4911.91.3000; *see* Am. Admin. R., Ex. N, at *14. Further, Additional U.S. Note 1 to Chapter 49 of the HTSUS states that "[f]or the purposes of determining the classification of printed matter produced in whole or in part by a

⁹ All citations to the HTSUS, including Chapter Notes and General Notes, are to the 2017 Basic Edition. This edition was in effect on April 25, 2018, when plaintiff sat for the CBLE. *See* Am. Admin. R., Ex. N, at *1.

lithographic process . . . the thickness of a permanently mounted lithograph is the combined thickness of the lithograph and its mounting.” Additional U.S. Note 1, Chapter 49, HTSUS.

Plaintiff argues that question 33 is ambiguous due to Customs’ use of the phrase “current-production.” *See* Pl. Br. at 7. Plaintiff asserts that Customs’ designated answer choice (B) “presupposes a certain timeframe within which the goods are produced.” *Id.* However, plaintiff argues that Customs “does not provide such a time in the question, instead expecting the undefined phrase ‘current production’ to signify the answer.” *Id.* Plaintiff contends that the phrase “current-production” does not provide sufficient information to determine that the subject merchandise was “[p]rinted not over 20 years at time of importation” and consequently is classified properly under subheading 4911.91.3000. *See id.*; Oral Argument Tr. at 28:20–29:2. Accordingly, plaintiff argues that question 33 is ambiguous and that Customs’ decision to deny plaintiff credit for the question was not supported by substantial evidence. *See* Pl. Br. at 7.

Defendants contend that Customs’ decision to deny plaintiff credit for question 33 was supported by substantial evidence. To start, defendants contest plaintiff’s argument that Customs’ use of the phrase “current-production” renders question 33 ambiguous. *See* Def. Resp. Br. at 12–14. Defendants contend that Customs determined that “the term ‘current-production’ . . . reasonably means that the printed lithography is not over 20 years old.” *Id.* at 13. According to defendants, this phrase, while “not a number of years . . . gives the test-taker a time reference” that provides sufficient information to determine that the subject merchandise is classified properly under subheading 4911.91.3000. Oral Arg. Tr. at 30:3–11; *see* Def. Resp. Br. at 13–14. On this basis, defendants contend that answer choice (B) is correct. *See* Def. Resp. Br. at 13–14.

In addition, defendants argue that plaintiff’s selected answer choice (E) is not correct. *See id.* at 14. Answer choice (E) points to Heading 9702.00.000 of the HTSUS, which applies to “[o]riginal engravings, prints and lithographs, framed or not framed.” HTSUS, 9702.00.000; *see* Am. Admin. R., Ex. N, at *14. Note 2 to Chapter 97 of the HTSUS states that “[f]or purposes of heading 9702, the expression ‘*original engravings, prints and lithographs*’ means impressions produced directly . . . of one or of several plates wholly executed by hand by the artist . . . *not including any mechanical or photomechanical process.*” Note 2, Chapter 97, HTSUS (emphasis supplied). Notably, question 33 describes the subject merchandise as “mechanically printed.” Am. Admin. R., Ex. N, at *14. Accordingly, defendants argue that in view of Note 2, Heading 9702.00.000 does not apply to the subject mer-

chandise. *See* Def. Resp. Br. at 14. On this basis, defendants contend that answer choice (E) is not correct. *See id.*

Accordingly, defendants argue that Customs' decision to deny plaintiff credit for question 33 was supported by substantial evidence. *See id.* at 13–14.

2. Analysis

Customs' decision to deny plaintiff credit for question 33 was supported by substantial evidence.

Question 33 evaluates the ability of an applicant to interpret and apply the HTSUS. In determining the proper tariff classification of subject merchandise, the Court is required to apply in numerical order the General Rules of Interpretation (“GRIs”) of the HTSUS. *See BASF Corp. v. United States*, 482 F.3d 1324, 1325–26 (Fed. Cir. 2007). GRI 1 states that the classification of merchandise “shall be determined according to the terms of the headings and any relative section or chapter notes.” GRI 1, HTSUS. In addition, the Section and Chapter Notes featured in the HTSUS are not “optional interpretive rules,” but rather have the force of statutory law. *Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005) (quoting *Park B. Smith, Ltd. v. United States*, 374 F.3d 922, 927 (Fed. Cir. 2003)).

With respect to question 33, Customs determined reasonably that answer choice (B) — subheading 4911.91.3000 of the HTSUS — is correct. The merchandise described in question 33 is a permanently mounted lithograph, printed onto sheets of paper and paperboard with a combined thickness of 0.85 mm. *See* Am. Admin. R., Ex. N, at *14. Subheading 4911.91.3000 of the HTSUS applies to “[l]ithographs on paper or paperboard” that are “[o]ver 0.51 mm in thickness,” HTSUS, 4911.91.3000 (emphasis supplied), and Additional U.S. Note 1 to Chapter 49 of the HTSUS states that “[f]or the purposes of determining the classification of *printed matter produced in whole or in part by a lithographic process . . .* the thickness of a permanently mounted lithograph is the combined thickness of the lithograph and its mounting.” Additional U.S. Note 1, Chapter 49, HTSUS (emphasis supplied). Accordingly, the merchandise described in question 33 tracks closely to subheading 4911.91.3000 in answer choice (B).

In addition, Customs determined reasonably that plaintiff's selected answer choice (E) is *not* correct. As noted, answer choice (E) refers to Heading 9702.00.000 of the HTSUS, which, pursuant to Note 2 to Chapter 97, expressly does *not* cover merchandise that is produced by “any mechanical or photomechanical process.” Note 2, Chapter 97, HTSUS; Am. Admin. R., Ex. N, at *14. Accordingly, answer choice (E) by its terms directly contradicts the language of

question 33, which explicitly describes the subject merchandise as “mechanically printed.” Am. Admin. R., Ex. N, at *14.

Plaintiff argues that the phrase “current-production” in question 33 is not sufficiently precise to indicate that the merchandise was “[p]rinted not over 20 years” ago, per subheading 4911.91.3000 in answer choice (B). See Pl. Reply Br. at 7; HTSUS, 4911.91.3000. However, the Court previously has stated that “a question or answer choice need not reflect the precise wording of [a statute or regulation] in order to be valid” and supported by substantial evidence. *Harak*, 30 CIT at 922; see 19 U.S.C. § 1202. Moreover, Heading 9702.00.000, in answer choice (E), does not classify subject merchandise with reference to *any* timeframe for production, thereby providing a further indication — particularly, in comparison with answer choice (B) — that answer choice (E) was not *a* or *the* correct choice. Am. Admin. R., Ex. N, at *14; HTSUS, 9702.00.000; see *Di Iorio*, 14 CIT at 748. Accordingly, the express terms of answer choice (B) track closely to question 33, while the express terms of answer choice (E) directly contradict question 33. “While not perfect, the question was adequate so that, as to this question, plaintiff’s appeal was rejected reasonably.” *Di Iorio*, 14 CIT at 748–49.

Consequently, and despite the compelling advocacy of plaintiff’s counsel in briefing and at oral argument — on this point and, in fact, as to each of the five questions in dispute — the court concludes that Customs’ decision to deny plaintiff credit for question 33 was supported by substantial evidence.

D. Question 39

Fourth, plaintiff appeals Customs’ decision to deny plaintiff credit for question 39 on the April 2018 exam. See Pl. Br. at 8. Question 39 states:

What is the **CLASSIFICATION** of a teacup that is made of porcelain containing 28 percent of tricalcium phosphate, valued at \$18, and offered for sale in the same pattern as all of the other articles listed in Additional U.S. Note 6(b) to Chapter 69, HTSUS, with the aggregate value of all those articles listed in that note being \$900?

- A. 6911.10.2500
- B. 6911.10.3810
- C. 6911.10.5800
- D. 6911.10.8010
- E. 6912.00.4500

Am. Admin. R., Ex. N, at *16.

1. Positions of the parties

Customs designated answer choice (A) as the correct response to question 39. *See* Def. Resp. Br. at 14. Plaintiff selected answer choice (B). *See* Pl. Br. at 8.

Plaintiff argues that Customs' decision to deny plaintiff credit for question 39 was not supported by substantial evidence. *See id.* at 9. Plaintiff does not contend that his selection of answer choice (B) is correct; rather, plaintiff argues that question 39 is ambiguous. *See id.* at 8.

Question 39 describes the subject merchandise as “a teacup that is made of porcelain containing 28 percent of tricalcium phosphate, valued at \$18 and offered for sale in the same pattern as all of the other articles listed in Additional U.S. Note 6(b) to Chapter 69, HTSUS.” Am. Admin. R., Ex. N, at *16. Customs designated answer choice (A) as the correct response to the question. Pl. Br. at 8. Answer choice (A) points to subheading 6911.10.2500 of the HTSUS, which applies to “[t]ableware and kitchenware” that is made of “bone chinaware” and that is valued at “[o]ther” than “not over \$31.50 per dozen pieces” — *i.e.*, valued at over \$31.50 per dozen pieces. HTSUS, 6911.10.2500. Further, Additional U.S. Note 5(b) to Chapter 69 of the HTSUS states that “the term ‘bone chinaware’ embraces chinaware or porcelain the body of which contains 25 percent or more of calcined bone or tricalcium phosphate.” Additional U.S. Note 5(b), Chapter 69, HTSUS.

Plaintiff asserts that the reference in question 39 to “a” single teacup is inconsistent with the reference in subheading 6911.10.2500 to a “dozen pieces.” Pl. Br. at 8. In view of this inconsistency, plaintiff contends that question 39 is ambiguous, as the question “confuses the price of a single teacup versus the price of a dozen cups.” *Id.* Plaintiff argues that he “should not be required to guess as to the number or value” of the merchandise to which the question refers. *Id.* Further, plaintiff contends that the value of the described merchandise, \$18, indicates that subheading 6911.10.1500 — which applies to merchandise “valued *not over* \$31.50 per dozen pieces” — is the “best fit as the correct answer to the question.” *Id.* ; HTSUS, 6911.10.1500 (emphasis supplied). Given that subheading 6911.10.1500 is not listed as one of the answer choices to question 39, plaintiff contends that Customs' decision to deny plaintiff credit for this question was not supported by substantial evidence. *See* Pl. Br. at 8–9.

Defendants contest plaintiff's argument that question 39 is ambiguous and emphasize that the question refers "clearly" to the price of "a" single teacup. Def. Resp. Br. at 14–15. Defendants assert that Customs "did not confuse the price of a teacup versus a dozen teacups." *Id.* at 15. Rather, according to defendants, question 39 "reasonably required the test taker to calculate the price of a dozen teacups based on the fact that one teacup costs \$18." *Id.* This calculation, in turn, would lead the applicant to conclude that the subject merchandise is classified properly under subheading 6911.10.2500. *See id.* Accordingly, defendants contend that question 39 is not ambiguous and that answer choice (A) is correct. *See id.*

On this basis, defendants argue that Customs' decision to deny plaintiff credit for question 39 was supported by substantial evidence. *See id.* at 14–15.

2. Analysis

Customs' decision to deny plaintiff credit for question 39 was supported by substantial evidence.

Customs determined reasonably that answer choice (A) is correct. The merchandise described in question 39 — "a teacup that is made of porcelain containing 28 percent of tricalcium phosphate, valued at \$18 and offered for sale in the same pattern as all of the other articles listed in Additional U.S. Note 6(b)" — is classified properly under subheading 6911.10.2500 of the HTSUS. Am. Admin. R., Ex. N, at *16.

First, the merchandise, a teacup, constitutes "[t]ableware [or] kitchenware." HTSUS, 6911.10.2500.

