U.S. Customs and Border Protection

19 CFR PART 190

REISSUANCE OF A NEW FORMAT FOR APPLICATION FOR A SPECIFIC MANUFACTURING DRAWBACK RULING UNDER 19 U.S.C. 1313(B) WITHOUT PARALLEL COLUMNS "SAME 8-DIGIT HTSUS CLASSIFICATION"

CBP Decision Number: 22–20

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

ACTION: Notice of the reissuance of a new format for application for a specific manufacturing drawback ruling under 19 U.S.C. 1313(b) without parallel columns "Same 8-Digit HTSUS Classification" for the purpose of including a CBP decision number.

SUMMARY: Specific manufacturing drawback rulings are contained in Appendix B to the regulations in Part 190 of title 19 Code of Federal Regulations (19 CFR Part 190)(entitled "Modernized Drawback"). As deemed necessary by U.S. Customs and Border Protection (CBP), and pursuant to 19 CFR 190.8(b), new specific manufacturing drawback rulings are issued as CBP Decisions and added to this appendix. A notice for the issuance of a new format for application for a specific manufacturing drawback ruling under 19 U.S.C. 1313(b) without parallel columns "Same 8-Digit HTSUS Classification" was issued without a proper CBP decision number on September 22, 2021. This notice is for the reissuance of the same new format with the sole purpose of inserting a proper CBP decision number. Any person who can comply with the conditions of this ruling may apply with Regulations and Rulings under the sample ruling, pursuant to the procedures set forth in 19 CFR 190.8(b). Subsequent to the publication of notice of the reissuance of this new ruling, CBP will amend Appendix B to Part 190 to add this ruling to the appendix.

EFFECTIVE DATE: September 22, 2021.

FOR FURTHER INFORMATION CONTACT: Gail Kan, Entry Process & Duty Refunds Branch, Office of Trade, at (202) 325–0346.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Under the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), the pre-TFTEA same kind and quality substitution standard was changed to classification under the same 8-digit subheading of the Harmonized Tariff Schedule of the United States (HTSUS). Pre-TFTEA manufacturing rulings were approved only once the process of manufacturing and same kind and quality substitution was verified. Similarly, under TFTEA, manufacturing rulings are vetting for a valid process of manufacturing and for substitution as related to the proper classification of the applicant provided 8-digit HTSUS.

CBP did not receive any comments regarding this maintained verification process, during the notice and comment phase of the rulemaking process for the new Part 190 of the CFR, which modernized the pre-TFTEA drawback regulations and appendices in Part 191 of the CFR (including Appendix B). Recently, certain members of the trade requested that CBP consider removal of the same 8-digit HTSUS vetting requirement performed at the ruling stage, to instead have all classification vetted at the time of claim filing. Upon review of this request, CBP created a new format for application for a specific manufacturing drawback ruling under 19 U.S.C. 1313(b) without parallel columns "Same 8-Digit HTSUS Classification," which went into effect on September 22, 2021, when it was initially published in the Customs Bulletin. For this new ruling, CBP did not include the "Parallel Columns" section but instead, provided a set of substitution stipulations.

Accordingly, manufacturers and producers may file for a new specific manufacturing ruling under either the original format containing the parallel columns "Same 8-Digit HTSUS Classification" or this new simplified ruling as of September 22, 2021. The addition of a proper CBP decision number is the only update to the original issuance of this notice; no other aspect is altered by the reissuance of this notice.

Dated: September 1, 2022

GREGORY CONNOR,
Acting Director
Commercial & Trade Facilitation Division

Attachment

HQ H320090

DRA 2
H320090 SMS
OT:RR:CTF:ER

Format For Application for a Specific Manufacturing Drawback Ruling Under 19 U.S.C. 1313(b) Without Parallel Columns "Same 8-Digit HTSUS Classification"

COMPANY LETTERHEAD (Optional)

U.S. Customs and Border Protection, Entry Process and Duty Refunds Branch, Commercial and Trade Facilitation Division, Regulations and Rulings, Office of Trade, 90 K Street NE - 10th Floor (Mail Stop 1177), Washington, DC 20229–1177.

Dear Sir or Madam: We, (Applicant's Name), a (State, e.g., Delaware) corporation (or other described entity) submit this application for a specific manufacturing drawback ruling that our manufacturing operations qualify for drawback under title 19, United States Code, section 1313(b), and part 190 of the CBP Regulations. We request that CBP authorize drawback on the basis of this application.

NAME AND ADDRESS AND IRS NUMBER (WITH SUFFIX) OF APPLICANT

(Section 190.8(a) of the CBP Regulations provides that each manufacturer or producer of articles intended for exportation with the benefit of drawback will apply for a specific manufacturing drawback ruling, unless operating under a general manufacturing drawback ruling under § 190.7 of the CBP Regulations. CBP will not approve an application which shows an unincorporated division or company as the applicant (*see* § 190.8(a)).)

LOCATION OF FACTORY

(Provide the address of the factory(s) where the process of manufacture or production will take place. Indicate if the factory is a different legal entity from the applicant, and indicate if the applicant is operating under an Agent's general manufacturing drawback ruling.)

PERSONS WHO WILL SIGN DRAWBACK DOCUMENTS

(List persons legally authorized to bind the corporation who will sign drawback documents. Section 190.6 of the CBP Regulations permits only the president, vice president, secretary, treasurer, and any employee legally authorized to bind the corporation to sign for a corporation. In addition, a person within a business entity with a customs power of attorney for the company may sign. A customs power of attorney may also be given to a licensed customs broker. This heading should be changed to NAMES OF PARTNERS or PROPRIETOR in the case of a partnership or sole proprietorship, respectively (*see* footnote at end of this sample format for persons who may sign applications for specific manufacturing drawback rulings).)

GENERAL STATEMENT

(The following questions must be answered:)

1. Who will be the importer of the designated merchandise?

(If the applicant will not always be the importer of the designated merchandise, specify that the applicant understands its obligations to maintain records to support the transfer under § 190.10, and its liability under § 190.63.)

2. Will an agent be used to process the designated or the substituted merchandise into articles?

(If an agent is to be used, the applicant must state it will comply with T.D.s 55027(2) and 55207(1), and § 190.9, as applicable, and that its agent will submit a letter of notification of intent to operate under the general manufacturing drawback ruling for agents (*see* § 190.7 and Appendix A), or an application for a specific manufacturing drawback ruling (*see* § 190.8 and this Appendix B).)

3. Will the applicant be the exporter?

(If the applicant will not be the exporter in every case, but will be the claimant, the manufacturer must state that it will reserve the right to claim drawback with the knowledge and written consent of the exporter (19 CFR 190.82).)

DESCRIPTION OF IMPORTED MERCHANDISE

Imported merchandise, drawback products,[1] or substituted merchandise to be designated as the basis for drawback in the manufacture of the exported (or destroyed) products.

SUBSTITUTION REQUIREMENTS.

(Following the items listed above, the applicant must make the below statements affirming the same 8-digit HTSUS subheading number of the merchandise. These statements should be included in the application exactly as it is stated below:)

The manufacturer or producer hereby agrees to the below listed substitution requirements:

1. The manufacturer or producer must identify all the imported and substituted merchandise by description that will be used within the Process of Manufacture or Production of the exported (or destroyed) article.

2. The proposed substitution of merchandise cannot alter the Process of Manufacture or Production.

3. The substituted merchandise used in producing the exported (or destroyed) articles on which drawback is claimed must be classifiable under the same 8-digit HTSUS classification number as the designated merchandise. Specifications, drawings, or other documentation describing the substituted merchandise maintained in the normal course of business will be maintained and made available for CBP Officials to verify classification of products. In order to obtain drawback it is necessary to prove that the merchandise,

[1] Drawback products are those produced in the United States in accordance with the drawback law and regulations. Such products have "dual status" under section 1313(b). They may be designated as the basis for drawback and also may be deemed to be domestic merchandise.

which is to be substituted for the imported merchandise or drawback products, is classifiable under the same 8-digit HTSUS classification.

4. To enable CBP to verify the required identity of the 8-digit HTSUS classification of the substituted merchandise for which it is being substituted, the applicant must attach to this ruling request a representative Bill of Materials (BOM) and/or Formulas for each distinct Process of Manufacture, which is an exhaustive list of all merchandise used in the Process of Manufacture, as defined under 19 CFR 190.2, identifying by 8-digit HTSUS number each merchandise, or element, material, chemical, mixture, or other substance incorporated into the manufactured article. However, the 8-digit HTSUS classification numbers referenced in the BOM/Formula will not be confirmed by CBP upon approval of this manufacturing ruling, but are subject to verification during claim processing. Any HTSUS provisions referenced in BOMs/Formulas submitted with drawback manufacturing rulings issued under 19 CFR 190 are information provided by the requester. To obtain a binding ruling on the tariff classification of this merchandise, a request may be submitted in accordance with 19 CFR 177.2.

5. The manufacturer or producer will submit an updated representative BOM and/or Formula, to the Drawback Office which liquidates its claims, in the event that there are any changes to the merchandise, elements, materials, chemicals, mixtures, or other substances incorporated into the manufactured article in the Process of Manufacture and being claimed for drawback, or to their proposed 8-digit HTSUS classification.

6. The imported merchandise designated in our claims will be classifiable under the same 8-digit HTSUS subheading number as the merchandise used in producing the exported articles on which we claim drawback, such that the merchandise used would, if imported, be subject to the same rate of duty as the designated merchandise.

(It is essential that all the characteristics which determine the identity of the merchandise are provided in the application in order to substantiate that the merchandise meets the "same 8-digit HTSUS subheading number" statutory requirement. These characteristics should clearly distinguish merchandise of different identities.

EXPORTED ARTICLES ON WHICH DRAWBACK WILL BE CLAIMED

(Name each article to be exported. When the identity of the product is not clearly evident by its name state what the product is, e.g., a herbicide. There must be a match between each article described under the PROCESS OF MANUFACTURE AND PRODUCTION section below and each article listed here.)

PROCESS OF MANUFACTURE OR PRODUCTION

(Drawback under § 1313(b) is not allowable except where a manufacture or production exists. Manufacture or production is defined, for drawback purposes, in § 190.2. In order to obtain drawback under § 1313(b), it is essential for the applicant to show use in manufacture or production by providing a thorough description of the manufacturing process. This description should include the name and exact condition of the merchandise listed in above, a complete explanation of the processes to which it is subjected in this country, the effect of such processes, the name and exact description of the finished article, and the use for which the finished article is intended. When applicable, include equations of any chemical reactions. Including a flow chart in the description of the manufacturing process is an excellent means of illustrating how manufacture or production occurs. Flow charts can clearly illustrate if and at what point during the manufacturing process by-products and wastes are generated.)

(This section should contain a description of the process by which each item of merchandise listed above is used to make or produce every article that is to be exported.)

MULTIPLE PRODUCTS

1. Relative Values

(Some processes result in the separation of the merchandise into two or more products. If applicable, list all of the products. State that you will record the market value of each product or by-product at the time it is first separated in the manufacturing process. If this section is not applicable to you, then state so.)

(Drawback law mandates the assignment of relative values when two or more products are necessarily produced in the same operation. For instance, the refining of flaxseed necessarily produces linseed oil and linseed husks (animal feed), and drawback must be distributed to each product in accordance with its relative value. However, the voluntary election of a steel fabricator, for instance, to use part of a lot of imported steel to produce automobile doors, and part of the lot to produce automobile fenders, does not call for relative value distribution.)

(The relative value of a product is its value divided by the total value of all products, whether or not exported. For example, 100 gallons of drawback merchandise are used to produce 100 gallons of products, including 60 gallons of product A, 20 gallons of product B, and 20 gallons of product C. At the time of separation, the unit values of products A, B, and C are $5, $10, and $50 respectively. The relative value of product A is $300 divided by $1,500 or 1/5. The relative value of B is 2/15 and of product C is 2/3, calculated in the same manner. This means that 1/5 of the drawback product payments will be distributed to product A, 2/15 to product B, and 2/3 to product C.)

(Drawback is allowable on exports of any of multiple products, but is not permitted on exports of valuable waste. In making this distinction between a product and valuable waste, the applicant should address the following significant elements: (1) The nature of the material of which the residue is composed; (2) the value of the residue as compared to the value of the principal manufactured product and the raw material; (3) the use to which it

is put; (4) its status under the tariff laws, if imported; (5) whether it is a commodity recognized in commerce; (6) whether it must be subjected to some process to make it saleable.)

2. Producibility

(Some processes result in the separation of fixed proportions of each product, while other processes afford the opportunity to increase or decrease the proportion of each product. An example of the latter is petroleum refining, where the refiner has the option to increase or decrease the production of one or more products relative to the others. State under this heading whether you can or cannot vary the proportionate quantity of each product.)

(The MULTIPLE PRODUCTS sections consist of two sub-sections: Relative Values and Producibility. If multiple products do not result from your operation state "Not Applicable" for the entire section. If multiple products do result from your operation Relative Values will always apply. However, Producibility may or may not apply. If Producibility does not apply to your multiple product operation, then state "Not Applicable" for this sub-section.)

WASTE

(Many processes result in residue materials which, for drawback purposes, are treated as waste. Describe any residue materials which you believe should be so treated. If no waste results, include a statement to that effect.)

(If waste occurs, state: (1) Whether or not it is recovered, (2) whether or not it is valueless, and (3) what you do with it. This information is required whether claims are made on a "used in" or "appearing in" basis, and regardless of the amount of waste incurred.)

(Irrecoverable wastes are those consisting of materials which are lost in the process. Valueless wastes are those which may be recovered, but have no value. These irrecoverable and valueless wastes do not reduce the drawback claim provided the claim is based on the quantity of imported material used in manufacturing. If the claim is based upon the quantity of imported merchandise appearing in the exported article, irrecoverable and valueless waste will cause a reduction in the amount of drawback.)