Second, the merchandise is made of "bone chinaware" because it contains "28 percent of tricalcium phosphate." Am. Admin. R., Ex. N, at *16. As Additional U.S. Note 5(b) states, "bone chinaware" encompasses "chinaware . . . the body of which contains 25 percent or more of . . . tricalcium phosphate." Additional Note 5(b), Chapter 69, HTSUS (emphasis supplied).

Last, the merchandise is valued at over \$31.50 per dozen pieces. HTSUS, 6911.10.2500. Question 39 indicates that "a" teacup is valued at \$18. Am. Admin. R., Ex. N, at *16. Accordingly, by multiplying the value of a single teacup by 12, the value of the merchandise "per dozen pieces" is \$216 — *i.e.*, greater than \$31.50 per dozen pieces. Customs determined reasonably that question 39 "test[s] an understanding of the structure of the HTSUS" by requiring an applicant to make the foregoing simple mathematical calculation to determine the proper classification of the subject merchandise. *Harak*, 30 CIT at

915; *see* Additional U.S. Note 7, Chapter 69, HTSUS (“For the purposes of headings 6911 . . . an article is a single tariff entity which may consist of more than one piece.”). Plaintiff’s failure to make this calculation does not indicate that question 39 is ambiguous. This calculation indicates that the merchandise is classified properly under subheading 6911.10.2500, rather than subheading 6911.10.1500, as plaintiff argues, and consequently that answer choice (A) is correct.

In addition, Customs determined reasonably that plaintiff’s selection of answer choice (B) is not correct. Answer choice (B) provides that the proper classification of the subject merchandise is subheading 6911.10.3810 of the HTSUS, which applies to “[o]ther . . . teacups and saucers . . . not over 22.9 cm in maximum” that have an “[a]ggregate value over \$200.” HTSUS, 6911.10.3810. The use of the term “[o]ther” indicates that merchandise classified under this subheading 6911.10.3810 is made of “[o]ther” than bone chinaware. *Id.* However, pursuant to Additional U.S. Note 5(b), the merchandise described in question 39 is made of “bone chinaware.” Additional Note 5(b), Chapter 69, HTSUS. On this basis, Customs determined reasonably that this merchandise is not classified properly under subheading 6911.10.3810 and that answer choice (B) is not correct.

Accordingly, Customs’ decision to deny plaintiff credit for question 39 was supported by substantial evidence.

E. Question 57

Last, plaintiff appeals Customs’ decision to deny plaintiff credit for question 57 on the April 2018 exam. *See* Pl. Br. at 11. Question 57 states:

Which of the following shipments does not contain restricted gray market merchandise as defined in 19 C.F.R. § 133.23?

A. A shipment of jeans, bearing a trademark registered and recorded in the United States, applied by a U.S. trademark owner’s foreign licensee independent of the U.S. trademark owner.

B. A shipment of shoes, bearing a trademark registered and recorded in the United States, applied under the authority of a foreign trademark owner other than the U.S. owner, a parent or subsidiary of the U.S. owner, or a party under common ownership or control with the U.S. owner, to whom the U.S. owner sold the foreign title.

C. A shipment of jackets, bearing a trademark registered and recorded in the United States, applied under the authority of a foreign trademark owner other than the U.S. owner, a parent or

subsidiary of the U.S. owner, or a party under common ownership or control with the U.S. owner, from whom the U.S. owner acquired the domestic title.

D. A shipment of books, bearing a U.S. registered and recorded trademark applied by a foreign subsidiary of the U.S. owner, determined by CBP to be different from the books authorized by the U.S. owner for importation or sale in the United States. The books feature a conspicuous label that they are not authorized by the U.S. owner for importation into the U.S. and are physically and materially different from the authorized ones.

E. A shipment of shirts, bearing a genuine foreign trademark owned by a foreign trademark owner, identical with or substantially indistinguishable from a trademark registered and recorded in the United States. The shipment was imported without the authorization of the U.S. owner who is not related to the foreign owner.

Am. Admin. R., Ex. N, at *25.

1. Positions of the parties

Customs designated answer choice (E) as the correct response to question 57. *See* Def. Resp. Br. at 20. Plaintiff selected answer choice (D). *See* Pl. Br. at 12.

Plaintiff argues that Customs' decision to deny plaintiff credit for question 57 was not supported by substantial evidence. *See id.* at 13. Plaintiff contends first that his selection of answer choice (D) is correct because the shipment described in this answer choice does *not* contain restricted gray market merchandise as defined in 19 C.F.R. § 133.23. *See id.* at 12. 19 C.F.R. § 133.23(a) provides:

§ 133.23 RESTRICTIONS ON IMPORTATION OF GRAY MARKET ARTICLES.

(a) RESTRICTED GRAY MARKET ARTICLES DEFINED. "Restricted gray market articles" are foreign-made articles bearing a genuine trademark or trade name identical with or substantially indistinguishable from one owned and recorded by a citizen of the United States or a corporation or association created or organized within the United States and imported without the authorization of the U.S. owner. "Restricted gray market goods" include goods bearing a genuine trademark or trade name which is:

- (1) INDEPENDENT LICENSEE. Applied by a licensee (including a manufacturer) independent of the U.S. owner; or
- (2) FOREIGN OWNER. Applied under the authority of a foreign trademark or trade name owner other than the U.S. owner, a

parent or subsidiary of the U.S. owner, or a party otherwise subject to common ownership or control with the U.S. owner . . . from whom the U.S. owner acquired the domestic title, or to whom the U.S. owner sold the foreign title(s); or

(3) “LEVER-RULE”. Applied by the U.S. owner, a parent or subsidiary of the U.S. owner, or a party otherwise subject to common ownership or control with the U.S. owner . . . to goods that [Customs] has determined to be physically and materially different from the articles authorized by the U.S. trademark owner for importation or sale in the U.S.

19 C.F.R. § 133.23(a)(1)-(3).

Plaintiff argues that the shipment described in answer choice (D) does not contain restricted gray market merchandise for three reasons: (1) the labels are “attached in close proximity to the trademark;” (2) the labels “appear[] in [their] most prominent location on the books;” and (3) the described books are “different from the books authorized by the U.S. owner for importation or sale in the United States.” Pl. Br. at 12. According to plaintiff, merchandise that bears the foregoing characteristics does not constitute restricted gray market merchandise within the meaning of 19 C.F.R. § 133.23. *See id.* On this basis, plaintiff contends that answer choice (D) is correct. *See id.*

Next, plaintiff contends that Customs’ selection of answer choice (E) is not correct because the shipment described in this answer choice *contains* restricted gray market merchandise. *See id.* Answer choice (E) describes a “shipment of shirts, bearing a genuine foreign trademark owned by a foreign trademark owner, identical with or substantially indistinguishable from a trademark registered and recorded in the United States[,] . . . [which] was imported without the authorization of the U.S. owner who is not related to the foreign owner.” Am. Admin. R., Ex. N, at *25. Based on this description, plaintiff argues that this merchandise falls within the “exact definition” of restricted gray market merchandise as set forth in 19 C.F.R. § 133.23(a). Pl. Reply Br. at 9.

In response, defendants challenge first plaintiff’s argument with respect to answer choice (D). Defendants argue that the three characteristics of the merchandise as described by plaintiff “have no bearing on the definition of ‘gray market’ goods as set forth in 19 C.F.R. § 133.23(a).” Def. Resp. Br. at 20 (citing Pl. Br. at 12). Further, defendants argue that the merchandise described in answer choice (D) meets the definition of restricted gray market merchandise provided in 19 C.F.R. § 133.23(a). *See id.*

Turning to answer choice (E), defendants contend that this answer choice is correct because the described merchandise bears “a genuine foreign trademark.” Am. Admin. R., Ex. N, at *25 (emphasis supplied). According to defendants, 19 C.F.R. § 133.23(a) provides that restricted gray market merchandise comprises only merchandise that bears a “genuine trademark.” Def. Resp. Br. at 20. Defendants argue that “regulations of foreign trademarks and their owners are not found in 19 C.F.R. § 133.23 because such facts have no bearing on the definition of a gray market good.” *Id.* Consequently, defendants assert that Customs determined reasonably that the shipment described in answer choice (E) does not fall within “the definition of a gray market good” and that this answer choice is correct. *Id.* at 20–21.

Accordingly, defendants argue that Customs’ decision to deny plaintiff credit for question 57 was supported by substantial evidence. *See id.* at 21.

2. Analysis

The court concludes that Customs’ decision to deny plaintiff credit for question 57 was not supported by substantial evidence.¹⁰

The court addresses first the parties’ arguments with respect to answer choice (D). As noted, plaintiff argues that the shipment described in answer choice (D) does *not* contain restricted gray market merchandise based on three characteristics, Pl. Br. at 12, while defendants contend that the three characteristics that plaintiff identifies “have no bearing on the definition of ‘gray market’ goods as set forth in 19 C.F.R. § 133.23(a).” Def. Resp. Br. at 20.

The books described in answer choice (D) satisfy the requirements set forth in 19 C.F.R. § 133.23(b) and accordingly do not constitute restricted gray market merchandise. 19 C.F.R. § 133.23(b) provides:

(b) LABELING OF PHYSICALLY AND MATERIALLY DIFFERENT GOODS. Goods determined by [Customs] to be physically and materially different under the procedures of this part, bearing a genuine mark applied under the authority of the U.S. owner, a parent or subsidiary of the U.S. owner, or a party otherwise subject to common ownership or control with the U.S. owner . . . shall not be detained under the provisions of paragraph (c) of this section

¹⁰ Based on the foregoing analysis of questions 5, 27, 33 and 39, plaintiff has not met the “minimum threshold” to establish entitlement to credit for at least three questions to attain a passing score on the CBLE. *Harak*, 30 CIT at 929. Nonetheless, the court offers a brief statement of its analysis and conclusions with respect to question 57. This approach highlights that the fullest possible consideration has been given to Mr. Chae’s claims and appeals in this matter. This approach is also consistent with past decisions of the Court. *See id.* (concluding that a contested question “technically ha[d] two answers,” despite determining that the receipt of credit for the question would not enable the plaintiff to attain a passing score on the exam).

where the merchandise or its packaging bears a conspicuous and legible label designed to remain on the product until the first point of sale to a retail consumer in the United States stating that: “This product is not a product authorized by the United States trademark owner for importation and is physically and materially different from the authorized product.” The label must be in close proximity to the trademark as it appears in its most prominent location on the article itself or the retail package or container. Other information designed to dispel consumer confusion may also be added.

19 C.F.R. § 133.23(b).

Pursuant to 19 C.F.R. § 133.23(c), merchandise that bears the characteristics set forth in 19 C.F.R. § 133.23(b) shall not be subject to restrictions such as “deni[al] [of] entry” and “detention.” 19 C.F.R. § 133.23(c); see *XYZ Corp. v. United States*, 41 CIT __, __, 253 F. Supp. 3d 1257, 1269 (2017) (“Importation of the . . . subject gray market [merchandise] is restricted, unless the labeling requirements of 19 CFR § 133.23(b) have been satisfied.” (quoting U.S. Customs and Border Protection Grant of “Lever–Rule” Protection, 51 Cust. Bull. & Dec. No. 12 at 1 (Mar. 22, 2017))).

The merchandise described in answer choice (D) bears each of the characteristics set forth in 19 C.F.R. § 133.23(b). First, the books described in answer choice (D) are “physically and materially different” from books that are authorized by the U.S. owner for importation into the United States. Am. Admin. R., Ex. N, at *25. Second, the books bear a “conspicuous label” that indicates that the books “are not authorized by the U.S. owner for importation into the U.S. and are physically and materially different from the authorized ones.” *Id.* Third, along with this label, the books feature a “U.S. registered and recorded trademark.” *Id.* Based on the fact that the articles described in answer choice (D) are books, rather than articles of a larger dimension, it was not reasonable for Customs to reject plaintiff’s position that the labels featured on each book are in “close proximity” to the trademarks. *Id.*; 19 C.F.R. § 133.23(b). Last, the books “bear[] a U.S. registered and recorded trademark applied by a foreign subsidiary of the U.S. owner.” Am. Admin. R., Ex. N, at *25. 19 C.F.R. § 133.23(b) requires that the goods “bear[] a genuine mark applied under the authority of the U.S. owner, a parent or subsidiary of the U.S. owner, or a party otherwise subject to common ownership or control with the U.S. owner.” 19 C.F.R. § 133.23(b).

Customs’ regulations do not specify that the phrase “subsidiary of the U.S. owner” applies only to a U.S. subsidiary. *Id.*; Am. Admin. R., Ex. N, at *25. Moreover, the regulatory history of 19 C.F.R. §

133.23(b) supports this conclusion. *See* Gray Market Imports and Other Trademarked Goods, 64 Fed. Reg. 9,058, 9,058–59 (Dep’t of the Treasury Feb. 24, 1999) (final rule). Accordingly, it was not reasonable for Customs to reject the conclusion that the labeling requirements of 19 C.F.R. § 133.23(b) apply with respect to a foreign subsidiary of the U.S. owner.

On this basis, it was not reasonable for Customs to reject the position that the merchandise described in answer choice (D) falls within the description provided in 19 C.F.R. § 133.23(b), and, pursuant to 19 C.F.R. § 133.23(c), the merchandise is not subject to restrictions such as denial of entry or detention. *See* 19 C.F.R. §§ 133.23(c), 133.25.

Plaintiff identified correctly that the merchandise described in answer choice (D) does not constitute “restricted gray market merchandise” within the meaning of 19 C.F.R. § 133.23. Pl. Br. at 12; 19 C.F.R. § 133.23. Customs’ decision to deny plaintiff credit for his selection of this answer choice was not reasonable, as Customs did not address the applicability of 19 C.F.R. §§ 133.23(b) and (c) to question 57 in evaluating plaintiff’s selection.

Turning to answer choice (E), the court concludes that Customs determined reasonably that this answer choice is a correct response to question 57. 19 C.F.R. § 133.23(a) defines restricted gray market merchandise as “foreign-made articles bearing a *genuine trademark* or trade name.” 19 C.F.R. § 133.23(a) (emphasis supplied). Answer choice (E) describes a “shipment of shirts, bearing a *genuine foreign trademark*.” Am. Admin. R., Ex. N, at *25 (emphasis supplied).

The inclusion of the term “foreign” in the phrase “*genuine foreign trademark*” in answer choice (E) distinguishes the merchandise described in this answer choice from merchandise that constitutes “restricted gray market merchandise” pursuant to 19 C.F.R. § 133.23(a). *Id.* Further, 19 C.F.R. § 133.23(a) is located in Part 133 of Title 19 of the CFR, which concerns the “the recordation of trademarks, trade names, and copyrights with *the U.S. Customs and Border Protection*.” 19 C.F.R. § 133.0 (emphasis supplied). The language of 19 C.F.R. § 133.23(a) and the context within which the provision is located in Customs’ regulations demonstrate that “restricted gray market merchandise” does not encompass merchandise that bears a foreign trademark. On this basis, Customs determined reasonably that answer choice (E) does not contain restricted gray market merchandise and consequently that this answer choice is correct.

Plaintiff’s counsel argued cogently in support of the position that Customs unreasonably denied plaintiff credit for his selection of answer choice (D). For the foregoing reasons, the court concludes that

both answer choices (D) and (E) are correct and that Customs' decision to deny plaintiff credit for question 57 was not supported by substantial evidence.

II. Customs' decision to deny plaintiff a customs broker's license

A. Positions of the parties

As discussed *supra* Sections I.A-E, plaintiff contends that he is entitled to credit for the contested questions such that he "achieved the requisite minimum passing score of 75%" on the April 2018 exam. Pl. Br. at 1. On this basis, plaintiff asserts that Customs' decision to deny plaintiff a customs broker's license was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 3; Am. Compl. at 1–2, 14; *Kenny*, 401 F.3d at 1361 n.3 ("[T]he denial of a license is a foregone conclusion for an unsuccessful examinee."). Defendants' view is that Customs' "decision not to grant plaintiff a license due to his failure to attain a passing score on the [CBLE] was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Def. Resp. Br. at 22–23.

B. Analysis

In reviewing Customs' decision to deny a customs broker's license, the Court is required to determine whether such a decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Kenny*, 401 F. 3d at 1361; *Dunn-Heiser*, 29 CIT at 555, 374 F. Supp. 2d at 1279; *Di Iorio*, 14 CIT at 747. A lawful ground for such a decision is an applicant's failure to pass the CBLE. *See* 19 U.S.C. § 1641(b)(2); 19 C.F.R. § 111.16(b)(2).

As discussed, a passing score on the CBLE is 75% or higher. 19 C.F.R. § 111.11(a)(4). In addition, each question on the 80 question exam is worth 1.25% of the total score. *See* Am. Admin. Rec, Ex. N, at *1. The Court previously has stated that to appeal successfully a result on the CBLE, an applicant is required to establish entitlement to credit for the "minimum" number of questions that the applicant requires to achieve a passing score. *Harak*, 30 CIT at 929. Should the applicant fail to meet this "minimum threshold," then Customs' denial of a customs broker's license is not "arbitrary, capricious, or otherwise not in accordance with law." *Id.* (citing 5 U.S.C. § 706(2)(A)).

Plaintiff's score on the April 2018 exam is 71.25%. *See* Am. Admin. R., Ex. L, at *1. Consequently, to attain a passing score of 75% or higher, plaintiff is required to establish that he is entitled to receive

credit for at least three of the five contested questions. Based on the foregoing analysis, the court concludes that Customs' decision to deny plaintiff credit for four of the five contested questions was supported by substantial evidence. Accordingly, plaintiff does not meet the "minimum threshold" to establish entitlement to credit for at least three questions. *Harak*, 30 CIT at 929. For this reason, Customs' decision to deny plaintiff's appeal was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* 19 C.F.R. § 111.16(b)(2).

III. EAJA attorney fees and other expenses

A. Positions of the parties

The EAJA provides that "a court shall award to a prevailing party other than the United States fees and other expenses . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Plaintiff contends that, provided that he prevails in the instant appeal, he also is entitled to attorney fees and other expenses under the EAJA. 28 U.S.C. § 2412(d)(1)(A); Pl. Br. at 13–14. Plaintiff argues that defendants' position in this appeal was not "substantially justified" because the contested questions — as well as Customs' decision to deny plaintiff credit for those questions — were "vague, ambiguous, and unfairly confusing." *Id.* at 14. Defendants argue for several reasons that the court should deny plaintiff's request for attorney fees and other expenses under the EAJA. *See* Def. Resp. Br. at 22–23 (citing 28 U.S.C. § 2412(d)(1)(A)).

B. Analysis

The EAJA provides that "a court shall award to a *prevailing party* other than the United States fees and other expenses . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."¹¹ 28 U.S.C. § 2412(d)(1)(A) (emphasis supplied).

Based on the foregoing analysis, plaintiff is not a "prevailing party" within the meaning of the EAJA. *Id.*; *see Former Emps. of IBM Corp., Glob. Servs. Div. v. U.S. Sec'y of Lab.*, 30 CIT 1591, 1593, 462 F. Supp. 2d 1239, 1241–42 (2006), *aff'd sub nom. Former Emps. of IBM Corp. v. Chao*, 292 F. App'x 902 (Fed. Cir. 2008) ("According to the Supreme

¹¹ In addition, to be eligible for relief under the EAJA, the party requesting relief must not have had a net worth that exceeds \$2,000,000 at the time the civil action was filed. *See* 28 U.S.C. § 2412(d)(2)(B). The parties do not contest that plaintiff did not have a net worth exceeding \$2,000,000 at the time he filed the instant appeal.

Court, a ‘prevailing party’ for the purposes of fee-shifting statutes, such as the EAJA, must have obtained sought-after relief through . . . a ‘judgment[] on the merits’ of its case.”) (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & H.R.*, 532 U.S. 598, 604 (2001)). Whether plaintiff is a “prevailing party” is a threshold consideration with respect to relief under the EAJA, and consequently the court is not required to determine whether defendants’ position was “substantially justified” or whether “special circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A). Accordingly, the court denies plaintiff’s request for attorney fees and other expenses under the EAJA. *See DePersia*, 33 CIT at 1112, 637 F. Supp. 2d at 1252–53 (concluding that the plaintiff’s “request for relief under the EAJA cannot lie” because the denial of the plaintiff’s appeal was “not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

CONCLUSION

For the foregoing reasons, the court concludes that Customs’ decision to deny plaintiff credit for questions 5, 27, 33 and 39 on the April 2018 exam was supported by substantial evidence, and consequently that Customs’ decision to deny plaintiff a customs broker’s license was not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). In addition, the court concludes that plaintiff is not entitled to attorney fees and other expenses under the EAJA.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for judgment on the agency record pursuant to USCIT Rule 56.1 is denied; and it is further

ORDERED that judgment is entered for defendants and the action is dismissed.

Dated: June 6, 2022

New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

Slip Op. 22–60

ADEE HONEY FARMS, et al., Plaintiffs, v. UNITED STATES, et al.,
Defendants.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 16–00127

[Denying motion for reconsideration of court’s previous ruling dismissing some claims as time-barred by the statute of limitations]

Dated: June 8, 2022

Adam H. Gordon, The Bristol Group PLLC, of Washington, D.C., for movant Monterey Mushrooms, Inc. With him on the submissions was *Lauren N. Fraid*.

Beverly A. Farrell, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendants United States, U.S. Customs and Border Protection, and Chris Magnus, Commissioner of U.S. Customs and Border Protection. With her on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Justin R. Miller*, Attorney in-Charge, International Trade Field Office. Of counsel were *Suzanna Hartzell-Ballard* and *Jessica Plew*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of Indianapolis, Indiana.

OPINION AND ORDER

Stanceu, Judge:

The plaintiffs in this consolidated case are domestic producers of honey, crawfish, garlic, or mushrooms that qualified as “affected domestic producers” (“ADPs”) entitled to receive certain cash benefits under the Continued Dumping and Subsidy Offset Act of 2000 (the “CDSOA” or the “Byrd Amendment”), 19 U.S.C. § 1675c.¹ Under the Byrd Amendment, ADPs were eligible to receive annual “continued dumping and subsidy offsets” (“distributions”) resulting from duties assessed upon imported merchandise under antidumping duty (“AD”) and countervailing duty (“CVD”) orders.

The CDSOA directed the U.S. Customs Service (now U.S. Customs and Border Protection (“Customs” or “CBP”)) to include, in the distributions made to ADPs on a fiscal-year basis, interest the government earned on assessed antidumping and countervailing duties. In this litigation, the plaintiffs claim that Customs, while including in their distributions the interest the government earned pursuant to Section 778(a) of the Tariff Act of 1930 (“Tariff Act”), 19 U.S.C. § 1677g, on underpaid antidumping and countervailing duties that was assessed at liquidation (“Section 1677g interest”), unlawfully failed to include interest collected according to Section 505(d) of the Tariff Act, 19 U.S.C. § 1505(d). This interest, which can be identified as “Section 505(d)” interest or “delinquency” interest, accrues if the importer of record or its surety is delinquent in paying the combined amount of all duties, fees, and interest that Customs determined at liquidation to be owing on the entry of imported merchandise.