(Valuable wastes are those recovered wastes which have a value either for sale or for use in a different manufacturing process. However, it should be noted that this standard applies to the entire industry and is not a selection on your part. An option by you not to choose to sell or use the waste in some different operation does not make it valueless if another manufacturer can use the waste. State what you do with the waste. If you have to pay someone to get rid of it, or if you have buyers for the waste, you must state so in your application regardless of what basis you are using.)

(If you recover valuable waste and if you choose to claim on the basis of the quantity of merchandise used in producing the exported articles less any valuable waste, state that you will keep records to establish the quantity and value of the waste recovered. *See* "Basis of Claim for Drawback" section below.)

STOCK IN PROCESS

(Some processes result in another type of residual material, namely, stock in process, which affects the allowance of drawback. Stock in process may exist when residual material resulting from a manufacturing or processing

operation is reintroduced into a subsequent manufacturing or processing operation; e.g., trim pieces from a cast article. The effect of stock in process on a drawback claim is that the amount of drawback for the period in which the stock in process was withdrawn from the manufacturing or processing operation (or the manufactured article, if manufacturing or processing periods are not used) is reduced by the quantity of merchandise or drawback products used to produce the stock in process if the "used in" or "used in less valuable waste" methods are used (if the "appearing in" method is used, there will be no effect on the amount of drawback), and the quantity of merchandise or drawback products used to produce the stock in process is added to the merchandise or drawback products used in the subsequent manufacturing or production period (or the subsequently produced article)).

(If stock in process occurs and claims are to be based on stock in process, the application must include a statement to that effect. The application must also include a statement that merchandise is considered to be used in manufacture at the time it was originally processed, so that the stock in process will not be included twice in the computation of the merchandise used to manufacture the finished articles on which drawback is claimed.)

LOSS OR GAIN (Separate and distinct from WASTE)

(Some manufacturing processes result in an intangible loss or gain of the net weight or measurement of the merchandise used. This loss or gain is caused by atmospheric conditions, chemical reactions, or other factors. If applicable, state the approximate usual percentage or quantity of such loss or gain. Note that percentage values will be considered to be measured "by weight" unless otherwise specified. Loss or gain does not occur during all manufacturing processes. If loss or gain does not apply to your manufacturing process, state "Not Applicable.")

PROCEDURES AND RECORDS MAINTAINED

We will maintain records to establish:

1. The identity and 8-digit HTSUS subheading number of the merchandise we designate;

2. The quantity of merchandise classifiable under the same 8-digit HTSUS subheading number as the designated merchandise[2] we used to produce the exported articles;

3. That, within 5 years after the date of importation, we used the designated merchandise to produce articles. During the same 5-year period, we produced[3] the exported articles;

We realize that to obtain drawback the claimant must establish that the completed articles were exported within 5 years after the importation of the imported merchandise. Our records establishing our compliance with these requirements will be available for audit by CBP during business hours. We understand that drawback is not payable without proof of compliance.

INVENTORY PROCEDURES

(Describe your inventory records and state how those records will meet the drawback recordkeeping requirements set forth in 19 U.S.C. 1313(b) and part

[2] If claims are to be made on an "appearing in" basis, the remainder of this sentence should read "appearing in the exported articles we produce."

[3] The date of production is the date an article is completed.

190 of the CBP Regulations as discussed under the heading PROCEDURES AND RECORDS MAINTAINED. To help ensure compliance the following areas, as applicable, should be included in your discussion:)

RECEIPT AND STORAGE OF DESIGNATED MERCHANDISE

RECORDS OF USE OF DESIGNATED MERCHANDISE

BILLS OF MATERIALS

MANUFACTURING RECORDS

WASTE RECORDS

RECORDS OF USE OF DUTY-PAID, DUTY-FREE OR DOMESTIC MERCHANDISE OF THE REQUIRED SAME 8-DIGIT HTSUS SUBHEADING WITHIN 5 YEARS AFTER IMPORTATION OF THE DESIGNATED MERCHANDISE FINISHED STOCK STORAGE RECORDS

SHIPPING RECORDS

(Proof of time frames may be specific or inclusive, e.g., within 120 days, but specific proof is preferable. Separate storage and identification of each article or lot of merchandise usually will permit specific proof of exact dates. Proof of inclusive dates of use, production or export may be acceptable, but in such cases it is better to describe very specifically the data you intend to use to establish each legal requirement, thereby avoiding misunderstandings at the time of audit.)

(If you do not describe the inventory records that you will use, you must state: "All legal requirements will be met by our inventory procedures." However, it should be noted that without a detailed description of the inventory procedures set forth in the application, a judgment as to the adequacy of such a statement cannot be made until a drawback claim is verified. Approval of this application for a specific manufacturing drawback ruling merely constitutes approval of the ruling application as submitted; it does not constitute approval of the applicant's recordkeeping procedures if those procedures are solely described as meeting the legal requirements, without specifically stating how the requirements will be met. Drawback is not payable without proof of compliance.)

BASIS OF CLAIM FOR DRAWBACK

(There are three different bases that may be used to claim drawback: (1) Used in; (2) appearing in; and (3) used in less valuable waste.)

(The "used in" basis may be employed only if there is either no waste, or the waste is valueless or unrecovered. Irrecoverable or valueless waste does not reduce the amount of drawback when claims are based on the "used in" basis. Drawback is payable in the amount of 99 percent of the duties, taxes, and fees, paid on the quantity of imported material designated as the basis for the

allowance of drawback on the exported articles. The designated quantity may not exceed the quantity of material actually used in the manufacture of the exported articles.)

(For example, if 100 pounds of material, valued at $1.00 per pound, were used in manufacture resulting in 10 pounds of irrecoverable or valueless waste, the 10 pounds of irrecoverable or valueless waste would not reduce the drawback. In this case drawback would be payable on 99% of the duties, taxes, and fees, paid on the 100 pounds of designated material used to produce the exported articles.)

(The "appearing in" basis may be used regardless of whether there is waste. If the "appearing in" basis is used, the claimant does not need to keep records of waste and its value. However, the manufacturer must establish the identity and quantity of the merchandise appearing in the exported product and provide this information. Waste reduces the amount of drawback when claims are made on the "appearing in" basis. Drawback is payable on 99 percent of the duties, taxes, and fees paid on the quantity of material designated, which may not exceed the quantity of eligible material that appears in the exported articles. "Appearing in" may not be used if multiple products are involved.)

(Based on the previous example, drawback would be payable on the 90 pounds of merchandise which actually went into the exported product (appearing in) rather than the 100 pounds used in as set forth previously.)

(The "used in less valuable waste" basis may be employed when the manufacturer recovers valuable waste, and keeps records of the quantity and value of waste from each lot of merchandise. The value of the waste reduces the amount of drawback when claims are based on the "used in less valuable waste" basis. When valuable waste is incurred, the drawback allowance on the exported article is based on the duties, taxes, and fees paid on the quantity of merchandise used in the manufacture, as reduced by the quantity of such merchandise which the value of the waste would replace. In such a case, drawback is claimed on the quantity of eligible material actually used to produce the exported product, less the amount of such material which the value of the waste would replace. Note section 190.26(c) of the CBP Regulations.)

(Based on the previous examples, if the 10 pounds of waste had a value of $.50 per pound, then the 10 pounds of waste, having a total value of $5.00, would be equivalent in value to 5 pounds of the designated material. Thus the value of the waste would replace 5 pounds of the merchandise used, and drawback is payable on 99 percent of the duties, taxes, and fees paid on the 95 pounds of imported material designated as the basis for the allowance of drawback on the exported article rather than on the 100 pounds "used in" or the 90 pounds "appearing in" as set forth in the above examples.)

(Two methods exist for the manufacturer to show the quantity of material used or appearing in the exported article: (1) Schedule or (2) Abstract.)

(A "schedule" shows the quantity of material used in producing each unit of product. The schedule method is usually employed when a standard line of merchandise is being produced according to fixed formulas. Some schedules will show the quantity of merchandise used to manufacture or produce each article and others will show the quantity appearing in each finished article. Schedules may be prepared to show the quantity of merchandise either on the basis of percentages, or by actual weights and measurements. A schedule

determines the amount of material that is needed to produce a unit of product, before the material is actually used in production.)

(An "abstract" is the summary of the records which shows the total quantity of merchandise used in producing all articles during the period covered by the abstract. The abstract looks at a period of time, for instance 3 months, in which the quantity of material has been used. An abstract looks back at how much material was actually used after a production period has been completed.)

(An applicant who fails to indicate the "schedule" choice must base its claims on the "abstract" method. State which Basis and Method you will use. An example of Used In by Schedule would read:)

We will claim drawback on the quantity of (specify material) used in manufacturing (exported article) according to the schedule set forth below.

(Section 190.8(f) of the CBP Regulations requires submission of the schedule with the application for a specific manufacturing drawback ruling. An applicant who desires to file supplemental schedules with the drawback office whenever there is a change in the quantity or material used should state:)

We request permission to file supplemental schedules with the drawback office covering changes in the quantities of material used to produce the exported articles, or different styles or capacities of containers of such exported merchandise.

(Neither the "appearing in" basis nor the "schedule" method for claiming drawback may be used where the relative value procedure is required.)

AGREEMENTS

The Applicant specifically agrees that it will:

1. Operate in full conformance with the terms of this application for a specific manufacturing drawback ruling when claiming drawback;

2. Open its factory and records for examination at all reasonable hours by authorized Government officers;

3. Keep its drawback related records and supporting data for at least 3 years from the date of liquidation of any drawback claim predicated in whole or in part upon this application;

4. Keep this application current by reporting promptly to the drawback office which liquidates its claims any changes in the number or locations of its offices or factories, the corporate name, the persons who will sign drawback documents, the basis of claim used for calculating drawback, the decision to use or not to use an agent under § 190.9 or the identity of an agent under that section, or the corporate organization by succession or reincorporation;

5. Keep this application current by reporting promptly to CBP Headquarters, all other changes affecting information contained in this application;

6. Keep a copy of this application and the letter of approval by CBP Headquarters on file for ready reference by employees and require all officials and employees concerned to familiarize themselves with the provisions of this application and that letter of approval; and

7. Issue instructions to ensure proper compliance with title 19, United States Code, section 1313, part 190 of the CBP Regulations and this application and letter of approval.

DECLARATION OF OFFICIAL

I declare that I have read this application for a specific manufacturing drawback ruling; that I know the averments and agreements contained herein are true and correct; and that my signature on this __ day of ____ 20__, makes this application binding on

(Name of Applicant Corporation, Partnership, or Sole Proprietorship)

By[4]

(Signature and Title)

(Print Name)

[4] Section 190.6(a) requires that letters of notification of intent to operate under a specific manufacturing drawback ruling be signed or electronically certified by any individual legally authorized to bind the person (or entity) for whom the application is signed or the owner of a sole proprietorship, a full partner in a partnership, an individual acting on his or her own behalf, or, if a corporation, the president, a vice president, secretary, treasurer or employee legally authorized to bind the corporation. In addition, any employee of a business entity with a customs power of attorney may sign such an application, as may a licensed customs broker with a customs power of attorney.

DATES AND DRAFT AGENDA OF THE SEVENTIETH SESSION OF THE HARMONIZED SYSTEM COMMITTEE OF THE WORLD CUSTOMS ORGANIZATION

AGENCIES: U.S. Customs and Border Protection, Department of Homeland Security, and U.S. International Trade Commission.

ACTION: Publication of the dates and draft agenda for the 70th session of the Harmonized System Committee of the World Customs Organization.

SUMMARY: This notice sets forth the dates and draft agenda for the next session of the Harmonized System Committee of the World Customs Organization.

DATE: September 21, 2022

FOR FURTHER INFORMATION CONTACT: Maria E. Solorzano, maria.e.solorzano@cbp.dhs.gov, Staff Assistant, Office of Trade, Regulations and Ruling, U.S. Customs and Border Protection (202–325–0743), or Daniel Shepherdson, daniel.shepherdson@usitc.gov, Senior Attorney Advisor, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission (202–205–2598).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System ("Harmonized System Convention"). The Harmonized Commodity Description and Coding System ("Harmonized System"), an international nomenclature system, forms the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States. The Harmonized System Convention is under the jurisdiction of the World Customs Organization (established as the Customs Cooperation Council).

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee ("HSC"). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC's responsibilities include issuing classification decisions on the interpretation of the Harmonized System. Those decisions may take the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year in

Brussels, Belgium. The next session of the HSC will be the 70th, commencing and it will be held from Monday September 5, to Friday September 23, 2022.

In accordance with section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418), the Department of Homeland Security, represented by U.S. Customs and Border Protection, the Department of Commerce, represented by the Census Bureau, and the U.S. International Trade Commission ("ITC"), jointly represent the U.S. The Customs and Border Protection representative serves as the head of the delegation at the sessions of the HSC.

Set forth below is the draft agenda for the next session of the HSC. Copies of available agenda-item documents may be obtained from either U.S. Customs and Border Protection or the ITC. Comments on agenda items may be directed to the above-listed individuals.

GREGORY CONNOR
Chief,
Electronics, Machinery, Automotive, and
International Nomenclature Branch

Attachment

WORLD CUSTOMS ORGANIZATION
ORGANISATION MONDIALE DES DOUANES

Established in 1952 as the Customs Co-operation Council
Créée en 1952 sous le nom de Conseil de coopération douanière

HARMONIZED SYSTEM
COMMITTEE
-
70th Session
-

NC2932Ee

Brussels, 7 September 2022.

DRAFT AGENDA FOR THE 70TH SESSION OF THE HARMONIZED SYSTEM COMMITTEE

The Presessional Working Party (to examine the questions under Agenda Item VI) will be held with four KUDO sessions from Tuesday 6 to Friday 9 September 2022 (13:00 – 16:00).

Adoption of the Report of the 60th Session of the HS Review Sub-Committee.

I.	**ADOPTION OF THE AGENDA**	
	1. Draft Agenda	NC2932Ee
	2. Draft Timetable	NC2933Ed
II.	**REPORT BY THE SECRETARIAT**	
	1. Position regarding Contracting Parties to the HS Convention, HS Recommendations and related matters; progress report on the implementation of HS 2022 - status and challenges	NC2934Ea
	2. Report on the last meetings of the Policy Commission (86th Session) and the Council (139th and 140th Sessions)	NC2935Ea
	3. Approval of decisions taken by the Harmonized System Committee at its 69th Session	NC2931Ea NG0275Ea
	4. Capacity building activities of the Nomenclature and Classification Sub-Directorate	NC2936Ea
	5. Co-operation with other international organizations	NC2937Ea
	6. New information provided on the WCO Web site	NC2938Eb
	7. Progress report on the use of working languages for HS-related matters	NC2973Ea
	8. Report on the Green Customs Global Conference	NC2939Ea
	9. Other	

III.	**GENERAL QUESTIONS**	
	1. Information on the Exploratory Study on a possible strategic review of the HS	NC2940Ea
	2. Possible amendment of the Rules of Procedure to reflect gender neutral language (proposal by the Secretariat)	NC2941Ea NC2941FAB1a
	3. Possible changes of threshold values for the next Harmonized System review cycles	NC2942Ea
	4. Amendments to the Compendium of Classification Opinions consequential to the Article 16 Council Recommendation of 28 June 2019	NC2943Ea NC2943FAB1a
	5. Draft Corrigendum amendments to the Explanatory Notes	NC2944Ea NC2944EAB1a **NC3012Ea** **NC3012EAB1a**
	6. Template for Work Programmes of WCO Working Bodies	NC2945Ea NC2945EAB1a
	7. Proposal for a cover document for requesting reexamination (reservations) in accordance with the procedure of Article 8 of the HS Convention (Proposal by the Secretariat)	NC2946Ea NC2946FAE1a
IV.	**RECOMMENDATIONS**	
	1. Possible amendment of the Recommendation of the Customs Co-operation Council on the Insertion in National Statistical Nomenclatures of Subheadings for Substances Controlled under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Request by the Organisation for the Prohibition of Chemical Weapons (OPCW)	NC2947Ea NC2947EAB1a
	2. Recommendation of the Customs Co-operation Council on the insertion in national statistical nomenclatures of subheadings to facilitate the collection and comparison of data on the international movement of waste oils containing PCBs at a concentration level of 50 mg/kg or more, controlled under the Basel Convention" (Request by the Basel Convention)	NC2948Ea NC2948EAB1a
	3. Recommendation of the Customs Co-operation Council on the insertion in national statistical nomenclatures of subheadings to facilitate the collection and comparison of data on the international movement of certain substances controlled under the Rotterdam Convention" (Request by the Rotterdam Convention)	NC3001Ea NC3001EAB1a
V.	**REPORT OF THE HS REVIEW SUB-COMMITTEE**	
	1. Report of the 60th Session of the HS Review Sub-Committee	NR1525Ec NR1525EAB1c
	2. Matters for decision	NC2949Ea
VI.	**REPORT OF THE PRESESSIONAL WORKING PARTY**	
	Possible amendments to the Compendium of Classification Opinions and the Explanatory Notes consequential to the decisions taken by the Committee at its 69th Session	NC2950Ea NC2950EAB1a
	1. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a " cough lozenges" in heading 17.04 (subheading 1704.90).	PRESENTATION_ Annex_A
	2. Amendment to the Compendium of Classification Opinions to reflect the decision to classify the product called " Protein Powder" in heading 21.06 (subheading 2106.10).	PRESENTATION_ Annex_B

	3. Amendment to the Compendium of Classification Opinions to reflect the decision to classify certain "Edible collagen casings for sausages" in heading 39.17 (subheading 3917.10).	PRESENTATION_ Annex_C
	4. Amendment to the Compendium of Classification Opinions to reflect the decision to classify the "cellular bamboo panels" in heading 44.18 (subheading 4418.91).	PRESENTATION_ Annex_D
	5. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a "cutter/ripper" in heading 84.32 (subheading 8432.80).	PRESENTATION_ Annex_E
	6. Amendment to the Compendium of Classification Opinions to reflect the decision to classify a product called " " in heading 90.32 (subheading 9032.89).	PRESENTATION_ Annex_F
VII.	**REQUESTS FOR RE-EXAMINATION (RESERVATIONS)**	
	1. Re-examination of the classification of certain preparations of a kind used in animal feeding (Request by Argentina)	NC2951Ea
	2. Re-examination of the classification of a device called " GPS running watch with wrist-based heart rate monitor" (Requests by Switzerland and Russian Federation)	NC2952Ea
	3. Re-examination of the classification of an " " balancing block (Request by Switzerland)	NC2953Ea
	4. Re-examination of the classification of rooibos tea (Request by South Africa)	NC2954Ea
	5. Re-examination of the classification of certain food preparations in liquid form (Request by the EU)	NC2955Ea
	6. Re-examination of the classification of a product called " " (Request by Switzerland and China)	NC2956Ea
	7. Re-examination of the classification of two products called "Coffee Makers" (Request by Guatemala)	NC2957Ea
	8. Re-examination of the classification of dried fish subsequently treated with water (rehydrated dried fish) (Request by Russian Federation)	NC2958Ea
	9. Re-examination of the classification of two products called "RF Generators and RF Matching Networks" (Request by Russian Federation)	NC2959Ea
	10. Re-examination of the classification of a product called " " (Request by Russian Federation)	NC2960Ea
	11. Re-examination of the possible amendment of the Explanatory Note to heading 27.10 (Request by the Russian Federation)	NC2961Ea
	12. Re-examination of the classification of a product called " Ice Lollies" (Requests by Russian Federation and the United States)	NC2962Ea
	13. Re-examination of the classification of the Commercial Utility vehicle (Request by the United States)	NC2963Ea
VIII.	**FURTHER STUDIES**	
	1. Possible amendment to the Nomenclature and the Explanatory Notes to clarify the classification of "pickets and stakes" (Proposal by the Secretariat)	NC2964Ea NC2964FAB1a
	2. Classification of a rectangular mat with right-angled corners called " " (Request by the Secretariat)	NC2965Ea

	3. Possible amendment of the Explanatory Note to heading 85.28 to clarify the expression "designed for use with" (Proposal by the Secretariat)	NC2966Ea
	4. Possible amendment to the English version of the Explanatory Note to heading 04.06 to better align its meaning with that of the French version (Proposal by Canada)	NC2967Ea NC2967FAB1a
	5. Classification of a "PVC canvas" bearing the reference "" (Request by Morocco)	NC2968Ea
	6. Classification of "fixed and mobile bleachers" (Request by Jamaica)	NC2969Ea
	7. Classification of a certain type of thin bricks (Request by the Secretariat)	NC2970Ea
	8. Classification of hydraulic hammers (Request by the Secretariat)	NC2971Ea
	9. Classification of "" (sugar confectionary) (Request by the EU)	NC2972Ea
	10. Classification of pedestal jib cranes (Request by the EU)	NC2974Ea
	11. Possible amendment to the Explanatory Note to headings 70.18 (Proposal by the EU)	NC2915Ea NC2915EAB1a
	12. Classification of a product called "Green Yellow Paint" (Request by Colombia)	NC2916Ea NC2975Ea
	13. Classification of a self-propelling ice filling machine (Request by the Russian Federation)	NC2917Ea
	14. Classification of a turbo-shaft engine (Request by the Russian Federation)	NC2918Ea
	15. Possible amendment to the Explanatory Note to heading 84.11 (Proposal by the EU)	NC2863Ea NC2863EAB1a NC2976Ea NC2976EAB1a
	16. Possible amendment to the Explanatory Note to heading 90.27 (Proposal by the EU)	NC2921Ea
	17. Review on interpretation of species In the Annex to Chapter 44 "Appellation of certain tropical woods" (Proposal by Korea)	NC2922Ea
	18. Classification of a product called Interacting Conference Terminals" (Request by China)	NC2923Ea NC3004Ea
	19. Possible amendment to the Explanatory Note to heading 84.62 concerning Notching machines (Proposal by China)	NC2927Eb NC2927EAB1b NC2999Ea NC2999EAB1a
	20. Classification of a product called "Dual-system solar water heater" (Request by the Secretariat)	NC2928Ea
IX.	**NEW QUESTIONS**	
	1. Reclassification of opinion 3824.99/20 concerning the classification of "Shisha-steam-stones"	NC2977Ea NC2977EAB1a
	2. Reclassification of opinions 9405.40/2 and 9405.40/3 concerning the classification of "Strip lights and "Tape lights", respectively	NC2978Ea
	3. Possible reclassification of Opinion 2106.90/5 concerning the classification of " Instant foodstuff"	NC2979Ea
	4. Possible amendment to the Explanatory Notes to heading 32.04 to clarify the classification of antibody conjugates and antibody fragment conjugates (Proposal by the Secretariat)	NC2980Ea NC2980EAB1a

	5. Possible amendment to the Explanatory Notes to heading 29.39 to clarify the classification of alkaloids that can be isolated from vegetal as well as other souces, and of derivatives of vegetal alkaloids.	NC2981Ea NC2981EAB1a
	6. Classification of a product called "[redacted]" (Request by North Macedonia)	NC2982Ea
	7. Deleted	
	8. Possible misalignment between the English and French texts in the Explanatory Note to heading 85.49- Exclusion (a)." (Request by COMALEP)"	NC2984Ea
	9. Possible amendments to the Harmonized System in respect of certain medical goods (Proposal by the Committee on Market Access (WTO))	NC2985Ea
	10. Classification of a product called "[redacted] traffic and speed enforcement laser"(Request by Ukraine)	NC2986Ea
	11. Classification of a product called "[redacted]" (request by Chile)	NC2987Ea
	12. Classification of a Low-Speed Vehicle for the Transportation of Goods (Request by the United States)	NC2988Ea
	13. Classification of a product called "[redacted]" (Request by the United States)	NC2989Ea
	14. Classification of two nicotine-free vaping products and possible amendment to the Explanatory Notes to clarify the meaning of "nicotine substitutes" as set forth in heading 24.04 (Request by the United States)	NC2990Ea
	15. Possible amendment to the Explanatory Note to heading 63.06 (Proposal by the EU)	NC2991Ea NC2991FAB1a
	16. Possible amendment to the Explanatory Note to heading 73.08 (Proposal by the EU)	NC2992Ea NC2992EAB1a
	17. Possible amendment to the Explanatory Note to heading 96.16 (Proposal by the EU)	NC2993Ea NC2993EAB1a
	18. Classification of a product called "sesame snacks" (Request by the EU)	NC2994Ea
	19. Classification of products called "[redacted]" (Request by the EU) "[redacted]"	NC2995Ea
	20. Classification of a product called "acrylic penguin family" (Request by the EU)	NC2996Ea
	21. Classification of certain products called "dental dam" (Request by Ukraine)	NC2997Ea
	22. Classification of lighting strings attached to frames (Proposal by Canada)	NC3000Ea
	23. Request for guidance on the possible implementation of Additional Notes (Request by the Caribbean Community Secretariat (CARICOM))	NC3007Ea
X.	**ADDITIONAL LIST**	
	1. Classification of "Display cover glass" (Request by Korea)	NC3002Ea
	2. Classification of "serving and delivering robots" (Request by Korea)	NC3003Ea
	3. Possible amendment of the Nomenclature in respect of certain categories of equipment used in the illicit manufacture of drugs (Proposal by the UN International Narcotics Control Board)	NC3005Ea
	4. Possible amendment to the Explanatory Note to heading 70.19 in respect of glass fibres (Request by COMALEP)	NC3006Ea NC3006EAB1a

	5. Classification of ASIC cryptocurrency mining machines (Requested by the Secretariat)	NC3008Ea
	6. Possible amendment to Nomenclature to provide for greater distinguishability of heat pumps (Proposal by the United Kingdom)	NC3009Ea
	7. Possible amendment to the Nomenclature and the Explanatory Note to provide for greater distinguishability of solar powered water pumps (Proposal by the United Kingdom)	NC3010Eb
	8. Possible amendment to the Explanatory Note to heading 85.48 (Proposal by the Secretariat)	NC3011Ea NC3011EAB1a
XI.	**OTHER BUSINESS**	
	1. List of questions which might be examined at a future session	NC2998Ea
XII.	**ELECTIONS**	
XIII.	**DATES OF NEXT SESSIONS**	

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 08 2022)

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

SUMMARY: The following copyrights, trademarks, and trade names were recorded with U.S. Customs and Border Protection in August 2022. A total of 148 recordation applications were approved, consisting of 4 copyrights and 144 trademarks.

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

FOR FURTHER INFORMATION CONTACT: Zachary Ewing, Paralegal Specialist, Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade at (202) 325–0295.