Before the court is the motion of plaintiff Monterey Mushrooms, Inc. (“Monterey Mushrooms” or “Movant”) for judgment on the agency record and reconsideration of a prior ruling by the court. Rule 56.1

¹ All citations to the United States Code are to the 2012 edition unless otherwise noted, except for citations to the Continued Dumping and Subsidy Offset Act of 2000 (“CDSOA”), which are citations to 19 U.S.C. § 1675c as in effect prior to repeal. All citations to the Code of Federal Regulations are to the 2014 edition unless otherwise noted.

Mot. for J. on the Agency R. (May 24, 2021), ECF No. 113 (“Movant’s Br.”). In this Opinion and Order, the court rules only on the portion of Monterey Mushrooms’s motion that seeks reconsideration of the court’s June 1, 2020 Opinion and Order, in which the court, granting in part defendants’ motion to dismiss, ruled that certain claims of the plaintiffs in this consolidated action, including Monterey Mushrooms, were time-barred by the two-year statute of limitations. *See Adee Honey Farms v. United States*, 44 CIT ___, 450 F. Supp. 3d 1365 (2020) (“*Adee Honey Farms I*”). The court denies the motion for reconsideration, reserving its ruling on the remaining issues addressed in movant’s Rule 56.1 motion.

I. BACKGROUND

Background on this litigation is presented in this court’s prior Opinion & Order. *See Adee Honey Farms I*, 44 CIT at ___, 450 F. Supp. 3d at 1367–70.

II. DISCUSSION

Under USCIT Rule 54(b), “any order or other decision, . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.” USCIT R. 54(b). Monterey Mushrooms urges reconsideration of *Adee Honey Farms I*, which dismissed as untimely under the two-year statute of limitations, 28 U.S.C. § 2636(i), plaintiff’s claims seeking delinquency interest on CDSOA distributions received prior to July 15, 2014. *See Adee Honey Farms I*, 44 CIT at ___, 450 F. Supp. 3d at 1378.

In *Adee Honey Farms I*, the court held that the “Final Rule” promulgated by Customs to implement the CDSOA, *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546 (Customs Serv. Sept. 21, 2001) (codified at 19 C.F.R. §§ 159.61–159.64, 178.2 (2002)) (“*Final Rule*”), placed interested parties on notice of a decision by Customs with respect to the type of interest Customs would deposit into each “special account,” where it would be available for distribution to ADPs. *Adee Honey Farms I*, 44 CIT at ___, 450 F. Supp. 3d at 1373 (“The court concludes that 19 C.F.R. § 159.64(e), when read together with the preamble language that pertained to it, provided adequate notice of the agency’s decision that no type of interest other than Section 1677g interest would be deposited into the special accounts for distribution to ADPs.”). As a result, the court held, the only timely claims of the plaintiffs were those relating to the application of the Final Rule to their individual CDSOA distributions occurring during the two years

prior to their instituting their actions. *Id.*, 44 CIT at ___, 450 F. Supp. 3d at 1377 (“Therefore, those of their claims that accrued during the two-year period prior to commencement of their actions on July 15, 2016 are timely, and those of their claims that accrued prior to that two-year period are not.”). As a consequence, the court dismissed as time-barred plaintiffs’ claims seeking delinquency interest on any CDSOA distributions received prior to July 15, 2014.

In moving for reconsideration of the court’s ruling in *Adee Honey Farms*, Monterey Mushrooms argues that the court should reverse its decision to dismiss the earlier claims. Movant’s Br. 29–32. Movant argues that “the administrative record . . . was first made available on August 6, 2020, more than two months after the Court issued the Order” and that “[t]he supplement to the administrative record was not filed until February 19, 2021, more than eight months after the Order was issued.” *Id.* at 30 (citations omitted). According to Monterey Mushrooms, “[t]he administrative record now confirms that CBP did not announce its unlawful decision to exclude delinquency interest from CDSOA distributions, and that this was not known to Plaintiff until 2014.” *Id.* at 31 (citation omitted). Movant insists that “CBP never made clear its intent to ignore its obligations under the CDSOA and to not distribute delinquency interest to ADPs, and thus, Plaintiff had no notice of such.” *Id.* Citing the administrative record, Monterey Mushrooms argues that Customs “initially intended to distribute delinquency interest as the ‘position of the agency,’ and indeed, considered methods for such distribution.” *Id.* at 30 (citation omitted). It asserts, further, that “[u]nbeknownst to Plaintiff, however, CBP changed its mind about including delinquency interest in the CDSOA distributions at some point between the publication of the proposed rule and the Final Rule” and that “[n]o contemporaneous reason (legal or other) has been provided for that decision.” *Id.* (citations omitted).

In moving for reconsideration, Monterey Mushrooms relies mistakenly on the filing of the administrative record with the court. Reversing the decision dismissing the claims the court ruled untimely would require the court to conclude that the Final Rule did not place Monterey Mushrooms on notice of an agency decision that Monterey Mushrooms would not be receiving delinquency interest in its CDSOA distributions. Nothing in plaintiff’s motion for reconsideration meaningfully addresses the issue of notice. The Final Rule provided that “statutory interest charged on antidumping and countervailing duties *at liquidation* will be transferred to the Special Account, when collected from the importer.” *Final Rule*, 66 Fed. Reg. at 48,554 (emphasis added). The court reasoned that “[t]he reference to statu-

tory interest ‘charged’ on antidumping and countervailing duties ‘at liquidation’ connotes an intent to deposit into the special accounts interest accrued under 19 U.S.C. § 1677g, which governs interest on underpaid (and overpaid) antidumping and countervailing duties that accrues up until liquidation.” *Adee Honey Farms I*, 44 CIT at __, 450 F. Supp. 3d at 1373. The preamble to the regulation clarified that “only interest charged on antidumping and countervailing duty funds themselves, pursuant to the express authority in 19 U.S.C. § 1677g, will be transferred to the special accounts and be made available for distribution under the CDSOA.” *Final Rule*, 66 Fed. Reg. at 48,550.

Monterey Mushrooms has not convinced the court that the ruling in *Adee Honey Farms I* was incorrect. After citing generally to the administrative record and a supplement to it, Monterey Mushrooms argues that “neither the administrative record nor the supplement to the administrative record contains any support for the agency’s interpretation that the CDSOA does not require that delinquency interest be distributed to ADPs.” Movant’s Br. 30. This argument misses the point. The question is not whether the administrative record supported the CBP’s interpretation of the CDSOA, but whether the Final Rule gave notice to interested parties that Customs had reached a decision on the type or types of interest it would deposit into the special accounts and distribute to ADPs.

In support of its argument that the Final Rule did not place it on notice of CBP’s decision on interest, Monterey Mushrooms also argues that “[t]he question is whether the notice was adequate to afford interested parties a reasonable opportunity to participate in the rule-making process.” *Id.* at 32 (quoting *MCI Telecomms. Corp. v. F.C.C.*, 57 F.3d 1136, 1142 (D.C. Cir. 1995) (internal quotation marks and citations omitted)). According to plaintiff, “no such notice was afforded to interested parties, including Plaintiff, who had no opportunity to review and comment on the critical preamble language, which did not appear until the final rule was published.” *Id.* This argument is also misguided. The “notice” issue pertaining to accrual of claims for purposes of the statute of limitations is whether the September 21, 2001 Federal Register notice comprising the Final Rule (which contained Section 159.64(e) and the preamble), adequately informed prospective plaintiffs of the agency’s decision. That the preamble language did not appear until the publication of the Final Rule has no bearing on that issue.

Finally, Monterey Mushrooms argues that the court’s decision in *Adee Honey Farms I* was incorrect because “it appears that the real reason underlying CBP’s decision was not a legal one, but rather rooted in ‘technological limitations’ of the agency’s internal systems,”

and because “the Court could not have considered information that was only divulged by CBP months after the Court rendered its decision.” Movant’s Br. 32 (citation omitted). This argument is irrelevant. What was relevant to the issue of the timeliness of the claims was not *why*, but *whether*, Customs announced in the Final Rule a decision to limit the interest it would deposit and distribute to the interest accruing to the government according to 19 U.S.C. § 1677g.

III. CONCLUSION

Monterey Mushrooms has not put forth a valid reason why the court should vacate or modify the decision reached in *Adee Honey Farms I* to dismiss the claims determined to be untimely. Therefore, upon considering plaintiff’s motion for reconsideration, all submissions made herein, and upon due diligence, it is hereby

ORDERED that Monterey Mushrooms’s motion for reconsideration of the court’s ruling in *Adee Honey Farms v. United States*, 44 CIT __, 450 F. Supp. 3d 1365 (2020) be, and hereby is, denied.

Dated: June 8, 2022

New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, JUDGE

Slip Op. 22–61

AMERICAN DREW, et al., Plaintiffs, v. UNITED STATES, et al., Defendants.

Before: Timothy C. Stanceu, Judge
Court No. 17–00086

[Denying motion for reconsideration of court’s previous ruling dismissing some claims as time-barred by the statute of limitations]

Dated: June 8, 2022

J. Michael Taylor, King & Spalding LLP, of Washington, D.C., for plaintiffs American Drew, American of Martinsville, Basset Furniture Industries Inc., Carolina Furniture Works, Inc., Century Furniture LLC d/b/a Century Furniture Industries, Harden Furniture Inc., Johnston Tombigbee Furniture Mfg. Co., Kincaid Furniture Company Inc., L & J G Stickley, Inc., La-Z-Boy Casegoods, Inc., Lea Industries, MJ Wood Products, Inc., Mobel Inc., Perdues Inc. d/b/a Perdue Woodworks Inc., Sandberg Furniture Mfg. Co., Inc., Stanley Furniture LLC (successor to Stanley Furniture Company, Inc.), T Copeland and Sons, Inc., Tom Seely Furniture LLC, Vaughan Bassett Furniture Company, Inc., Vermont Quality Wood Products, LLC, and Webb Furniture Enterprises, Inc. With him on the submissions were *Jeffrey M. Telep*, *Jeremy M. Bylund*, and *Neal J. Reynolds*.

Beverly A. Farrell, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendants United States, U.S. Customs and Border Protection, and Chris Magnus, Commissioner of U.S. Customs and Border Protection. With her on the submission were *Brian M. Boynton*,

Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office. Of counsel were *Suzanna Hartzell-Ballard* and *Jessica Plew*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of Indianapolis, Indiana.

OPINION AND ORDER

Stanceu, Judge:

Plaintiffs American Drew, American of Martinsville, Basset Furniture Industries Inc., Carolina Furniture Works, Inc., Century Furniture LLC d/b/a Century Furniture Industries, Harden Furniture Inc., Johnston Tombigbee Furniture Mfg. Co., Kincaid Furniture Company Inc., L & J G Stickley, Inc., La-Z-Boy Casegoods, Inc., Lea Industries, MJ Wood Products, Inc., Mobel Inc., Perdues Inc. d/b/a Perdue Woodworks Inc., Sandberg Furniture Mfg. Co., Inc., Stanley Furniture LLC, T Copeland and Sons, Inc., Tom Seely Furniture LLC, Vaughan Bassett Furniture Company, Inc., Vermont Quality Wood Products, LLC, and Webb Furniture Enterprises, Inc. are U.S. producers of wooden bedroom furniture. Each qualified as an “affected domestic producer” (“ADP”) entitled to receive certain cash distributions under the Continued Dumping and Subsidy Offset Act of 2000 (the “CDSOA” or “Byrd Amendment”), 19 U.S.C. § 1675c.¹ Under the Byrd Amendment, ADPs were eligible to receive annual “continued dumping and subsidy offsets” (“distributions”) resulting from duties assessed upon imported merchandise under antidumping duty (“AD”) and countervailing duty (“CVD”) orders.