ALAINA VAN HORN
Chief,
Intellectual Property Enforcement Branch
Regulations and Rulings, Office of Trade

CBP IPR RECORDATION — AUGUST 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 22–00657	11/14/2019	7/10/2032	Color Orange on Tile Insulation	Schluter Systems L.P.	No
TMK 18–00183	12/13/2021	12/11/2031	BALENCIAGA (STYLIZED)	BALENCIAGA CORPORATION FRANCE	No
TMK 17–00081	1/4/2022	11/23/2031	AMERICAN QUALITY MAVERICK CIGARETTES & DESIGN	ITG BRANDS, LLC	No
TMK 02–00820	5/10/2022	6/9/2032	NEWPORT & DESIGN	LORILLARD LICENSING COMPANY LLC	No
TMK 19–00448	5/18/2022	5/28/2032	BETTER PRICE TOBACCO & DESIGN	Top Tobacco, LP LIMITED	No
TMK 13–00716	5/19/2022	11/11/2032	WONG TO YICK (Chinese Characters)	WONG TO YICK WOOD LOCK OINTMENT	No
TMK 07–00873	5/24/2022	6/5/2032	ON	Semiconductor Components Industries, L.L.C.	No
TMK 18–00432	5/26/2022	6/13/2032	PROTAC	Streamlight, Inc.	No
TMK 19–01150	6/1/2022	5/1/2032	LEVI STRAUSS & CO S.F.CAL & DESIGN	LEVI STRAUSS & CO.	No
TMK 16–00928	6/27/2022	6/5/2032	MAGNUM	Magnum Magnetics Corporation	No
TMK 22–00683	7/12/2022	7/26/2032	TN LAB SUPPLY	TN LAB SUPPLY, LLC	No
TMK 22–00688	7/13/2022	2/16/2026	MR. HEATER	Enerco Group, Inc.	No
TMK 22–00599	7/29/2022	6/17/2025	AVENT (STYLIZED)	Koninklijke Philips N.V. NETHERLANDS	No
TMK 22–00596	7/29/2022	2/28/2028	AVENT & DESIGN	Koninklijke Philips NETHERLANDS	No
TMK 22–00591	7/29/2022	11/4/2030	HEATSTAR	Enerco Group, Inc.	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 22–00593	7/29/2022	8/19/2030	DESIGN OF HEATER	Enerco Group, Inc.	No
TMK 22–00600	7/29/2022	12/13/2026	AVENT (STYLIZED)	Koninklijke Philips N.V. NETHERLANDS	No
TMK 22–00602	7/29/2022	2/5/2033	PORTABLE BUDDY	ENERCO GROUP INC. GERMANY	No
TMK 22–00601	7/29/2022	7/26/2026	BIG BUDDY	Enerco Group, Inc.	No
TMK 16–00497	7/29/2022	6/6/2032	RAPTOR	Ford Motor Company	No
TMK 18–00843	7/29/2022	5/15/2032	MOTORCRAFT	FORD MOTOR COMPANY CORPORATION	No
TMK 22–00603	7/29/2022	6/9/2030	LITTLE BUDDY	Enerco Group, Inc.	No
TMK 22–00609	7/29/2022	5/5/2032	EU YAN SANG & DESIGN	Eu Yan Sang International Ltd	No
TMK 15–00782	7/29/2022	4/24/2032	Delta Logo	Reebok International UNITED KINGDOM	No
TMK 06–00865	7/29/2022	4/7/2032	DD Design	DOLBY LABORATORIES LICENSING CORPORATION	No
TMK 03–00732	7/29/2022	6/12/2031	SILVER	NEW PCH LLC	No
TMK 22–00598	7/29/2022	12/16/2026	AVENT	Koninklijke Philips N.V. NETHERLAND	No
TMK 22–00597	7/29/2022	11/26/2024	SONICARE & DESIGN	Koninklijke Philips N.V. High Tech Campus NETHERLANDS	No
TMK 22–00595	7/29/2022	9/26/2028	DIAMONDCLEAN	Koninklijke Philips N.V. Philips Intellectual Property & Standard	No
TMK 22–00592	8/1/2022	3/10/2023	FEELDOE	EROGENICS, INC.	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 22–00604	8/1/2022	1/11/2032	MALIBU Bottle Design	THE ABSOLUT COMPANY AKTIEBOLAG	No
TMK 22–00610	8/1/2022	6/25/2028	DESIGN OF MAGNET	Microsemi Corporation	No
TMK 22–00594	8/2/2022	10/26/2032	FRANCISCO OROZCO CONSULTANT (STYLIZED)	Orozco, Francisco	No
TMK 22–00605	8/2/2022	11/3/2032	Jelly Belly & Design	JELLY BELLY CANDY COMPANY	No
TMK 22–00631	8/3/2022	7/12/2026	Face Design	M&M; Ventures CYPRUS	No
TMK 22–00629	8/3/2022	7/12/2026	Human Face Design (STYLIZED)	M&M; Ventures (2014) Limited	No
TMK 22–00611	8/3/2022	3/13/2027	STUART WEITZMAN	Stuart Weitzman IP, LLC	No
TMK 22–00607	8/3/2022	9/25/2029	ENSURE	Abbott Laboratories	No
TMK 22–00606	8/3/2022	1/18/2029	ALIMENTUM	ABBOTT LABORATORIES	No
TMK 22–00608	8/3/2022	5/12/2032	Chevrolet Emblem	General Motors Corporation CORPORATION DELAWARE 300	No
COP 22–00038	8/3/2022	8/3/2042	WW LEGENDS Logo	WORLD WRESTLING ENTERTAINMENT, INC. Address: 1241 East Main Street, Stamford, CT, 06902, United States.	No
TMK 22–00703	8/3/2022	6/5/2032	Corvette C4 Emblem	GENERAL MOTORS LLC	No
TMK 22–00612	8/3/2022	1/26/2033	ZIPPO & Design	ZIPPMARK, INC.	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
COP 22–00037	8/3/2022	9/8/2031	ECW EXTREME CHAMPIONSHIP WRESTLING Logo.	WORLD WRESTLING ENTERTAINMENT, INC	No
TMK 22–00628	8/4/2022	9/14/2026	BATH & BODY WORKS	Bath & Body Works Brand Management, Inc.	No
TMK 22–00625	8/4/2022	8/2/2027	DURITIUM	Shot Stop Ballistics, LLC	No
TMK 22–00614	8/4/2022	3/30/2025	BATH & BODY WORKS	Bath & Body Works Brand Management, Inc.	No
TMK 22–00615	8/4/2022	5/5/2032	KATE SPADE NEW YORK	Kate Spade, LLC	No
TMK 22–00623	8/4/2022	10/19/2029	WHITE BARN	Bath & Body Works Brand Management, Inc.	No
TMK 22–00618	8/5/2022	9/28/2032	TRUTH BOTANICALS	Truth Botanicals LLC	No
TMK 22–00616	8/5/2022	7/28/2025	TAMPAX (STYLIZED)	Tambrands Inc.	No
TMK 22–00626	8/5/2022	11/2/2026	CONFIGURATION OF PORTABLE BUDDY HEATER	Enerco Group, Inc.	No
TMK 22–00620	8/5/2022	2/2/2031	TESTICUZZI	TESTIES LLC	No
TMK 22–00621	8/5/2022	12/22/2030	BUDDY FLEX	Enerco Group, Inc.	No
TMK 22–00627	8/5/2022	7/19/2029	OLD SPICE	Shulton, Inc.	No
TMK 22–00619	8/5/2022	3/14/2032	CLASSIC JIGGA	John Edward Epperson III	No
COP 22–00039	8/5/2022	8/5/2042	Mario Party Superstars	Nintendo of America Inc.	No

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TMK 22–00613	8/5/2022	8/12/2029	BATH & BODY WORKS	Bath & Body Works Brand Management, Inc.	No
TMK 22–00639	8/5/2022	8/11/2028	CASCADE	PROCTER & GAMBLE COMPANY	No
TMK 22–00638	8/5/2022	8/27/2028	IVORY	PROCTER & GAMBLE COMPANY	No
COP 22–00040	8/5/2022	8/5/2042	WarioWare: Get It Together!	Nintendo of America Inc.	No
TMK 22–00624	8/5/2022	9/25/2029	REFOAM	Plastilite Corporation	No
TMK 22–00633	8/5/2022	4/18/2031	WALLFLOWERS	Bath & Body Works Brand Management, Inc.	No
TMK 22–00634	8/5/2022	9/2/2029	INSTANT THIGH LIFT	LaRosa, Penilopee L.	No
TMK 22–00622	8/5/2022	12/24/2029	SKINNIES	LaRosa, Penilopee L.	No
TMK 22–00617	8/5/2022	9/21/2032	KHEE (STYLIZED)	Khee, LLC	No
TMK 22–00637	8/8/2022	10/14/2031	FS (STYLIZED)	Federal Signal Corporation	No
TMK 22–00630	8/8/2022	8/14/2029	TRUVAC	VACTOR MANUFACTURING, LLC	No
TMK 22–00632	8/8/2022	5/21/2027	VACTOR	VACTOR MANUFACTURING, LLC	No
TMK 22–00635	8/9/2022	4/7/2026	ELGIN (STYLIZED)	ELGIN SWEEPER COMPANY	No
TMK 22–00636	8/9/2022	3/29/2032	JETSTREAM & DESIGN	Jetstream of Houston, Inc.	No
TMK 22–00644	8/9/2022	2/8/2026	NANIT	Udisense Inc.	No
TMK 22–00641	8/9/2022	4/14/2030	GINGHAM	Bath & Body Works Brand Management, Inc.	No
TMK 22–00640	8/9/2022	3/28/2032	DECODING RELATIONSHIPS	Decoding Relationships, LLC	No

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TMK 22–00645	8/9/2022	6/29/2026	MAHOGANY TEAKWOOD	Bath & Body Works Brand Management, Inc.	No
TMK 22–00642	8/9/2022	3/17/2029	Triangle P	Dr. Ing. h.c. GERMANY	No
TMK 22–00647	8/9/2022	8/15/2032	BING	Inspiration Beverage Company, LLC	No
TMK 22–00649	8/9/2022	12/12/2030	SPREAD LOVE NOT GERMS	BATH & BODY WORKS BRAND MANAGEMENT, INC.	No
TMK 22–00651	8/9/2022	3/15/2031	P & DESIGN	DR. ING. H.C.F. PORSCHE GERMANY	No
TMK 22–00643	8/9/2022	7/10/2028	GINGHAM	Bath & Body Works Brand Management, Inc.	No
TMK 22–00646	8/9/2022	8/2/2029	POCKETBAC	Bath & Body Works Brand Management, Inc.	No
TMK 22–00648	8/9/2022	7/3/2031	WALLFLOWERS	BATH & BODY WORKS, INC.	No
TMK 03–00381	8/10/2022	10/6/2032	TAYLOR MADE	TAYLOR MADE GOLF COMPANY, INC.	No
TMK 22–00650	8/10/2022	10/10/2024	GUZZLER	Guzzler Manufacturing, Inc.	No
TMK 22–00656	8/11/2022	2/20/2029	HILLSBURG	Tempire Group LLC	No
TMK 22–00652	8/11/2022	7/23/2029	CHAMPAGNE TOAST	Bath & Body Works Brand Management, Inc.	No
TMK 22–00653	8/11/2022	9/7/2026	CHAMPAGNE TOAST	Bath & Body Works Brand Management, Inc.	No
TMK 22–00654	8/11/2022	9/21/2032	AEGINA SKINCARE	Doctor Molecules, LLC	No

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TMK 22–00655	8/11/2022	6/12/2029	DANDANAH	Tempire Group LLC	No
TMK 22–00694	8/12/2022	3/18/2030	ZIG ZAG	REPUBLIC TECHNOLOGIES INTERNATIONAL S.A.S. FRANCE	No
TMK 22–00659	8/12/2022	8/24/2032	AQUABEADS	ClearH2O, Inc.	No
TMK 08–00520	8/12/2022	10/1/2032	SILLY PUTTY (STYLIZED)	Crayola Properties, Inc.	No
TMK 22–00660	8/12/2022	4/9/2030	GAP (STLYIZED)	Gap Inc.	No
TMK 13–00945	8/12/2022	5/29/2032	SILFLEX	American Ceramic Technology Corporation	No
TMK 21–00054	8/12/2022	7/10/2032	CUMMINS	Cummins Inc.	No
TMK 20–00524	8/15/2022	5/28/2032	ODOR-EATERS	Blistex Inc.	No
TMK 22–00661	8/15/2022	7/28/2030	EVERYDROP & DESIGN	Whirlpool Properties, Inc.	No
TMK 12–00842	8/15/2022	10/31/2032	MOMBACHO	Tropical Tobacco, Inc.	No
TMK 22–00664	8/16/2022	11/20/2023	MULTI-CART	Dahl, Gary-Michael	No
TMK 22–00666	8/16/2022	2/3/2030	STRUKTURE	ACE PRODUCTS ENTERPRISES, INC.	No
TMK 22–00668	8/16/2022	8/15/2032	PIG HOG	Ace Products Enterprises Inc.	No
TMK 22–00667	8/16/2022	5/28/2032	SANUK	DECKERS OUTDOOR CORPORATION	No
TMK 22–00662	8/16/2022	11/16/2032	KST (STYLIZED)	KST DIGITAL TECHNOLOGY LIMITED HONG KONG	No
TMK 22–00665	8/16/2022	5/17/2029	ROCK N' ROLLER	Dahl, Gary Michael	No
TMK 22–00663	8/16/2022	6/28/2029	REUNION BLUES	ACE PRODUCTS ENTERPRISES, INC.	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 22–00669	8/17/2022	5/13/2028	GEORGIA PEACH WORLD & DESIGN	Eulonia Country Store, LLC	No
TMK 22–00670	8/17/2022	5/13/2028	GEORGIA PEACH WORLD	Eulonia Country Store, LLC	No
TMK 04–00586	8/17/2022	8/21/2032	ORLANDO MAGIC & DESIGN	ORLANDO MAGIC, LTD.	No
TMK 22–00684	8/19/2022	11/6/2029	CHROMA	1.4G HOLDINGS, LLC	No
TMK 22–00672	8/19/2022	4/24/2032	JEEP	FCA US LLC	No
TMK 22–00676	8/19/2022	2/26/2031	MOPAR (Stylized)	FCA US LLC	No
TMK 22–00673	8/19/2022	11/7/2031	R/T (Stylized)	FCA US LLC	No
TMK 22–00674	8/19/2022	5/9/2032	DODGE	FCA US LLC	No
TMK 22–00675	8/19/2022	1/3/2031	UL & DESIGN	Ul LLC.	Yes
TMK 22–00671	8/19/2022	7/26/2032	KHEE	Khee, LLC	No
TMK 17–00060	8/19/2022	12/20/2031	AMERICAN QUALITY MAVERICK CIGARETTES & DESIGN	ITG BRANDS, LLC	No
TMK 22–00685	8/22/2022	3/28/2032	SMM	Kollmorgen Corporation	No
TMK 22–00686	8/22/2022	3/28/2032	SAFEMOTION	Kollmorgen Corporation	No
TMK 22–00677	8/22/2022	8/15/2030	RUMMIKUB	M&M; VENTURES	No
TMK 22–00678	8/22/2022	6/10/2032	DESIGNER IMPOSTERS	PARFUMS DE COEUR, LTD.	No
TMK 22–00679	8/22/2022	8/21/2032	BOD MAN	Parfums de Coeur, Ltd.	No
TMK 22–00681	8/23/2022	2/4/2025	BON O BON & DESIGN	Arcor S.A.I.C. ARGENTINA	No
TMK 22–00680	8/23/2022	4/10/2026	TOUGH BUDDY	Enerco Group, Inc.	No
TMK 22–00687	8/23/2022	9/25/2029	CAPER	CUCUMBER MERGER SUB II LLC	No

CBP IPR RECORDATION — AUGUST 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 03–00382	8/23/2022	2/19/2033	ROCKWOOD & DESIGN	ROCKWOOD PRODUCTS, INC.	No
TMK 22–00690	8/23/2022	9/9/2029	C.O. BIGELOW	Bigelow Merchandising, LLC	No
TMK 22–00682	8/23/2022	11/23/2032	HS RESCUE	Microtech Knives, Inc.	No
TMK 22–00695	8/24/2022	11/16/2025	ZIG ZAG (STYLIZED)	REPUBLIC TECHNOLOGIES INTERNATIONAL S.A.S.	No
TMK 22–00692	8/24/2022	9/30/2028	ZIG ZAG BEARDED MAN HOLDING CIGARETTE DESIGN	REPUBLIC TECHNOLOGIES INTERNATIONAL S.A.S.	No
TMK 22–00691	8/24/2022	12/28/2024	ZIG ZAG BEARDED SMOKING MAN DESIGN	REPUBLIC TECHNOLOGIES INTERNATIONAL S.A.S.	No
TMK 22–00693	8/24/2022	9/30/2028	ZIG ZAG BEARDED MAN HOLDING CIGARETTE DESIGN	REPUBLIC TECHNOLOGIES INTERNATIONAL S.A.S.	No
TMK 22–00689	8/24/2022	3/29/2030	MR. HEATER	Enerco Group, Inc.	No
TMK 22–00700	8/24/2022	12/20/2026	TPOXX	SIGA Technologies, Inc.	No
TMK 22–00658	8/25/2022	8/1/2032	DURADRAIN	Bendix Commercial Vehicle Systems LLC	No
TMK 22–00702	8/25/2022	5/24/2024	LITTLE GIANT	LITTLE GIANT LADDER SYSTEMS, LLC	No
TMK 22–00705	8/25/2022	11/28/2031	LITTLE GIANT	LITTLE GIANT LADDER SYSTEMS, LLC	No
TMK 22–00697	8/25/2022	8/24/2032	SGS & Design	SGS Société Générale de Surveillance SA	No
TMK 22–00704	8/25/2022	6/5/2032	Buick Emblem	General Motors Corporation	No

CBP IPR RECORDATION — AUGUST 2022

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 22–00701	8/25/2022	7/10/2032	TOAS-TITE	TOAS-TITE, LLC	No
TMK 07–00923	8/25/2022	9/18/2032	ON and Design	Semiconductor Components Industries, L.L.C.	No
TMK 22–00698	8/25/2022	11/21/2028	Configuration of Pen	Melissa & Doug, LLC	No
TMK 22–00699	8/26/2022	7/4/2027	DYSON	Dyson Technology UNITED KINGDOM	No
TMK 22–00706	8/26/2022	5/5/2029	AIRWRAP	Dyson Technology UNITED KINGDOM	No
TMK 22–00696	8/26/2022	7/7/2030	DESIGN OF LIPSTICK TUBE	CHURCH & DWIGHT CO., INC.	No
TMK 13–00473	8/26/2022	2/20/2033	POLYWOOD	Poly-Wood, Inc.	No
TMK 21–00040	8/26/2022	12/4/2032	C CUMMINS (STYLIZED)	CUMMINS INC.	No
TMK 22–00707	8/29/2022	3/5/2030	BOSCH	ROBERT BOSCH GESELLSCHAFT GERMANY	No
TMK 17–00028	7/23/2032	7/23/2032	UPSHER-SMITH	UPSHER-SMITH LABORATORIES, LLC	No

DEATH GRATUITY INFORMATION SHEET

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

ACTION: 60-Day notice and request for comments; new 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 November 7, 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 1651–0NEW 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 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: Death Gratuity Information Sheet.

OMB Number: 1651–0NEW.

Form Number: N/A.

Current Actions: New collection of information.

Type of Review: New collection of information.

Affected Public: Individuals/ Households.

Abstract: When the U.S. Customs and Border Protection (CBP) Commissioner has made the determination that the death of a CBP employee is to be classified as a line-of-duty death (LODD), a Death Gratuity (DG) may become payable to the personal representative of the deceased. After the LODD determination is made, CBP will send the potential personal representative of the deceased a DG Information Sheet. This information sheet aids the involved CBP offices in establishing who the personal representative of the deceased is, approving DG, and subsequently, getting the payment paid to the correct person after CBP Commissioner approval.

Potential personal representatives are provided by/from the deceased CBP employee, through their executed beneficiary forms. However, if there are no beneficiary forms on file, next of kin will be identified via the emergency contact information listed with the agency for that employee in WebTele. Potential personal representatives will be required to provide the following data elements on the DG information sheet:

- Name of Deceased CBP Employee
- Date of Death
- Location of Death
- Name of Claimant/personal representative
- Address of Claimant/personal representative (for payment)

- Phone Number and Email Address of Claimant/personal representative
- Relationship to Employee (*i.e.,* spouse, child, parent, etc.)
- If spouse, date of marriage
- If child or parent, date of birth
- First page of will, if applicable
- Contact information for Executor of Estate, if applicable
- Copy of Marriage Certificate, if applicable
- Copy of Letters of Administration, if applicable

CBP is authorized to collect the information requested on this form pursuant to Public Law 104–208 which allows the agency to pay a death gratuity in some situations of LODD. 110 Stat. 3009–368, Sept. 30, 1996; 5 U.S.C. 8133 note. In order to make this payment, CBP must first identify and obtain the information from the personal representative so it can be known where and to whom the payment should be sent. CBP Retirement and Benefits Advisory Services (RABAS) has the authority designated by the Office of Personnel Management (OPM) to provide retirement, benefits, and survivor counselling and processing. This authority is outlined in detail in the Civil Service Retirement System/Federal Employee Retirement System (CSRS/FERS) Handbook, Federal Employees Group Life Insurance (FEGLI) Handbook, and Federal Employee Health Benefits (FEHB) Handbook.

Type of Information Collection: Death Gratuity Information Sheet.

Estimated Number of Respondents: 33.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 33.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 8.25.

Dated: September 1, 2022.

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

[Published in the Federal Register, September 8, 2022 (85 FR 55016)]

NOTICE OF ISSUANCE OF FINAL DETERMINATION CONCERNING CERTAIN SCORE®7T TABLETS

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

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of certain SCORE®7T tablets. Based upon the facts presented, CBP has concluded that the country of origin of the SCORE®7T tablets in question is Taiwan for purposes of U.S. Government procurement.

DATES: The final determination was issued on September 1, 2022. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination no later than October 11, 2022.

FOR FURTHER INFORMATION CONTACT: Albena Peters, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325–0321.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) issued a final determination concerning the country of origin of certain SCORE®7T tablets for purposes of Title III of the Trade Agreements Act of 1979. This final determination, HQ H325833, was issued at the request of Advanced Technologies Group, LLC (ATG), under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP has concluded that, based upon the facts presented, the country of origin of the tablets is Taiwan for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that a notice of final determination shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: September 1, 2022.

ALICE A. KIPEL,
Executive Director,
Regulations and Rulings, Office of Trade.

HQ H325833
September 1, 2022
OT:RR:CTF:VS H325833 AP
Category: Origin

CHARLES WEISS, PARTNER,
BRYAN CAVE LEIGHTON PAISNER LLP,
211 NORTH BROADWAY SUITE 3600,
ST. LOUIS, MO 63102–2750

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. 2511); Subpart B, Part 177, CBP Regulations; Country of Origin of SCORE®7T tablets

DEAR MR. WEISS:

This is in response to your June 17, 2022 request, on behalf of Advanced Technologies Group, LLC ("ATG"), for a final determination[1] concerning the country of origin of SCORE®7T tablets used in U.S. correctional institutions. This request is being sought because ATG wants to confirm eligibility of the merchandise for U.S. Government procurement purposes pursuant to Title III of the Trade Agreements Act of 1979 ("TAA"), as amended (19 U.S.C. 2511 *et seq.*), and subpart B of part 177, U.S. Customs and Border Protection ("CBP") Regulations (19 CFR 177.21, *et seq.*). ATG is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and 177.23(a), and is therefore entitled to request this final determination. On August 24, 2022, we held a meeting with you and your client representatives.

FACTS

The SCORE®7T tablet at issue is a custom-designed tablet assembled in China and shipped to the United States. The chipset powering the tablet is manufactured in Taiwan and represents approximately 60 percent of the cost of the tablet's hardware. The circuit and component layout for the motherboard is also made in Taiwan. The tablet uses a system on a chip ("SOC") design. The SOC is an integrated circuit that includes the central processing unit, memory, input/output logic, secondary storage, graphics processing unit, radio frequency signal processing functions, and communication controller on a single microchip. You explain that the chipset does all computing on the tablet. The hardware tablet is assembled in China. The assembly process involves combining the components manufactured in Taiwan with a screen to make the finished tablet. You describe the assembly operations in China as "simple and repetitive" and requiring "little worker skill." Upon importation into the United States, the tablet does not have the manufacturer's generic Android firmware or other firmware installed.

ATG designs, develops, writes, and installs the tablet's operating system ("OS"), known as SCORE® firmware, in the United States at "a substantial effort and cost to ATG." ATG's firmware is an ATG proprietary custom-built

[1] TG previously submitted a request for an advisory ruling dated March 7, 2022. Under the facts presented in the advisory ruling request, the imported tablets arrived with installed manufacturer's generic Android firmware, which ATG states is no longer the case. On April 20, 2022, we issued advisory ruling HQ H324386 concluding that the removal of the installed manufacturer's firmware from the imported functioning tablet and the installation of the U.S.-designed and developed firmware did not constitute a substantial transformation. The merchandise was a functioning tablet upon importation and remained a functioning tablet, just with limited and specialized functions.

version of the Android system, which "reflects over 20,000 hours of software development by ATG personnel." ATG uses Google-provided (not manufacturer's) Android OS as a starting point to design and develop its own firmware. ATG's firmware contains security protections that control the tablet's functionality, communication capabilities, applications allowed to be installed or run, and enforces rules that users in correctional institutions must follow. ATG removes all Android functions, features, and drivers that are not needed at correctional institutions and reprograms the remaining Android functions and applications to impose new security rules and adds new security features.

Once ATG's firmware is installed, the tablet cannot run regular Android applications. The firmware transforms the tablet into a highly secure tablet specifically designed to meet Federal Bureau of Prisons security requirements. When the tablet connects to ATG's network implemented in correctional institutions, ATG's SCORE® servers automatically update the firmware to the most current version. The firmware only allows ATG-signed applications to run. You state that only select ATG personnel can modify or remove ATG's firmware.

ISSUE

What is the country of origin of the subject tablet for purposes of U.S. Government procurement?

LAW AND ANALYSIS

CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government, pursuant to subpart B of part 177, 19 CFR 177.21–177.31, which implements Title III of the TAA, as amended (19 U.S.C. 2511–2518).

CBP's authority to issue advisory rulings and final determinations is set forth in 19 U.S.C. 2515(b)(1), which states:

> For the purposes of this subchapter, the Secretary of the Treasury shall provide for the prompt issuance of advisory rulings and final determinations on whether, under section 2518(4)(B) of this title, an article is or would be a product of a foreign country or instrumentality designated pursuant to section 2511(b) of this title.

The rule of origin set forth under 19 U.S.C. 2518(4)(B) states:

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of part 177 consistent with the Federal Procurement Regulation ("FAR"). *See* 19 CFR 177.21. In this regard, CBP recognizes that the FAR restricts the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 CFR 25.403(c)(1).

The FAR, 48 CFR 25.003, defines "U.S.-made end product" as:

> . . . an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

Section 25.003 defines "designated country end product" as:

> a WTO GPA [World Trade Organization Government Procurement Agreement] country end product, an FTA [Free Trade Agreement] country end product, a least developed country end product, or a Caribbean Basin country end product.

Section 25.003 defines "WTO GPA country end product" as an article that:

> (1) Is wholly the growth, product, or manufacture of a WTO GPA country; or
>
> (2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Taiwan is a WTO GPA country. China is not.

ATG asserts that the subject tablet is substantially transformed in the United States because its firmware is entirely developed, written and installed in the United States, and without ATG's firmware the tablet is nonfunctional. ATG maintains that the use of the SCORE®7T tablet "is solely dictated by the firmware and it otherwise has no use."