The CDSOA directed the U.S. Customs Service (now U.S. Customs and Border Protection (“Customs” or “CBP”)) to include, in the distributions made to ADPs on a fiscal-year basis, interest the government earned on assessed antidumping and countervailing duties. In this litigation, plaintiffs claim that Customs, while including in their distributions the interest the government earned pursuant to Section 778(a) of the Tariff Act of 1930 (“Tariff Act”), 19 U.S.C. § 1677g, on underpaid antidumping and countervailing duties that was assessed at liquidation (“Section 1677g interest”), unlawfully failed to include interest collected according to Section 505(d) of the Tariff Act, 19 U.S.C. § 1505(d). This interest, which can be identified as “Section 505(d)” interest or “delinquency” interest, accrues if the importer of record or its surety is delinquent in paying the combined amount of all duties, fees, and interest that Customs determined at liquidation to be owing on an entry of imported merchandise.

¹ All citations to the United States Code are to the 2012 edition unless otherwise noted, except for citations to the Continued Dumping and Subsidy Offset Act of 2000 (“CDSOA”), which are citations to 19 U.S.C. § 1675c as in effect prior to repeal. All citations to the Code of Federal Regulations are to the 2014 edition unless otherwise noted.

Before the court is Plaintiffs’ Motion for Judgment on the Agency Record and for Reconsideration (May 24, 2021), ECF No. 81, on behalf of all plaintiffs, pursuant to USCIT Rule 56.1 (“Pls.’ Mot.”). In this Opinion and Order, the court rules only on the portion of plaintiffs’ motion that seeks reconsideration of the court’s June 1, 2020 Opinion and Order, in which the court, granting in part defendants’ motion to dismiss, ruled that certain of plaintiffs’ claims were time-barred by the two-year statute of limitations. See *American Drew v. United States*, 44 CIT __, __, 450 F. Supp. 3d 1378, 1390 (2020) (“*American Drew I*”). The court denies the motion for reconsideration, reserving its ruling on the remaining issues addressed in plaintiffs’ Rule 56.1 motion.

I. BACKGROUND

Background on this litigation is presented in this court’s prior Opinion and Order granting defendants’ motion to dismiss in part and denying it in part. See *American Drew I*, 44 CIT at __, 450 F. Supp. 3d at 1380–82.

II. DISCUSSION

Under USCIT Rule 54(b), “any order or other decision, . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.” USCIT R. 54(b). Plaintiffs urge reconsideration of *American Drew I*, which dismissed as untimely under the two-year statute of limitations, 28 U.S.C. § 2636(i), plaintiffs’ claims seeking delinquency interest on CDSOA distributions received prior to April 18, 2015.

In *American Drew I*, the court held that the “Final Rule” promulgated by Customs to implement the CDSOA, *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546 (Customs Serv. Sept. 21, 2001) (codified at 19 C.F.R. §§ 159.61–159.64, 178.2 (2002)) (“*Final Rule*”) placed interested parties on notice of a decision by Customs with respect to the type of interest Customs would deposit into each “special account,” where it would be available for distribution to ADPs. *American Drew I*, 44 CIT at __, 450 F. Supp. 3d at 1385 (“The court concludes that 19 C.F.R. § 159.64(e), when read together with the preamble language that pertained to it, provided adequate notice of the agency’s decision that any type of interest other than Section 1677g interest would not be deposited into the special accounts for distribution to ADPs.”). As a result, the court held, the only timely claims of the plaintiffs were

those relating to the application of the Final Rule to their individual CDSOA distributions occurring during the two years prior to their instituting their actions. *Id.*, 44 CIT at __, 450 F. Supp. 3d at 1389 (“Therefore, those of their claims that accrued during the two-year period prior to commencement of their actions on April 18, 2017 are timely, and those of their claims that accrued prior to that two-year period are not.”) As a consequence, the court dismissed as time-barred plaintiffs’ claims seeking delinquency interest on any CDSOA distributions received prior to April 18, 2015.

The Final Rule, in section 159.64(e), provided, specifically, that “statutory interest charged on antidumping and countervailing duties *at liquidation* will be transferred to the Special Account, when collected from the importer.” *Final Rule*, 66 Fed. Reg. at 48,554 (emphasis added). In *American Drew I*, the court reasoned that “[t]he reference to statutory interest ‘charged’ on antidumping and countervailing duties ‘at liquidation’ connotes an intent to deposit into the special accounts interest accrued under 19 U.S.C. § 1677g, which governs interest on underpaid (and overpaid) antidumping and countervailing duties that accrues up until liquidation.” *American Drew I*, 44 CIT at __, 450 F. Supp. 3d at 1385. The preamble to the regulation clarified that “only interest charged on antidumping and countervailing duty funds themselves, pursuant to the express authority in 19 U.S.C. § 1677g, will be transferred to the special accounts and be made available for distribution under the CDSOA.” *Final Rule*, 66 Fed. Reg. at 48,550. Because interest accrues according to 19 U.S.C. § 1677g from the time of required deposit of estimated antidumping or countervailing duties up until the liquidation of the entry, but not afterward, the court viewed the regulation, as clarified by the preamble, to constitute definitive notice to interested parties that they would be receiving interest that accrued in favor of the government under 19 U.S.C. § 1677g and would not be receiving delinquency interest under 19 U.S.C. § 1505(d).

In moving for reconsideration of the court’s ruling in *American Drew I*, plaintiffs argue that the court should reverse its decision to dismiss the earlier claims. Pls.’ Mot. 50–57. Plaintiffs argue that the “recently submitted Administrative Record Supplement now confirms that CBP is playing an interpretive shell game,” *id.* at 50, and that “it appears that CBP changed its mind about whether to distribute delinquency interest, and reflected that decision (if at all) with the word ‘only’ in the preamble to the final rule,” *id.* at 50–51; *see* Reply in Supp. of Pls.’ Rule 56.1 Mot. for J. on the Admin. R. and for Recons. 33 (Oct. 8, 2021), ECF No. 92 (“Pls.’ Reply”) (“Agencies are afforded a presumption of regularity, and Plaintiffs were not required to assume

that CBP would impermissibly use a preamble to change the regulation from one that is consistent with the CDSOA to one that contradicts it.”) According to plaintiffs:

This one word, which was tucked away in a non-binding discussion of another issue, was insufficient to give Plaintiffs notice of CBP’s change in position to withhold delinquency interest (which the agency also never explained in its final rule). Plaintiffs therefore could not have challenged that decision until they obtained such notice in 2016.

Pls.’ Mot. 51. Contending that “[t]he proposed and final rules are materially the same,” plaintiffs argue that “CBP’s reading hinges entirely on the word ‘only,’ which appears only in the *preamble* to the final rule.” *Id.* at 54.

Plaintiffs’ argument is unconvincing. The conclusion that the Final Rule provided notice of the type of interest to be distributed does not hinge entirely on the preamble language or the word “only” appearing therein. The interest identified for distribution to ADPs in section 159.64(e) of the Final Rule is interest “charged on antidumping and countervailing duties at liquidation.” 19 C.F.R. § 159.64(e). Delinquency interest accruing under Section 505(d) of the Tariff Act is not charged at liquidation and can begin to accrue only *from* liquidation. See 19 U.S.C. § 1505(d). Even though § 159.64(e) does not expressly state that interest *not* charged at liquidation, i.e., delinquency interest, will *not* be added to the Special Accounts, it is unreasonable to interpret the provision to mean that any interest other than interest charged at liquidation will be made available for distribution to ADPs. The preamble, by informing interested parties that only Section 1677g interest will be made available for distribution under the CDSOA, removed any remaining doubt.

Based on the supplemented administrative record, Administrative Record Supplement (Feb. 19, 2021), ECF Nos. 72 (public), 74 (conf.) (“Admin. R. Supp.”),² plaintiffs contend that as of the time the agency published its proposed rule for implementing the CDSOA, on June 26, 2001, Customs had taken the position to consider ways to distribute delinquency interest but “changed course, apparently during the time between the proposed rule and the September 21, 2001 final rule” and decided not to do so. Pls.’ Mot. 53–54 (discussing a February 21, 2001 agency document, Admin. R. Supp. 511). “That is the only position of the agency in the Administrative Record that predates the publication of the proposed rule in June 2001.” *Id.* at 53. Plaintiffs state, further, that “[a] record document dated August 19, 2001 memorial-

² All citations in this Opinion and Order are to public documents.

izes a decision to change course, noting that the ‘{d}ecision has been made that accrued interest for late payment of bill,’ i.e., delinquency interest, ‘will not be made available for disbursement under the Byrd Amendment.’” *Id.* (citing Admin. R. Supp. 579). This argument, too, is unavailing. As plaintiffs themselves acknowledge, the proposed rule, which they describe as “materially the same” as the final rule, also informed interested parties that Customs would deposit and distribute “statutory interest charged on antidumping and countervailing duties at liquidation.” *See* Pls.’ Mot. 54 (quoting *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 33,920, 33,926 (proposed June 26, 2001) (to be codified at 19 C.F.R. § 159.61–159.64 (2002))). Nothing in the proposed rule provided or even suggested to interested parties that Customs would distribute delinquency interest to ADPs. Even if, as plaintiffs argue, Customs contemplated distributing delinquency interest but “changed course” on that issue before issuing the Final Rule, such a sequence of events does not signify that Customs ever disclosed to the public a decision to distribute delinquency interest. To the contrary, the August 19, 2001 record document plaintiffs cite shows that Customs made a decision, approximately a month before publishing the Final Rule, not to do so. Plaintiffs fail to present a plausible argument that the September 21, 2001 Federal Register notice announcing the Final Rule (which included the preamble) was inadequate as public notice of that decision.

Plaintiffs also argue that “CBP’s sea change requires more explanation and process than was given here.” Pls.’ Mot. 55. They reason that “{t}he question is whether the notice was adequate to afford interested parties a reasonable opportunity to participate in the rule-making process.” *Id.* (quoting *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1142 (D.C. Cir. 1995) (internal quotation marks and citations omitted)). According to plaintiffs, “[i]t is hard to see how the notice was adequate here given the timing in the record of CBP’s course change” and “[t]here is no way that the preliminary rule could have prepared interested parties for the CBP’s decision to go in the opposite direction than what CBP was intending when it published the proposed rule,” which “is underscored by the lack of comments on the issue.” *Id.* at 55–56. Again, neither the proposed rule nor the Final Rule informed interested parties that delinquency interest would be distributed. The “notice” issue pertaining to accrual of claims for purposes of the statute of limitations is whether the September 21, 2001 Federal Register notice comprising the Final Rule (which contained § 159.64(e) and the preamble language), adequately informed prospective plaintiffs that Customs had decided to distribute only

interest charged at liquidation, and not delinquency interest, to the ADPs. Plaintiffs confuse that “notice” issue with the issue of whether Customs afforded interested parties adequate notice and opportunity to comment on the question of delinquency interest. While the latter issue may have implications for a claim that the Final Rule was invalidly promulgated (a claim plaintiffs do not assert in this litigation, *see* Pls.’ Mot. 18–49), only the former is relevant to the time at which plaintiffs’ claims accrued.

III. CONCLUSION

Plaintiffs have not put forth a valid reason why the court should vacate or modify the decision reached in *American Drew I* to dismiss the claims determined to be untimely. Therefore, upon considering plaintiffs’ motion for reconsideration, all submissions made herein, and upon due diligence, it is hereby

ORDERED that plaintiffs’ motion for reconsideration of the court’s ruling in *American Drew v. United States*, 44 CIT ___, 450 F. Supp. 3d 1378 (2020) be, and hereby is, denied.