The issue of substantial transformation is a "mixed question of technology and customs law, mostly the latter." *Texas Instruments, Inc. v. United States,* 681 F.2d 778, 783 (CCPA 1982). The substantial transformation test is whether an article emerges from a process with a new name, character, or use, different from that possessed by the article prior to processing. *See Texas Instruments,* 681 F.2d at 778. CBP considers the totality of the circumstances and makes substantial transformation determinations on a case-by-case basis. The country of origin of the item's components, the extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, or use are primary considerations. *See* Headquarters Ruling Letter ("HQ") H311606, dated June 16, 2021. No one factor is determinative.

A new and different article of commerce is an article that has undergone a change in commercial designation or identity, fundamental character, or commercial use. A determinative issue is the extent of the operations performed and whether the materials lose their identity and become an integral part of the new article. *See Nat'l Hand Tool Corp. v. United States,* 16 CIT 308 (1992), *aff'd,* 989 F.2d 1201 (Fed. Cir. 1993). "For courts to find a change in character, there often needs to be a substantial alteration in the characteristics of the article or components." *Energizer Battery, Inc. v. United States,* 190 F. Supp. 3d 1308, 1318 (Ct. Int'l Trade 2016) (citations omitted). Courts

have looked to "the essence" of the completed article "to determine whether it has undergone a change in character as a result of post-importation processing." *Id.* (citing *Uniroyal, Inc. v. United States,* 542 F. Supp. 1026 (Ct. Int'l Trade 1982), *aff'd,* 702 F.2d 1022 (Fed. Cir. 1983)). In *Uniroyal,* 542 F. Supp. at 1030, the U.S. Court of International Trade ("CIT") held that "it would be misleading to allow the public to believe that a shoe is made in the United States when the entire upper—which is the very essence of the completed shoe—is made in Indonesia and the only step in the manufacturing process performed in the United States is the attachment of an outsole."

In *Data General Corp. v. United States,* 4 CIT 182 (1982), the programming in the United States of a read-only memory chip ("PROM") fabricated in a foreign country for use in a computer circuit board assembly substantially transformed the PROM into a U.S. article. After the programming, the PROM was exported for incorporation into a finished circuit board that was then imported into the United States. The programming bestowed upon each circuit its electronic function. The court concluded that the programming altered the character of the PROM and that altering the non-functioning circuitry comprising the PROM through technological expertise in order to produce a functioning read only memory device, possessing a desired distinctive circuit pattern, was no less a "substantial transformation" than the manual interconnection of transistors, resistors and diodes upon a circuit board creating a similar pattern. The programming established the "essence" of the PROM, its pattern of interconnections, or stored memory.

CBP has issued a number of rulings and final determinations regarding the origin of tablets and smartphones. In HQ H322417, dated Feb. 23, 2022, CBP concluded that a smartwatch originated from Taiwan for purposes of Section 301 trade remedies because Taiwan was the country where the two printed circuit board assemblies ("PCBAs"), which were the "essence" of the smartwatch, were manufactured by means of surface-mount technology ("SMT"). The final assembly and firmware upload in China did not result in another substantial transformation in China because it was not a complex or time-intensive process compared to the SMT operations in Taiwan and did not substantially transform the PCBAs. The firmware for the smartwatch was developed in third countries outside of China, including in the United States, and in some cases the firmware uploaded in China was an intermediate OS and the end user in the United States would need to download the final OS after importation into the United States. CBP's reasoning was that the PCBAs allowed the device to process information, communicate wirelessly, utilize global positioning system ("GPS") functionality, play music and other audio, send, and receive text and email messages, and gather information on a user's fitness. In sum, the functionality of the smartwatch was dependent on the collective capabilities of the PCBA.

In HQ H284834, dated Feb. 21, 2018, a tablet and a smartphone were produced in South Korea and China, respectively. Both were intended for purchase by the Veterans Health Administration for use by patients at home. In the United States, the tablet and smartphone went through a number of software uninstallations and installations. The generic Android functions originally included on the devices, such as alarms, calculators and text messaging, were removed. Other functions, such as Bluetooth capability, were modified and additional software was added. Mobile application software developed entirely in the United States was installed to enable patients to provide vital sign data by connecting to the peripheral devices via Blue-

tooth. When the preprogrammed tablets and smartphones were imported, they could perform their standard functions of an Android tablet or smartphone, and could be used for their intended purpose, and their name, character, and use remained the same. They were not substantially transformed in the United States by the downloading of the proprietary software, which allowed them to function with the Department of Veterans Affairs healthcare network. The country of origin of the imported tablets and smartphones for purposes of U.S. Government procurement remained the country where they were originally manufactured. *See also* HQ H284617, dated Feb. 21, 2018 (concluding that the downloading of proprietary software after importation into the United States, which allowed tablets preprogrammed with a generic program to function within the Department of Veterans Affairs healthcare network, did not substantially transform the tablets; after the software was downloaded, the country of origin of the imported tablets for purposes of U.S. Government procurement remained the country where they were manufactured because their name, character, and use remained the same).

In HQ H284523, dated Aug. 22, 2017, software was installed onto tablets in the United States to limit the original capacity of the imported tablets for the purpose of facilitating the reception, collection and transmission of a patient's medical data to Department of Veterans Affairs clinicians for their review. The general functionality of the tablet was removed and replaced so that it was easier for patients to use the device and access the system, and to better protect the security of the patient's medical data. The loading of specialized software onto the tablet and the disabling of the pre-programmed general applications were insufficient to create a new and different article of commerce, since all of the functionality of the original computer was retained. The imported tablets were not substantially transformed in the United States by the downloading of the proprietary software, which allowed them to function with the Department of Veterans Affairs healthcare network. After the software was downloaded, the country of origin of the tablets for purposes of U.S. Government procurement remained the country where they were originally manufactured.

In HQ H261623, dated Nov. 22, 2016, for purposes of U.S. Government procurement, in the first scenario, the country of origin of computer notebook hard disk drives ("HDDs") was the country where the majority of the manufacturing operations occurred and where the firmware was written and installed onto the HDDs. In the second scenario, where the firmware was written in a different country from where it was downloaded onto the HDDs, for purposes of U.S. Government procurement and country of origin marking, the country of origin of the notebook was the country where the last substantial transformation took place.

The subject tablets are distinguishable from the PROM in *Data General Corp., supra.,* and from the HDDs in H261623. The PROM has no function or use until it is programmed. The programming establishes the pattern of interconnections within the PROM, which is its "essence." After the PROM is programmed, it is no longer a PROM. Furthermore, the programming transforms the HDDs into digital storage devices that store or retrieve data. The tablet, on the other hand, remains a completed notebook after the OS is installed. The tablet has an integrated circuit that includes the central processing unit, memory, input/output logic, secondary storage, graphics processing unit, radio frequency signal processing functions, and communication controller. The chipset powering the tablet and the circuit and component

layout for the motherboard manufactured in Taiwan determine the tablet's functionality. The chipset enables the central processing unit to communicate with the other components of the tablet. You advise that the operations in China are "simple" and involve attaching all the parts together into the final tablet and adding a screen. Thus, consistent with our previous rulings and decisions above, we find that the last substantial transformation takes place in Taiwan where the chipset and the circuit and component layout for the motherboard are manufactured. After the final assembly in China, the tablet will undergo a firmware upload in the United States. The imported tablet already has the system requirements, which make it possible to install the firmware. The installation of the U.S.-developed firmware in the United States does not transform the Taiwan-manufactured tablet into another product with a new name, character or use. The country of origin of the tablet remains the country where the last substantial transformation occurred, which is Taiwan.

Therefore, the SCORE®7T tablets programmed with ATG's U.S.-developed firmware in the United States would be products of a foreign country or instrumentality designated pursuant to 19 U.S.C. 2511(b)(1).

HOLDING

Based on the facts and analysis set forth above, the country of origin of the instant SCORE®7T tablets will be Taiwan.

Notice of this final determination will be given in the **Federal Register**, as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 CFR 177.30, any party-at-interest may, within 30 days of publication of the **Federal Register** Notice referenced above, seek judicial review of this final determination before the U.S. Court of International Trade.

Sincerely,

ALICE A. KIPEL,
Executive Director,
Regulations and Rulings Office of Trade.

[Published in the Federal Register, September 8, 2022 (85 FR 55013)]

U.S. Court of Appeals for the Federal Circuit

ARP MATERIALS, INC., Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee

Appeal No. 2021–2176

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

THE HARRISON STEEL CASTINGS COMPANY, Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee

Appeal No. 2021–2177

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

Decided: September 6, 2022

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

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

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

HUGHES, *Circuit Judge*.

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

I

A

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

"[T]o mitigate the potential harm of these tariffs on U.S. companies and workers," USTR established, "for the first and only time," an opportunity for domestic stakeholders "to request to exclude particular products from the additional tariffs." *Id.* at 1, 6; *see also* 83 Fed. Reg. 40,823, 40,824 (Aug. 16, 2018) (for List 2); 84 Fed. Reg. 20,459, 20,460 (May 9, 2019) (for List 3). USTR informed importers that any exclusion granted would "apply to the particular product covered by the exclusion" rather than the "particular producer[] or exporter[]" who requested the exclusion. *ARP Materials, Inc. v. United States*, 520 F. Supp. 3d 1341, 1349 (Ct. Int'l Trade 2021) (*Decision*). These exclusions were thus "product-specific," meaning that "the grant of an exclusion in response to one importer's application could apply to like products imported by other entities." *Id.* ; *see also* 84 Fed. Reg. 37,381, 37,381 (July 31, 2019) ("[T]he exclusions are available for any product that meets the description in the Annex, regardless of whether the importer filed an exclusion request."). These exclusions were applied retroactively to the effective date of each tariff—August 23, 2018 for List 2[1] and September 24, 2018 for List 3.[2] *See* 84 Fed. Reg. at 37,381; 84 Fed. Reg. 38,717, 38,717 (Aug. 7, 2019).

USTR declared that Customs "w[ould] issue instructions on entry guidance and implementation," and it instructed importers to reach out to Customs directly. 84 Fed. Reg. at 37,381. It further provided

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

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

contact information for importers to do so—for answers to any specific questions importers might have about "[C]ustoms classification or implementation of the product exclusions." *Id.* ; *see also Decision* at 1349 ("Just as . . . USTR's initial imposition of [§] 301 duties was not self-executing as to any entry of goods and instead depended upon Customs' classification of the entry as subject to such duties, . . . USTR's retroactive exclusions were not self-executing as to the eligible goods.").

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

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

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

> As the IOR, *if you* have a pending product exclusion request with USTR, or *are importing a product that is covered by such a pending exclusion request, and you are concerned that a corresponding entry may liquidate before USTR renders a decision on the exclusion request, you can*:
>
> (1) *request an extension of the liquidation deadline, and file a PSC no later than 15 days before the extended date of liquidation*; and/or
>
> (2) file a protest within the 180 day period following liquidation. When filing a protest, the protestant should identify the pending product exclusion decision from USTR as a basis for the protest. Upon receiving USTR's decision on the product exclusion, the protestant should submit the exclusion information to [Customs], as additional information pursuant to 19 C.F.R. [§] 174.28.
>
> If a protest is filed, [Customs] will postpone making a determination on protests that include a claim identifying a pending product exclusion. Once USTR completes the exclusion process, [i.e., rules on the product exclusion request,] [Customs] will process these protests pursuant to USTR's exclusion determination. That is, [Customs] will refrain from denying or granting a

> party's protest before the importer receives a final determination from USTR regarding its product exclusion request.

Id. (emphases added). Customs reissued substantially similar instructions immediately following each notice of product exclusion that USTR published. *See, e.g.*, U.S. Customs & Border Prot., CSMS No. 39169565, GUIDANCE: Seventh Round of Products Excluded from Section 301 Duties (Tranche 2) (2019) ("To request a refund of [§] 301 duties paid on previous imports of duty-excluded products granted by . . . USTR, importers . . . may protest the liquidation."); U.S. Customs & Border Prot., CSMS No. 42181055, GUIDANCE: Section 301 Tranche 3 - $200B Eleventh Round of Product Exclusions from China (2020) (substantially identical instructions).

B

ARP "made five entries (importations) of merchandise" that Customs had classified under subheading 3901.90.1000 (on List 2) of the Harmonized Tariff Schedule of the United States (HTSUS), "render-[ing] the entries liable for [§] 301 duties," i.e., "subject to [§] 301 tariffs on the dates of entry."[3] *Decision* at 1350. On July 31, 2019, after the five entries were made, USTR granted exclusion requests submitted by other importers that covered the same category of products as ARP's merchandise. 84 Fed. Reg. at 37,382. These exclusions applied retroactively to August 23, 2018—before ARP's entries—and remained in effect through July 31, 2020. On March 2, 2020, seven months after USTR had published its exclusion notice and 199 days following liquidation,[4] ARP protested Customs' assessment of § 301 duties on entries '4968–3 and '5369–3. *Decision* at 1351–52. Customs denied the protest as untimely since ARP had failed to file the protest within 180 days of the entries' liquidation date. *Id.* at 1351; *see also* 19 U.S.C. § 1514(c)(3)(A) ("A protest of a decision, order, or finding described in subsection (a) shall be filed with [Customs] within 180 days after but not before . . . [the] date of liquidation or reliquidation."). On June 27, 2020, ARP timely filed a protest for entry '7552–2. Decision at 1351–52. Since it had filed that protest just 15 days after the entry's liquidation,[5] Customs granted the protest, reclassified the

[3] ARP made its first entry of merchandise, No. F57–4005259–6 (entry '5259–6), on August 30, 2018; its second entry, No. F57–4004968–3 (entry '4968–3), on September 21, 2018; its third entry, No. F57–4005369–3 (entry '5369–3), on September 24, 2018; its fourth entry, No. F57–4005611–8 (entry '5611–8), on September 27, 2018; and its fifth entry, No. F57–4007552–2 (entry '7552–2) on July 17, 2019. *Decision* at 1352.

[4] The liquidation date for entries '4968–3 and '5369–3 was August 16, 2019. *Decision* at 1352.

[5] The liquidation date for entry '7552–2 was June 12, 2020. *Decision* at 1352.

entry, and refunded ARP the § 301 duties it had paid for that entry. *Id.* at 1351. "ARP did not file protests for entries '5259–6 and '5611–8."[6] *Id.*

Harrison made two entries of merchandise—one on September 27, 2018, and the other on October 12, 2018—that Customs classified under HTSUS subheading 8302.30.3060 (on List 3), rendering the entries liable for § 301 duties. On March 26, 2020, USTR "granted exclusion requests submitted by other importers that covered the same category of products as Harrison's." *Id.* at 1352; *see also* 85 Fed. Reg. 17,158, 17,160 (Mar. 26, 2020). These exclusions applied retroactively to September 24, 2018—before Harrison's entries—and remained in effect through August 7, 2020. On March 31, 2020, five days after USTR had published its exclusion notice but more than 180 days after the liquidation dates for the two entries at issue, August 7, 2020. On March 31, 2020, five days after USTR had published its exclusion notice but more than 180 days after the liquidation dates for the two entries at issue, August 7, 2020. On March 31, 2020, five days after USTR had published its exclusion notice but more than 180 days after the liquidation dates for the two entries at issue,[7] "Harrison filed a protest challenging Customs' assessment of [§] 301 duties on these entries *and* two other entries not included in Harrison's complaint." *Decision* at 1353 & n.22. "Customs denied the protest as untimely as to the two entries at issue but granted the protest as to the other two entries." *Id.*

After Customs denied their protests, ARP and Harrison commenced civil actions against the government in the Court of International Trade, both invoking 28 U.S.C. § 1581(i) as the jurisdictional basis for their suits. In "their substantially identical complaints," the importers alleged that the government was "in wrongful possession of" certain § 301 duties they had paid since "USTR ha[d] determined that no such duties apply *ab initio* to the date of implementation of [§] 301 duties on [Lists 2 and 3] of the affected items previously announced by . . . USTR." *Id.* at 1354 (third alteration in original); *see also id.* at 1354 n.24 (explaining that "the two amended complaints are substantively identical aside from references to the plaintiffs' names and a few minor wording differences"). The importers seek to compel refunds for the § 301 duties that USTR had imposed but retroactively rescinded after Customs had liquidated them.

[6] The liquidation date for entry '5259–6 was July 26, 2019. *Decision* at 1352. The liquidation date for entry '5611–8 was August 23, 2019. *Id.*

[7] The liquidation date for the first entry of merchandise, No. 555–0666283–6 (entry '6283–6), was August 23, 2019. *Decision* at 1354. The liquidation date for the second entry of merchandise, No. 555–0666818–9 (entry '6818–9), was September 6, 2019. *Id.*

The government moved to dismiss ARP's and Harrison's actions, and the Court of International Trade granted the motions.[8] The court held that it lacks subject matter jurisdiction under § 1581(i) as to the entries challenged in this appeal. In the court's view, "jurisdiction would have existed here under § 1581(a) had [the importers] timely protested Customs' classification decisions that resulted in their erroneous liability for [§] 301 duties," and failure to timely invoke the importers' available remedy under § 1581(a) did not render the remedy inadequate. *Id.* at 1361. The court pointed out that the importers "had adequate notice of the procedures they were to follow to correct Customs' erroneous classification decisions." *Id.* at 1362. Indeed, the court highlighted, the importers "did follow those procedures to receive refunds as to certain entries." *Id.* They simply and "regrettably dropped the ball" when they failed to timely protest the classification decisions for "the entries remaining at issue here." *Id.* Because a remedy would have been available under § 1581(a), the court determined that it lacked subject matter jurisdiction under the "catch-all" provision, § 1581(i). The court accordingly granted the government's motions to dismiss under Federal Rule of Civil Procedure 12(b)(1).

ARP and Harrison appeal. Because they make the same arguments, we address them together. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

II

We review the Court of International Trade's "decision to grant the government's motions to dismiss for lack of subject matter jurisdiction de novo as a question of law." *Hutchison Quality Furniture, Inc. v. United States*, 827 F.3d 1355, 1359 (Fed. Cir. 2016) (cleaned up).

The Court of International Trade's jurisdiction is governed by 28 U.S.C. § 1581, with each of its subsections "delineat[ing] particular laws over which the Court of International Trade may assert jurisdiction." *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1555 (Fed. Cir. 1988). The two provisions relevant to this appeal are § 1581(a) and (i).

Section 1581(a) grants the Court of International Trade "exclusive jurisdiction [over] any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515]." 28 U.S.C. § 1581(a). "Section 1515 provides for Customs' review and subsequent allowance or denial of protests that are 'filed in accordance with' 19

[8] The Court of International Trade consolidated ARP's and Harrison's actions on September 8, 2020, designating these cases as "test cases" pursuant to United States Court of International Trade Rule 83(e)

U.S.C. § 1514." *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1371 (Fed. Cir. 2002) (quoting 19 U.S.C. § 1515(a)). Section 1514 details the types of Customs decisions "that may be the subject of protests," including "decisions relating to 'the liquidation or reliquidation of an entry.'" *Id.* (quoting 19 U.S.C. § 1514(a)(5)). "[T]he Court of International Trade's authority to hear a claim under [§] 1581(a) depends upon the importer raising the claim in a valid protest filed with Customs within the prescribed [180]-day period, or alternatively, in a protest coming within an exception that excuses a failure to meet the deadline." *Id.*

Section 1581(i) confers jurisdiction over a civil action arising out of any federal law providing for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(1)(B). Though we describe § 1581(i) as a "catch-all" provision, "its scope is strictly limited." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992). "Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 *is or could have been available*, unless the remedy provided under that other subsection would be manifestly inadequate." *Id.* (citation omitted). "This preserves the congressionally mandated procedures and safeguards provided in the other subsections, absent which litigants could ignore the precepts of subsections (a)–(h) and immediately file suit in the Court of International Trade under subsection (i)." *Id.* (internal citations omitted).

An inquiry into § 1581(i) jurisdiction is thus a two-step process. "First, we consider whether jurisdiction under a subsection other than § 1581(i) was available." *Erwin Hymer Grp. N. Am., Inc. v. United States*, 930 F.3d 1370, 1375 (Fed. Cir. 2019). Second, "if jurisdiction was available under a different subsection of § 1581, we [then] examine whether the remedy provided under that subsection is 'manifestly inadequate.'" *Id.*

A

ARP and Harrison challenge the Court of International Trade's decision holding that jurisdiction under § 1581(a) would have been available had the importers "timely protested Customs' classification decisions that resulted in their erroneous liability for [§] 301 duties." *Decision* at 1361. The crux of ARP's and Harrison's arguments is that "the fundamental issues" they raise involve USTR's exclusion decisions, "**not** the purely ministerial involvement of [Customs] in the effectuation of the decisions of . . . USTR under [§] 301." Appellants' Br. 3. So, they contend, they were not required to file protests. *Id.* at 18 (relying on *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1354–55 (Fed. Cir. 2006), "because it among many cases demon-

strates that the challenge of decisions of an agency **other than** [Customs] does not require the filing of a protest"). In the importers' view, Customs' role was ministerial because Customs' "hands were tied by the decisions of . . . USTR, without which [§] 301 duties could not be collected by [Customs]." *Id.* at 22; *see also Indus. Chems., Inc. v. United States*, 941 F.3d 1368, 1371 (Fed. Cir. 2019) ("'Customs must [have] engage[d] in some sort of decision-making process in order for there to be a protestable decision.' This is because Customs must have the 'authority to grant relief in [the] protest action.'" (alterations in original) (citations omitted)).

But "the protest procedure cannot be [so] easily circumvented." *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006); *see Norsk Hydro Can.*, 472 F.3d at 1355 ("[A] party may not expand a court's jurisdiction by creative pleading."). "To prevent usurpation of the protest scheme Congress has crafted, it is of utmost importance that mere recitation of a basis for jurisdiction not be controlling." *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1293 (Fed. Cir. 2008). Instead, "[w]e look to the 'true nature of the action' in determining whether the [Court of International Trade] properly found jurisdiction lacking." *Hutchison*, 827 F.3d at 1360 (citation omitted). This "will depend upon the attendant facts asserted in the pleadings." *Id.* Thus, "[d]etermining the true nature of an action under § 1581" requires that we "discern the particular agency action that is the source of the alleged harm so that we may identify which subsection of § 1581 provides the appropriate vehicle for judicial review." *Id.*

Here, the importers allege that the government "remains in wrongful possession of the [§] 301 duties on [the importers'] entries of [certain] merchandise as . . . USTR ha[d] determined that no such duties apply *ab initio* to the date of implementation of [such] duties." Appx 53, 59. And they request that the Court of International Trade "order refund of the monies due through reliquidation of the involved entries." Appx 54, 60. Thus, as characterized by the importers themselves, the source of their alleged harm is Customs' classification decisions that "USTR's retroactive exclusions rendered erroneous." *Decision* at 1359–60 ("According to Plaintiffs, the USTR's retroactive exclusions rendered Customs' classification of their merchandise under those subheadings 'wrongful.'"). These classification decisions are necessarily protestable "decisions" because "[p]roper classification of goods under the HTSUS" requires the agency to "first ascertain[] the meaning of specific terms in the tariff provisions and then determin[e] whether the subject merchandise comes within the description of those terms"—the first question being one of law, the second being

one of fact. *Millenium Lumber Distrib. Ltd. v. United States*, 558 F.3d 1326, 1328 (Fed. Cir. 2009). Customs made substantive legal determinations—interpreting the HTSUS subheadings—and factual determinations—determining whether the entries fell within those subheadings—that it had the authority to make. *See Hutchison*, 827 F.3d at 1362 ("Indeed, when Customs makes a decision to liquidate, that decision is '[m]ore than passive or ministerial' and 'constitute[s] a "decision" within the context of § 1514(a).'" (alterations in original) (quoting *Cemex, S.A. v. United States*, 384 F.3d 1314, 1324 (Fed. Cir. 2004))).

Accordingly, this case "presents exactly the scenario in which § 1514's protest provisions can be invoked because Customs engaged in some sort of decision-making process." *Chemsol, LLC v. United States*, 755 F.3d 1345, 1351 (Fed. Cir. 2014) (citation omitted) (cleaned up). Because the importers contend that USTR's exclusions rendered Customs' classifications of their entries erroneous, they were statutorily obligated to timely protest under 19 U.S.C. § 1514(a)(2). That Customs' classification decisions became erroneous after USTR granted retroactive exclusions is irrelevant. The obligation to protest a Customs classification error does not turn on whether it was erroneous *ab initio* or became erroneous because of retroactive administrative action. It instead turns on whether Customs' classifications of the importers' entries were protestable "decisions" under 19 U.S.C. § 1514, and we hold that these classifications were such protestable "decisions."

B

Because a remedy would have been available under § 1581(a) had the importers timely protested Customs' classification decisions, ARP and Harrison cannot invoke the Court of International Trade's residual jurisdiction under § 1581(i) unless they show that the relief in § 1581(a) would have been manifestly inadequate. *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995). But neither ARP nor Harrison can meet this burden because "a remedy is not inadequate 'simply because [the importer] failed to invoke it within the time frame [that is] prescribe[d].'" *Id.* (citation omitted). "[T]o be manifestly inadequate, the protest must be an exercise in futility, or incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain." *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1193–94 (Fed. Cir. 2018) (cleaned up).

Here, the importers' successful protests, for example, for entry '7552–2, were "far from being exercises in futility." *Decision* at 1361. Had ARP protested within 180 days following the liquidation for each

entry now at issue, ARP would have had the opportunity to protest Customs' assessments of § 301 duties underlying the challenged entries' liquidations. *See Juice Farms*, 68 F.3d at 1346 ("If Juice Farms had protested within ninety days of bulletin notices, it would have had an opportunity to protest the legality of Customs' liquidations in the Court of International Trade."). Indeed, ARP had ample opportunity to file such protests. Of its five entries at issue, ARP's earliest protest deadline—i.e., 180 days after an entry's liquidation—was January 22, 2020. Yet ARP did not protest any of Customs' classification decisions until March 2, 2020, more than seven months after USTR had issued the applicable relevant product exclusion notice. The opportunity to protest is not an inadequate remedy "simply because [ARP] failed to invoke it within the time frame . . . prescribe[d]." *Id.* at 1346 (citation omitted). ARP "had an adequate remedy for its alleged erroneous liquidation[s], but it lost that remedy because its protest[s] w[ere] untimely," or not made at all, "not because the remedy was inadequate." *Carbon Activated Corp. v. United States*, 6 F. Supp. 3d 1378, 1380 (Ct. Int'l Trade 2014), *aff'd*, 791 F.3d 1312 (Fed. Cir. 2015); *see also Hutchison*, 827 F.3d at 1362 ("The record demonstrates that Hutchison not only could have filed a protest, but that it in fact did so after Customs liquidated its entries. Hutchison's incorrect 'belief that it had no remedy under § 1581(a) [does] not make that remedy inadequate,' and in any event is belied by the actions Hutchison took prior to filing suit." (alteration in original) (quoting *Hartford Fire*, 544 F.3d at 1294)).