Dated: June 8, 2022

New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, JUDGE

Slip Op. 22–62

HILEX POLY Co., LLC, et al., Plaintiffs, v. UNITED STATES, et al.,
Defendants.

Before: Timothy C. Stanceu, Judge
Court No. 17–00090

[Denying motion for reconsideration of court’s previous ruling dismissing some claims as time-barred by the statute of limitations]

Dated: June 8, 2022

J. Michael Taylor, King & Spalding LLP, of Washington, D.C., for plaintiffs Hilex Poly Co., LLC, Superbag LLC (successor to Superbag Corporation), Unistar Plastics, LLC, Command Packaging, LLC (successor to Grand Packaging Inc. d/b/a Command Packaging), Roplast Industries Inc., and US Magnesium LLC (successor to Magnesium Corporation of America). With him on the submissions were *Jeffrey M. Telep*, *Jeremy M. Bylund*, and *Neal J. Reynolds*.

Beverly A. Farrell, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendants United States, U.S. Customs and Border Protection, and Chris Magnus, Commissioner of U.S. Customs and Border Protection. With her on the submission were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office. Of counsel were

Suzanna Hartzell-Ballard and *Jessica Plew*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of Indianapolis, Indiana.

OPINION AND ORDER

Stanceu, Judge:

Plaintiffs Hilex Poly Co., LLC, Superbag LLC, Unistar Plastics, LLC, Command Packaging, LLC, Roplast Industries Inc., and US Magnesium LLC are U.S. companies that qualified as “affected domestic producers” (“ADPs”) entitled to receive certain cash distributions under the Continued Dumping and Subsidy Offset Act of 2000 (the “CDSOA” or “Byrd Amendment”), 19 U.S.C. § 1675c.¹ Under the Byrd Amendment, ADPs were eligible to receive annual “continued dumping and subsidy offsets” (“distributions”) resulting from duties assessed upon imported merchandise under antidumping duty (“AD”) and countervailing duty (“CVD”) orders.

The CDSOA directed the U.S. Customs Service (now U.S. Customs and Border Protection (“Customs” or “CBP”)) to include, in the distributions made to ADPs on a fiscal-year basis, interest the government earned on assessed antidumping and countervailing duties. In this litigation, plaintiffs claim that Customs, while including in their distributions the interest the government earned pursuant to Section 778(a) of the Tariff Act of 1930 (“Tariff Act”), 19 U.S.C. § 1677g, on underpaid antidumping and countervailing duties (“Section 1677g interest”) that was assessed at liquidation, unlawfully failed to include interest collected according to Section 505(d) of the Tariff Act, 19 U.S.C. § 1505(d). This interest, which can be identified as “Section 505(d)” interest or “delinquency” interest, accrues if the importer of record or its surety is delinquent in paying the combined amount of all duties, fees, and interest that Customs determined at liquidation to be owing on an entry of imported merchandise.

Before the court is Plaintiffs’ Motion for Judgment on the Agency Record and for Reconsideration (May 24, 2021), ECF No. 83, on behalf of all plaintiffs, pursuant to USCIT Rule 56.1 (“Pls.’ Mot.”). In this Opinion and Order, the court rules only on the portion of plaintiffs’ motion that seeks reconsideration of the court’s June 1, 2020 Opinion and Order, in which the court, granting in part defendants’ motion to dismiss, ruled that certain of plaintiffs’ claims were time-barred by the two-year statute of limitations. *See Hilex Poly Co., LLC v. United*

¹ All citations to the United States Code are to the 2012 edition unless otherwise noted, except for citations to the Continued Dumping and Subsidy Offset Act of 2000 (“CDSOA”), which are citations to 19 U.S.C. § 1675c as in effect prior to repeal. All citations to the Code of Federal Regulations are to the 2014 edition unless otherwise noted.

States, 44 CIT __, __, 450 F. Supp. 3d 1390, 1402 (2020) (“*Hilex Poly I*”). The court denies the motion for reconsideration, reserving its ruling on the remaining issues addressed in plaintiffs’ Rule 56.1 motion.

I. BACKGROUND

Background on this litigation is presented in this court’s prior Opinion & Order granting defendants’ motion to dismiss in part and denying it in part. See *Hilex Poly I*, 44 CIT at __, 450 F. Supp. 3d at 1392–1395.

II. DISCUSSION

Under USCIT Rule 54(b), “any order or other decision . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.” USCIT R. 54(b). Plaintiffs urge reconsideration of *Hilex Poly I*, which dismissed as untimely under the two-year statute of limitations, 28 U.S.C. § 2636(i), plaintiffs’ claims seeking delinquency interest on CDSOA distributions received prior to April 18, 2015. See *Hilex Poly I*, 44 CIT at __, 450 F. Supp. 3d at 1401–02.

In *Hilex Poly I*, the court held that the “Final Rule” promulgated by Customs to implement the CDSOA, *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546 (Customs Serv. Sept. 21, 2001) (codified at 19 C.F.R. §§ 159.61–159.64, 178.2 (2002)) (“*Final Rule*”) placed interested parties on notice of a decision by Customs with respect to the type of interest Customs would deposit into each “special account,” where it would be available for distribution to ADPs. *Id.*, 44 CIT at __, 450 F. Supp. 3d at 1396–97 (“The court concludes that 19 C.F.R. § 159.64(e), when read together with the preamble language that pertained to it, provided adequate notice of the agency’s decision that any type of interest other than Section 1677g interest would not be deposited into the special accounts for distribution to ADPs.”). As a result, the court held, the only timely claims of the plaintiffs were those relating to the application of the Final Rule to their individual CDSOA distributions occurring during the two years prior to their instituting their actions. *Id.*, 44 CIT at __, 450 F. Supp. 3d at 1401 (“Therefore, those of their claims that accrued during the two-year period prior to commencement of their actions on April 18, 2017 are timely, and those of their claims that accrued prior to that two-year period are not.”). As a consequence, the court dismissed as time-barred plaintiffs’ claims seeking delinquency interest on any CDSOA distributions received prior to April 18, 2015.

The Final Rule, in section 159.64(e), provided, specifically, that “statutory interest charged on antidumping and countervailing duties *at liquidation* will be transferred to the Special Account, when collected from the importer.” *Final Rule*, 66 Fed. Reg. at 48,554 (emphasis added). In *Hilex Poly I*, the court reasoned that “[t]he reference to statutory interest ‘charged’ on antidumping and countervailing duties ‘at liquidation’ connotes an intent to deposit into the special accounts interest accrued under 19 U.S.C. § 1677g, which governs interest on underpaid (and overpaid) antidumping and countervailing duties that accrues up until liquidation.” *Hilex Poly I*, 44 CIT at __, 450 F. Supp. 3d at 1396. The preamble to the regulation clarified that “only interest charged on antidumping and countervailing duty funds themselves, pursuant to the express authority in 19 U.S.C. § 1677g, will be transferred to the special accounts and be made available for distribution under the CDSOA.” *Final Rule*, 66 Fed. Reg. at 48,550. Because interest accrues according to 19 U.S.C. § 1677g from the time of required deposit of estimated antidumping or countervailing duties up until the liquidation of the entry, but not afterward, the court viewed the regulation, as clarified by the preamble, to constitute definitive notice to interested parties that they would be receiving interest that accrued in favor of the government under 19 U.S.C. § 1677g and would not be receiving delinquency interest under 19 U.S.C. § 1505(d).

In moving for reconsideration of the court’s ruling in *Hilex Poly I*, plaintiffs argue that the court should reverse its decision to dismiss the earlier claims. Pls.’ Mot. 50–57. Plaintiffs argue that the “recently submitted Administrative Record Supplement now confirms that CBP is playing an interpretive shell game,” *id.* at 50, and that “[i]t appears that CBP changed its mind about whether to distribute delinquency interest and reflected that decision (if at all) with the word ‘only’ in the preamble to the final rule,” *id.* at 50–51; *see* Reply in Supp. of Pls.’ Rule 56.1 Mot. for J. on the Admin. R. and for Recons. 33 (Oct. 8, 2021), ECF No. 94 (“Pls.’ Reply”) (“Agencies are afforded a presumption of regularity, and Plaintiffs were not required to assume that CBP would impermissibly use a preamble to change the regulation from one that is consistent with the CDSOA to one that contradicts it.”) According to plaintiffs:

This one word, which was tucked away in a non-binding discussion of another issue, was insufficient to give Plaintiffs notice of CBP’s change in position to withhold delinquency interest (which the agency also never explained in the final rule). Plaintiffs therefore could not have challenged that decision until they obtained such notice in 2016.

Pls.' Mot. 51. Contending that "[t]he proposed and final rules are materially the same," plaintiffs argue that "CBP's reading hinges entirely on the word 'only,' which appears only in the *preamble* to the final rule." *Id.* at 54.

Plaintiffs' argument is unconvincing. The conclusion that the Final Rule provided notice of the type of interest to be distributed does not hinge entirely on the preamble language or the word "only" appearing therein. The interest identified for distribution to ADPs in section 159.64(e) of the Final Rule is interest "charged on antidumping and countervailing duties at liquidation." 19 C.F.R. § 159.64(e). Delinquency interest accruing under Section 505(d) of the Tariff Act is not charged at liquidation and can begin to accrue only *from* liquidation. *See* 19 U.S.C. § 1505(d). Even though § 159.64(e) does not expressly state that interest *not* charged at liquidation, i.e., delinquency interest, will *not* be added to the Special Accounts, it is unreasonable to interpret the provision to mean that any interest other than interest charged at liquidation will be made available for distribution to ADPs. The preamble, by informing interested parties that only Section 1677g interest will be made available for distribution under the CDSOA, removed any remaining doubt.

Based on the supplemented administrative record, Administrative Record Supplement (Feb. 19, 2021), ECF Nos. 72 (public), 74 (conf.) ("Admin. R. Supp."),² plaintiffs contend that as of the time the agency published its proposed rule for implementing the CDSOA, on June 26, 2001, Customs had taken the position to consider ways to distribute delinquency interest but "changed course, apparently during the time between the proposed rule and the September 21, 2001 final rule" and decided not to do so. Pls.' Mot. 53–54 (discussing a February 21, 2001 agency document, Admin. R. Supp. 511). "That is the only position of the agency in the Administrative Record that predates the publication of the proposed rule in June 2001." *Id.* at 53. Plaintiffs state, further, that "[a] record document dated August 19, 2001 memorializes a decision to change course, noting that the '{d}ecision has been made that accrued interest for late payment of bill,' i.e., delinquency interest, 'will not be made available for disbursement under the Byrd Amendment.'" *Id.* (citing Admin. R. Supp. 579). This argument, too, is unavailing. As plaintiffs themselves acknowledge, the proposed rule, which they describe as "materially the same" as the final rule, also informed interested parties that Customs would deposit and distribute "statutory interest charged on antidumping and countervailing duties at liquidation." *See* Pls.' Mot. 54 (quoting *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*,

² All citations in this Opinion and Order are to public documents.

66 Fed. Reg. 33,920, 33,926 (proposed June 26, 2001) (to be codified at 19 C.F.R. § 159.61–159.64 (2002)). Nothing in the proposed rule provided or even suggested to interested parties that Customs would distribute delinquency interest to ADPs. Even if, as plaintiffs argue, Customs contemplated distributing delinquency interest but “changed course” on that issue before issuing the Final Rule, such a sequence of events does not signify that Customs ever disclosed to the public a decision to distribute delinquency interest. To the contrary, the August 19, 2001 record document plaintiffs cite shows that Customs made a decision, approximately a month before publishing the Final Rule, not to do so. Plaintiffs fail to present a plausible argument that the September 21, 2001 Federal Register notice announcing the Final Rule (which included the preamble) was inadequate as public notice of that decision.

Plaintiffs also argue that “CBP’s sea change requires more explanation and process than was given here.” Pls.’ Mot. 55. They reason that “[t]he question is whether the notice was adequate to afford interested parties a reasonable opportunity to participate in the rule-making process.” *Id.* (quoting *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1142 (D.C. Cir. 1995) (internal quotation marks and citations omitted)). According to plaintiffs, “[i]t is hard to see how the notice was adequate here given the timing in the record of CBP’s course change” and “[t]here is no way that the preliminary rule could have prepared interested parties for the CBP’s decision to go in the opposite direction than what CBP was intending when it published the proposed rule,” which “is underscored by the lack of comments on the issue.” *Id.* at 55–56. Again, neither the proposed rule nor the Final Rule informed interested parties that delinquency interest would be distributed. The “notice” issue pertaining to accrual of claims for purposes of the statute of limitations is whether § 159.64(e) of the Final Rule, as clarified by the preamble language, adequately informed prospective plaintiffs that Customs had decided to distribute only interest charged at liquidation, and not delinquency interest, to the ADPs. Plaintiffs confuse that “notice” issue with the issue of whether Customs afforded interested parties adequate notice and opportunity to comment on the question of delinquency interest. While the latter issue may have implications for a claim that the Final Rule was invalidly promulgated (a claim plaintiffs do not assert in this litigation, *see* Pls.’ Mot. 18–49), only the former is relevant to the time at which plaintiffs’ claims accrued.

III. CONCLUSION

Plaintiffs have not put forth a valid reason why the court should vacate or modify the decision reached in *Hilex Poly I* to dismiss the claims the court determined to be untimely. Therefore, upon considering plaintiffs' motion, all submissions made herein, and upon due diligence, it is hereby

ORDERED that plaintiffs' request for reconsideration of the court's ruling in *Hilex Poly Co., LLC v. United States*, 44 CIT __, 450 F. Supp. 3d 1390 (2020) be, and hereby is, denied.

Dated: June 8, 2022

New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, JUDGE

Slip Op. 22–63

GUJARAT FLUOROCHEMICALS LIMITED, Plaintiff, v. UNITED STATES,
Defendant, and DAIKIN AMERICA, INC., Defendant-intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 22–00120

[Denying plaintiff's motion for injunctive relief in litigation contesting an agency determination in a countervailing duty investigation]

Dated: June 9, 2022

John M. Gurley, ArentFox Schiff LLP, of Washington, D.C., for plaintiff. With him on the submissions were *Diana Dimitriuc Quaia* and *Jessica R. DiPietro*. Also appearing are *Matthew M. Nolan* and *Wendy Qiu*.

Daniel F. Roland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the response were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the response was *Paul K. Keith*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Luke A. Meisner, Schagrin Associates, of Washington, D.C., for defendant-intervenor. Appearing with him are *Roger B. Schagrin*, *Benjamin J. Bay*, *Christopher T. Cloutier*, *Elizabeth J. Drake*, *Jeffrey D. Gerrish*, *Joseph A. Laroski, Jr.*, *Kelsey M. Rule*, *Michelle R. Avrutin*, *Nicholas J. Birch*, *Saad Y. Chalchal*, and *William A. Fennell*.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff Gujarat Fluorochemicals Limited (“GFCL” or “GFL”) is an Indian producer of granular polytetrafluoroethylene (“PTFE”). GFCL brought this action to contest a decision (the “Final Determination”) of the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) in a countervailing duty

(“CVD”) investigation of imports of granular PTFE resin from India and has filed a motion for injunctions. The court denies plaintiff’s motion as it applies to a preliminary injunction that plaintiff seeks to lower the rate of cash deposits, holding that plaintiff has not shown the likelihood of irreparable harm in the absence of such a preliminary injunction. The court also denies, without prejudice, plaintiff’s motion as to an injunction to prohibit liquidation of entries during the pendency of this litigation, concluding that GFCL has failed to propose an injunction in a technical form that the court may issue.

I. BACKGROUND

Plaintiff brought this action on April 12, 2022, asserting subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), according to which the court reviews actions commenced under 19 U.S.C. § 1516a.¹ Summons, ECF No. 1; Compl. ¶¶ 5–6, ECF No. 6. The next day, plaintiff filed the instant motion for injunctive relief and accompanying brief. Pl.’s Mem. of Law in Supp. of Its Mot. for a Prelim. Inj. (Apr. 13, 2022), ECF Nos. 9 (conf.), 10 (public) (“Pl.’s Br.”); Pl.’s Mot for a Prelim. Inj. (Apr. 13, 2022), ECF Nos. 9–3 (conf.), 10–1 (public) (“Pl.’s Mot.”).²

The decision contested in this litigation, the “Final Determination,” was published as *Granular Polytetrafluoroethylene Resin From India: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 87 Fed. Reg. 3,765 (Int’l Trade Admin. Jan. 25, 2022) (“*Final Determination*”). Following an affirmative determination of material injury to a U.S. domestic industry by the U.S. International Trade Commission (“Commission” or “ITC”), the Final Determination culminated in the Department’s issuing a countervailing duty order (“CVD Order”) on PTFE from India. *See Granular Polytetrafluoroethylene (PTFE) Resin from India and Russia; Determinations*, 87 Fed. Reg. 14,038 (Int’l Trade Comm’n Mar. 11, 2022); *see also Granular Polytetrafluoroethylene Resin from India and the Russian Federation: Countervailing Duty Orders*, 87 Fed. Reg. 14,509 (Int’l Trade Admin. Mar. 15, 2022) (“*CVD Order*”).

Plaintiff seeks an injunction that would prohibit, during the pendency of this litigation (including any remands and appeals), the collection of cash deposits on entries of PTFE resin produced by GFCL at the 31.89% subsidy rate Commerce calculated for GFCL in the Final Determination. *See Final Determination*, 87 Fed. Reg. at 3,766. The injunction it seeks would direct, instead, the collection of cash deposits at the 4.75% subsidy rate Commerce calculated in its pre-

¹ All citations to the United States Code herein are to the 2018 edition.

² All citations in this Opinion and Order are to public documents.

liminary determination. *See Granular Polytetrafluoroethylene Resin From India: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, and Alignment of Final Determination With Final Antidumping Duty Determination*, 86 Fed. Reg. 35,479, 35,480 (Int'l Trade Admin. July 6, 2021) (“*Preliminary Determination*”). Plaintiff also seeks a “statutory” injunction under section 516A(c)(2) of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1516a(c)(2) (“Tariff Act”), to prohibit liquidation of its entries that are subject to the CVD Order. Pl.’s Br. 2.

Defendant opposes plaintiff’s motion as to the rate of cash deposit collection, arguing that under “well settled law” plaintiff fails to establish the necessary factors to obtain the “rare and extreme relief it seeks.” Def.’s Partial Opp’n to Pl.’s Mot. for a Prelim. Inj. 2–3 (May 4, 2022), ECF Nos. 13 (public), 14 (conf.) (“Def.’s Resp.”). With respect to the requested injunction against liquidation, “Commerce consents to a limited statutory injunction with a finite end date at the end of the first review period” as opposed to “the open-ended scope of GFL’s request—relief GFL does not meaningfully attempt to demonstrate is warranted.” *Id.* at 3.

Defendant-intervenor Daikin America, Inc. has not taken a position on plaintiff’s motion. *See* Order (May 11, 2022), ECF No. 23 (granting consent motion of Daikin America, Inc. (May 11, 2022), ECF No. 16, to intervene as of right pursuant to 28 U.S.C. § 2631(j)(1)(B)).

II. DISCUSSION

A. GFCL’s Preliminary Injunction Motion Regarding Cash Deposits

If Commerce determines that “a countervailable subsidy is being provided with respect to the subject merchandise,” 19 U.S.C. § 1671d(a)(1), it is required by the Tariff Act to “determine an estimated individual countervailable subsidy rate for each exporter and producer individually investigated,” *id.* § 1671d(c)(1)(B)(i)(I). The Tariff Act directs, further, that:

Within 7 days after being notified by the Commission of an affirmative determination under section 1671d(b) of this title, the administering authority [i.e., Commerce] shall publish a countervailing duty order which— . . . requires the deposit of estimated countervailing duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited.

Id. § 1671e(a)(3). In implementing these statutory provisions, the CVD Order provided that “[o]n or after the date of publication of the

ITC's final injury determinations in the **Federal Register**, [U.S. Customs and Border Protection] must require, at the same time as importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the rates noted below." *CVD Order*, 87 Fed. Reg. at 14,510. The CVD Order specified a deposit rate of 31.89% for GFCL. *Id.*

When an interested party contests a final countervailing duty determination that Commerce reached under 19 U.S.C. § 1671d, as plaintiff contests here, this Court "may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances." 19 U.S.C. § 1516a(c)(2). Plaintiff seeks such an injunction, but the other injunction sought in plaintiff's motion, which is a preliminary injunction directed to the collection of cash deposits, is of a type not specifically provided for in the Tariff Act, or customary in international trade law. To the contrary, the Tariff Act, in 19 U.S.C. § 1671e(a)(3), directs Commerce to order the "deposit of estimated countervailing duties" that it determines for an exporter or producer in a final affirmative countervailing duty determination made according to § 1671d(c)(1)(B)(i)(I). Any preliminary injunction is an "extraordinary remedy," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citations omitted), but that is particularly the case where, as here, ordering the requested relief would depart from the ordinary procedure Congress established. Under that ordinary procedure, it is Commerce, not this Court, that determines the rate of deposits of estimated countervailing duties pending judicial review following a CVD investigation.

Still, the Tariff Act does not prohibit a preliminary injunction directed to a cash deposit rate, which would depend upon the exercise of the court's general authority (with exceptions not here relevant) to order any "form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition." 28 U.S.C. § 2643(c)(1). The court does not imply that a circumstance necessitating a preliminary injunction directed to a cash deposit rate could never arise. But a plaintiff faces a particularly heavy burden in demonstrating a need for a remedy beyond those routinely available under the Tariff Act upon adjudication of the merits of its claims, i.e., a remand order and refund of cash deposits.

To obtain any preliminary injunction, GFCL must establish that it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities

is in its favor, and that an injunction is in the public interest. *Winter*, 555 U.S. at 20 (citations omitted). While plaintiff contends that no one factor is determinative, *Winter* instructs that a showing of likelihood of irreparable harm in the absence of the relief sought is a necessary prerequisite to a preliminary injunction. *Id.* at 22.

Plaintiff contends that absent a preliminary injunction to lower its cash deposit rate, it will suffer irreparable reputational and economic harm pending a decision on the merits. Pl.'s Br. 44. It alleges that "GFCL has contractual commitments to deliver granular PTFE resin to U.S. customers on the basis of annual contracts and other contracts that will [be] fulfilled at a loss to GFCL." *Id.* at 45. Plaintiff also alleges that "[d]ue to the significant duty increases caused by the final CVD rates, GFCL has been forced to reach out to all of its existing customers to mitigate and renegotiate its contracts with them." *Id.* at 46. GFCL asserts, further, that "this effort by GFCL will have long lasting negative consequences on its good will, reputation and brand in the United States" and that "[c]ustomers will remember that GFCL asked to renegotiate contract terms and push on price increases resulting in business uncertainty and loss of customers." *Id.* It adds that "[e]ventually, these customers will be pushed to work with GFCL's competitors, leaving GFCL with no avenue to reestablish these lost relationships" and that "[d]ue to the high rates established by the *Final Determination*, GFCL will also have to adjust its business plans and behaviors, resulting in lost business opportunities, and a reduction in available granular PTFE resin for the U.S. market." *Id.* (citation omitted). Plaintiff summarizes these points as follows:

Because of the increased CVD cash deposits that will be due on GFCL's exports to U.S. customers and GFCL's inability to pass on these duty increases to U.S. customers with whom it has contractual obligations, the threat of lost revenues on U.S. sales through the next year is immediate and not speculative. Not only will U.S. customers look elsewhere for supply but they will also look for processing of PTFE resin outside the United States, resulting in business uncertainty and in decreased demand for granular PTFE resin in the U.S. market. If these trends take hold, they will be nearly irreversible.

Id. at 47. To support its assertions, plaintiff relies on an affidavit submitted by Kapil Malhotra, the Global Business Unit Head- Fluoropolymers of GFCL. See Pl.'s Br., Exh. 20. In relevant part, the affidavit includes a chart titled "Gujarat Fluorochemicals Limited Estimated Loss of Revenue and Cost Increases on Exports of Granu-

lar PTFE Resin, Due to Final CVD Duty Rate.” *Id.* at 4. These estimations are described as based, in part, on the “customer’s reactions thus far.” *Id.* at 3

For the purpose of ruling on plaintiff’s motion for an injunction on the cash deposit rate, the court presumes that the consequences plaintiff alleges—e.g., “lost business opportunities,” inability to pass on costs and the attendant “threat of lost revenues on U.S sales through the next year,” “business uncertainty,” and “decreased demand”—are true. Pl.’s Br. 46–47. But even upon doing so, the court must conclude that plaintiff has not made allegations of likely harm sufficient to entitle it to the preliminary injunction it seeks.³ The types of harm plaintiff alleges are not unlike those that reasonably could be expected to occur in a typical countervailing duty investigation involving a similar cash deposit rate. Plaintiff has not put forth allegations sufficient to cause the court to conclude that the prospect of future refunds of excess cash deposits for importers of record, along with a lower deposit rate at that time, will be an inadequate remedy under the statutory scheme.

Plaintiff alleges, further, that it “will suffer significant financial harm as a consequence of the sudden increase in the CVD rate and having to post large CVD cash deposits.” *Id.* at 46. This allegation is difficult to comprehend. In the standing section of its complaint, Compl. ¶ 7, GFCL describes itself as an exporter and producer of the subject merchandise, not as an importer of record that would be required to post cash deposits upon making entry. Nor does it state that it is speaking on behalf of an affiliated importer that would have “to post large CVD cash deposits.” Pl.’s Br. 46. But even were plaintiff presumed to incur the expense of cash deposits until such time as refunds may be available, its allegations would not support the extraordinary remedy being sought.

In summary, plaintiff has not alleged facts sufficient to show that the current cash deposit rate is likely to cause it serious, irreparable harm, nor has it shown that the ordinary remedies available under the Tariff Act upon judicial review are likely to be inadequate. GFCL having failed to meet an essential prerequisite for a preliminary injunction as established in *Winter*, 555 U.S. at 22, the court will deny plaintiff’s motion as it pertains to a preliminary injunction to lower the current cash deposit rate.

³ Because the court presumes plaintiff’s allegations to be true for purposes of ruling on its motion for a preliminary injunction, the court has not conducted an evidentiary hearing on the issue of the likelihood of irreparable harm.

B. Injunction to Prevent the Liquidation of Entries Affected by this Litigation

GFCL seeks an injunction under 19 U.S.C. § 1516a(c)(2) to prohibit the government from “issuing instructions to liquidate or making or permitting liquidation of Plaintiff’s unliquidated entries subject to the Order” that would “expire upon entry of a final and conclusive court decision in this litigation, including all appeals, as provided in 19 U.S.C. §1516a(e).” Pl.’s Mot. 2; Pl.’s Mot., Draft Order 2. Defendant responds that this court should “deny GFL’s request for an injunction against liquidation with an indeterminate scope and instead issue a limited injunction consistent with Form 24 that would end on February 28, 2023—the end of the first review period.” Def.’s Resp. 1. Defendant “consents to a limited statutory injunction consistent with the terms of Form 24 but opposes the indeterminate aspect of GFL’s requested relief as to entries that will be made after February 28, 2023 (the ‘Disputed Entries’).” *Id.* at 20. Defendant argues that “GFL has not shown entitlement to an injunction against liquidation with an indeterminate scope,” adding that “GFL largely ignores that it seeks an injunction against liquidation, and it makes no effort to address the duration of its proposed relief.” *Id.*

The purpose of an injunction entered under § 1516a(c)(2) (often referred to as a “statutory” injunction) is to preserve the court’s ability to provide relief should the movant prevail on the merits. *Ugine & Alz Belg. v. United States*, 452 F.3d 1289, 1297 (Fed. Cir. 2006). Injunctions under 19 U.S.C. § 1516a(c)(2) are not “extraordinary” and routinely are granted in cases seeking judicial review under the Section 516A of the Tariff Act, 19 U.S.C. §1516a. *See Husteel Co., Ltd. v. United States*, 38 CIT __, __, 34 F. Supp. 3d 1355, 1359 (2014) (“Because of the unique nature of antidumping and countervailing duty challenges, the court routinely enjoins liquidation to prevent irreparable harm to a party challenging the anti-dumping or countervailing duty rate.” (citing *Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 95 (Fed. Cir. 2014))). In the absence of an injunction in some form, the attachment of finality to the liquidation of the entries of merchandise covered by the contested determination, 19 U.S.C. § 1516a(c)(2), may place those entries beyond the reach of a court-ordered remedy imposed at the conclusion of the litigation and may deny the plaintiff the opportunity to obtain meaningful judicial review of the contested agency action. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983). The prospect of this type of harm to plaintiff is present in this litigation.

Parties to an action brought under Section 516A may agree upon the terms of a statutory injunction according to 19 U.S.C. §

1516a(c)(2) by submission of an executed USCIT Form 24. In this case, the parties have not done so. Moreover, plaintiff's draft order informs the court only that plaintiff seeks an injunction against "liquidation of Plaintiff's unliquidated entries subject to the [CVD] Order," Pl.'s Mot., Draft Order 2, and offers no additional details. It is not clear what is meant by "Plaintiff's unliquidated entries": it is not apparent that plaintiff could have its own entries, and the reference might mean either entries of merchandise produced by plaintiff, or of merchandise exported by plaintiff. There is no attempt to specify the technical parameters that are addressed in USCIT Form 24. *See, e.g., Mosaic Co. v. United States*, 45 CIT __, __, 540 F. Supp. 3d 1330, 1337–38 (2021); *see also* USCIT Rules, Appendix of Forms, Specific Instructions - Form 24. Beyond the stated, and inadequate, terms of its draft order, plaintiff leaves it to the court to develop an order of injunction that would satisfy the multiple requirements of a statutory injunction in an action contesting the final determination in a countervailing duty investigation. This the court declines to do.

Defendant has submitted a draft order of injunction that addresses details that plaintiff's draft order does not. *See* Def.'s Resp., Draft Order. Since the filing of this document, plaintiff has made no submissions, and the court, therefore, has not been informed as to whether plaintiff consents to a statutory injunction entered according to 19 U.S.C. § 1516a(c)(2) on the terms defendant proposes.

III. CONCLUSION AND ORDER

In conclusion, plaintiff has not alleged sufficient facts to establish that it is likely to suffer irreparable harm in the absence of preliminary relief regarding its payment of cash deposits at the CVD rate established in the Final Determination, and, accordingly, is not entitled to the preliminary injunction it seeks.

While the circumstances of this litigation warrant the issuance of a statutory injunction, in some form, under 19 U.S.C. §1516a(c)(2), plaintiff has not placed before the court a draft order in a form that the court may issue.

Upon consideration of plaintiff's motion for a preliminary injunction, Mot. for Prelim. Inj. (Apr. 13, 2022), ECFs Nos. 9–3 (conf.), 10–1 (public), plaintiff's brief in support of its motion, Pl.'s Mem. of Law in Supp. of Its Mot. for a Prelim. Inj. (Apr. 13, 2022), ECF Nos. 9 (conf.), 10 (public), defendant's response, Def.'s Partial Opp'n to Pl.'s Mot. for a Prelim. Inj. (May 4, 2022), ECF Nos. 13 (public), 14 (conf.), and all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction directed to the cash deposit rate be, and hereby is, denied; it is further

ORDERED that plaintiff's motion for an injunction under 19 U.S.C. § 1516a(c)(2) is denied without prejudice for plaintiff's failure to provide the court a draft order in a satisfactory form; it is further

ORDERED that plaintiff shall have 30 days from the date of this Opinion and Order in which to renew its motion for an injunction under 19 U.S.C. § 1516a(c)(2) and inform the court whether plaintiff consents to an injunction under 19 U.S.C. § 1516a(c)(2) in the form of defendant's draft order (May 4, 2022), ECF Nos. 13 (public), 14 (conf.), and if it does not so consent, to submit its own draft order and the reasons for its objections to defendant's draft order; and it is further

ORDERED that defendant-intervenor, should it so choose, may submit comments to the court on defendant's draft order within 30 days of the date of this Opinion and Order.

Dated: June 9, 2022

New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU

JUDGE

Index

Customs Bulletin and Decisions
Vol. 56, No. 24, June 22, 2022

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

	CBP No.	Page
Extension of Import Restrictions Imposed on Certain Archaeological Artifacts and Ethnological Material From Peru	22–11	1

General Notices

	Page
Cargo Container and Road Vehicle Certification for Transport Under Customs Seal	5
Notice of Open Public Meetings	7
Protest (CBP Form 19)	9
Canadian Border Boat Landing Permit (CBP Form I-68)	12
Holders or Containers Which Enter the United States Duty Free	15

U.S. Court of Appeals for the Federal Circuit

	Appeal No.	Page
USP Holdings, Inc., Substituted for Universal Steel Products, Inc., PSK Steel Corporation, Dayton Parts, LLC, Borusan Mannesmann Pipe U.S. Inc., Jordan International Company, Plaintiffs-Appellants v. United States, Joseph R. Biden, Jr., President of the United States, Gina M. Raimondo, Secretary of Commerce, Troy Miller, Senior Official Performing the Duties of the Commissioner for U.S. Customs and Border Protection, Defendants-Appellees	2021–1726	18
USP Holdings, Inc., Substituted for Universal Steel Products, Inc., PSK Steel Corporation, Dayton Parts, LLC, Borusan Mannesmann Pipe U.S. Inc., Jordan International Company, Plaintiffs-Appellants v. United States, Joseph R. Biden, Jr., President of the United States, Gina M. Raimondo, Secretary of Commerce, Troy Miller, Senior Official Performing the Duties of the Commissioner for U.S. Customs and Border Protection, Defendants-Appellee	2021–1726	30

U.S. Court of International Trade

Slip Opinions

	Slip Op. No.	Page
Borusan Mannesmann Boru Sanayi ve Ticaret A.S. and Gulf Coast Express Pipeline, LLC, Plaintiffs, v. United States, Defendant.	22-58	37
Byungmin Chae, Plaintiff, v. Janet Yellen, United States Secretary of the Treasury, Alejandro Mayorkas, United States Secretary of Homeland Security, United States Department of the Treasury, United States Department of Homeland Security, and United States, Defendants.	22-59	53
Adee Honey Farms, et al., Plaintiffs, v. United States, et al., Defendants.	22-60	86
American Drew, et al., Plaintiffs, v. United States, et al., Defendants.	22-61	91
Hilex Poly Co., LLC, et al., Plaintiffs, v. United States, et al., Defendants.	22-62	97
Gujarat Fluorochemicals Limited, Plaintiff, v. United States, Defendant, and Daikin America, Inc., Defendant-intervenor.	22-63	103