Similarly, had Harrison timely requested an extension of the liquidation deadlines for the entries at issue, Harrison would have had the opportunity to request a refund by filing a Post Summary Correction "no later than 15 days before the extended date of liquidation." U.S. Customs & Border Prot., CSMS No. 19000260, Section 301 Products Excluded from Duties - Liquidation Extension Request (2019) (providing instructions for importers that "have a pending product exclusion request with USTR, or are importing a product that is covered by such a pending exclusion request, and [who] are concerned that a corresponding entry may liquidate before USTR renders a decision on the exclusion request"). Thus, Harrison likewise could have had the opportunity to challenge Customs' classification decisions had the importer done so promptly. *See Juice Farms*, 68 F.3d at 1346 ("Customs posted bulletin notices of these liquidations at the customs house. The bulletin notices supply sufficient notice and thus trigger the ninety-day period for protests. . . . Juice Farms, the importer, bears the burden to check for posted notices of liquidation and to

protest timely. Juice Farms cannot circumvent the timely protest requirement by claiming that its own lack of diligence requires equitable relief under 28 U.S.C. § 1581(i)." (citations omitted)); *cf. Int'l Custom Prods.*, 467 F.3d at 1328 ("Plaintiff cannot take it upon itself to determine whether it would be futile to protest or not. In order to protect itself, a protest should have been filed . . . .").

III

We have considered the parties' remaining arguments and find them unpersuasive. We affirm the Court of International Trade's decision dismissing ARP's and Harrison's amended complaints for lack of jurisdiction.

AFFIRMED

Slip Op. 22–103

THE MOSAIC COMPANY, Plaintiff, PHOSAGRO PJSC, JSC APATIT, Consolidated Plaintiff, INDUSTRIAL GROUP PHOSPHORITE LLC, Consolidated Plaintiff and Consolidated Plaintiff-Intervenor, v. UNITED STATES, Defendant, THE MOSAIC COMPANY, Consolidated Defendant, PHOSAGRO PSJC, JSC APATIT, INDUSTRIAL GROUP PHOSPHORITE LLC, Defendant-Intervenor

Before: Jane A. Restani, Judge
Consol. Court No. 21–00117
PUBLIC VERSION

[Commerce's final determination in the countervailing duty investigation of phosphate fertilizers from the Russian Federation is partially sustained and partially remanded for reconsideration consistent with this opinion.]

Dated: September 2, 2022

Patrick James McLain, *David J. Ross*, and *Stephanie Ellen Hartmann*, Wilmer, Cutler, Pickering, Hale and Dorr LLP, of Washington, DC, argued for Plaintiff The Mosaic Company. With them on the brief were *Alexandra S. Mauer*, *Eliot Kim*, and *Natan Pinchas Lyons Tubman*.

Meen Geu Oh, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, argued for the Defendant. With him on the brief was *Ebonie I. Branch*. Of counsel on the brief was *Jared Michael Cynamon*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Jonathan Thomas Stoel and *Cayla Danielle Ebert*, Hogan Lovells US LLP, of Washington, DC, argued for Defendant-Intervenors PhosAgro PJSC and JSC Apatit. With them on the brief were *Harold Deen Kaplan*, *Jared Rankin Wessel*, *Maria Alejandra Arboleda Gonzalez*, and *Nicholas R. Sparks*.

Peter J. Koenig, Squire Patton Boggs (US) LLP, of Washington, DC, argued for Defendant-Intervenor Industrial Group Phosphorite, LLC. With him on the brief was *Jeremy William Dutra*.

OPINION AND ORDER

Restani, Judge:

This action is a challenge to the final determination made by the United States Department of Commerce ("Commerce") in the countervailing duty ("CVD") investigation of phosphate fertilizers from the Russian Federation ("Russia") covering the period from January 1, 2019, through December 31, 2019.

Plaintiffs, Consolidated Plaintiffs, and Consolidated Plaintiff-Intervenors request that the court hold aspects of Commerce's final determination unsupported by substantial evidence or otherwise not

in accordance with law. The United States ("Government") asks that the court sustain Commerce's final determination.

BACKGROUND

The Mosaic Company ("Mosaic") filed a CVD petition on June 26, 2020, concerning imports of phosphate fertilizers from Russia. *Petitions for Imposition of Countervailing Duties: Phosphate Fertilizers from Morocco and Russia*, P.R. 1–8, C.R. 1–8 (June 26, 2020). Commerce initiated the CVD investigation on July 23, 2020. *Phosphate Fertilizers From the Kingdom of Morocco and the Russian Federation: Initiation of Countervailing Duty Investigations*, 85 Fed. Reg. 44,505 (Dep't Commerce July 23, 2020). On August 4, 2020, the U.S. International Trade Administration selected LLC Industrial Group Phosphorite ("EuroChem") and PhosAgro-Cherepovets ("PhosAgro") as mandatory respondents ("Plaintiffs") in this review. *See Countervailing Duty Investigation of Phosphate Fertilizers from Russia: Respondent Selection*, P.R. 55, C.R. 23 (Aug. 4, 2020).

Commerce published its preliminary results on November 30, 2020, *see Phosphate Fertilizers From the Russian Federation: Preliminary Affirmative Countervailing Duty Determination*, 85 Fed. Reg. 76,524 (Dep't Commerce Nov. 30, 2020), along with the accompanying *Decision Memorandum for the Affirmative Preliminary Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Russian Federation*, C-821825, POR 1/1/2019–12/31/2019 (Dep't Commerce Nov. 23, 2020) ("*PDM*").

Commerce published its final determination on April 7, 2021. *See Phosphate Fertilizers From the Kingdom of Morocco and the Russian Federation: Countervailing Duty Orders*, 86 Fed. Reg. 18,037 (Dep't Commerce Apr. 7, 2021) ("*Final Results*"); *see also Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Russian Federation*, C-821–825, POR 1/1/2019–12/31/2019 (Dep't Commerce Feb. 8, 2021) ("*IDM*"). Commerce determined the countervailable subsidy rate to be 47.05 percent for EuroChem and 9.19 percent for PhosAgro. *Final Results*, 86 Fed. Reg. at 18,038. Relevant here, Commerce found subsidies based on the government of Russia's ("GOR") provision of natural gas for less than adequate remuneration ("LTAR"). *IDM* at 8–9. Additionally, as relevant here, Commerce found that a subsidy for phosphate mining rights for LTAR did not yield a measurable benefit. *Id.* at 10. Mosaic, EuroChem, and PhosAgro raise challenges to the final determination.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(i). The court will uphold Commerce's determinations in a CVD proceeding unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Rosneft as a Government Authority

In the final determination, Commerce applied adverse facts available ("AFA") to determine that Rosneft is a government authority such that its provision of natural gas to a cross-owned affiliate of EuroChem was a countervailable financial contribution. *See IDM* at 6, 9, 35–37. EuroChem challenges this determination.[1]

During the investigation, Commerce issued a questionnaire requesting that the GOR provide an Input Producer Appendix for any company or enterprise that is wholly or partially owned by the GOR, whether directly or indirectly. *See Letter from USDOC to Embassy of Russian Federation Pertaining to GOR Initial Questionnaire*, P.R. 56 (Aug. 4, 2020) ("Initial Qnaire to GOR"). In its initial questionnaire response, the GOR provided an appendix for Gazprom and PJSC Novatek. *Response from Mayer Brown, LLP to Sec of Commerce Pertaining to Ministry, Initial QR* at 41, P.R. 131, C.R. 305 (Sept. 25, 2020) ("GOR IQR"). EuroChem, however, reported that its cross-owned affiliate, Nak Azot purchased natural gas from Russian corporation Rosneft. *Response from Squire Patton Boggs (US) LLP to Sec of Commerce Pertaining to EuroChem Supp QR* at 12–13, P.R. 229, C.R. 437 (Oct. 26, 2020) ("EuroChem 1st SQR"). It is undisputed that Rosneft's main shareholder, Rosneftegaz JSC ("Rosneftegaz"), is 100 percent owned by the GOR. *Id.* at 13, Ex. SQ-16.2. Commerce requested that the GOR provide an Input Producer Appendix for both Rosneft and Rosneftegaz, but the GOR declined, stating that neither entity was a vested government authority in the Russian natural gas market. *See Letter from USDOC to Mayer Brown Pertaining to GOR 2nd Sec II Suppl Qnaire*, P.R. 282 (Nov. 3, 2020) ("Suppl. 2d Qnaire to GOR"); *Response from Mayer Brown, LLP to Sec of Commerce Pertaining to Ministry 2nd Suppl QR* at 1–2, P.R. 300, C.R. 418 (Nov. 13, 2020) ("GOR 2d SQR"). Following the preliminary determination, Commerce again requested the Input Producer Appendices for Rosneft and Rosneftegaz from the GOR, but the GOR did not submit the

[1] In its brief, PhosAgro incorporates EuroChem's challenge to Commerce's determination that Roseneft was a government authority. PhosAgro Br. at 17.

requested information. *See Letter from Mayer Brown, LLP Pertaining to GOR 2nd Supp Qnaire*, P.R. 317, C.R. 489 (Nov. 25, 2020) ("GOR Post-Prelim. Qnaire"); *Response from Mayer Brown, LLP to Sec of Commerce Pertaining to Ministry 3rd Suppl QR* at 6–7, P.R. 331, C.R. 502 (Dec. 8, 2020) ("GOR 3rd SQR").

A subsidy is countervailable if the following elements are satisfied: (1) an authority has provided a financial contribution directly or entrusts a private entity to make a financial contribution; (2) a benefit is thereby conferred on a recipient of the financial contribution; and (3) the subsidy is specific to a foreign enterprise or foreign industry, or a group of such enterprises or industries. *See* 19 U.S.C. § 1677(5)(A)–(B), (D)–(E), (5A). Normally, information from the foreign government is necessary for Commerce to make a reasonable determination about whether an entity is a government authority. *See Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369–70 (Fed. Cir. 2014) ("*Fine Furniture*"). If the record is missing necessary information to an investigation, Commerce may use facts otherwise available to fill in any gaps that are necessary to find that the elements of the CVD statute have been satisfied. *See* 19 U.S.C. § 1677e(a) (2015); *see also Changzhou Trina Solar Energy Co. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1329, 1325 (2019).

19 U.S.C. § 1677e specifically provides two avenues to fill in the gap for the missing information: "facts otherwise available" and "facts otherwise available" with "adverse inferences." *See* 19 U.S.C. § 1677e(a)–(b). Accordingly, the court has interpreted the two subsections in the statute to have slightly different purposes. *See Mueller Commercial de Mexico v. United States*, 753 F.3d 1227, 1232 (Fed. Cir. 2014). Facts otherwise available shall be used when necessary information is not available on record, or if an interested party or any other person fails to satisfactorily respond to Commerce's requests for "necessary information" by: (1) withholding requested information, (2) failing to provide information by the submission deadlines or in the form or manner requested, (3) significantly impeding a proceeding, or (4) providing information that cannot be verified. *Id.* § 1677e(a)(1)–(2). Separately, pursuant to § 1677e(b), Commerce is authorized to use an adverse inference when selecting from available facts if an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information." *Id.* § 1677e(b). For the following reasons, the court holds that Commerce satisfied both prongs of the statutory requirement for AFA and lawfully determined that Rosneft is a government authority within the meaning of § 1677(5)(A).

A. The GOR's failure to provide the Input Producer Appendix resulted in a gap in the record and EuroChem's factual submission did not cure this gap

To apply AFA, Commerce must first identify a gap in the record. *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011) ("The use of facts otherwise available . . . is only appropriate to fill gaps when Commerce must rely on other sources of information to complete the factual record."). Notably, the gap in the record must be relevant to the investigation and the use of AFA must fill in information that is actually missing. *See e.g.*, *Guizhou Tyre Co. v. United States*, 42 CIT __, __, 348 F. Supp. 3d 1261, 1270 (2018).

Here, Commerce has made an affirmative showing that there was a relevant gap in the record created by the GOR's failure to provide the requested Input Producer Appendix for Rosneft and Rosneftegaz. *See IDM* at 36. Specifically, Commerce requested the following information: (1) a trace of all ownership in Rosneft back to the GOR; (2) an explanation of the history of government ownership in Rosneft; (3) an explanation of the corporate governance structure of each entity in Rosneft's chain of ownership and the role of minority shareholders; (4) an explanation of any obligations each entity is required to carry out on behalf of the state; and (5) a description of the role of the GOR in any restructuring. *See* GOR Post-Prelim. Qnaire at Section II. In the preliminary determination, Commerce identified that there was conflicting record evidence regarding the GOR's authority over Rosneft. *See* PDM at 9. Commerce sought Input Producer Appendices from Rosneft and Rosneftegaz to understand the corporate structures of state-sponsored enterprises and assess the level of governmental influence. *See IDM* at 6–7. Further, the GOR was able to provide this information for Gazprom and PJSC Novatek when it supplied Input Producer Appendices for both entities. *See* GOR IQR at 41. Thus, the information requested was reasonably sought and the investigative questions issued by Commerce were reasonable.

After Commerce issued its preliminary determination, the GOR responded to the request for information and provided Rosneft's charter, which included information regarding shareholder rights, voting rights, and regulations surrounding composition and selection of board members and executives. *See* GOR 3rd SQR at Ex. TQ-I-6. The GOR's response, however, failed to include the requested information regarding the corporate history and the role of the GOR in any restructuring. *Id.* More importantly, the GOR's response did not include the requested Index Producer Appendix information for Rosneftegaz. *Id.* at 6–8.

EuroChem contends that it submitted supplementary information following the preliminary determination that cured any gap in the record. EuroChem Br. at 4. Indeed, although EuroChem provided additional information regarding Rosneft's corporate governance, the information provided was not responsive to Commerce's request for the Input Producer Appendix. *See Letter from Squire Patton Boggs (US) LLP to Sec of Commerce Pertaining to EuroChem Rebuttal Comments on Suppl QR*, P.R. 340 (Dec. 17, 2020) ("EuroChem Factual Submission"). EuroChem's submission included a Rosneft affidavit and publicly available profiles for Rosneft's board of directors and management board, but remained silent on Rosneftegaz's corporate structure and the corporate history of both Rosneft and Rosneftegaz. *Id.* at Ex. 1–10. Thus, the Eurochem's submission did not provide sufficient information for Commerce to determine whether Rosneft is a government authority. *Id.*

Absent the necessary information from the GOR, Commerce was unable to determine the extent of governmental ownership and influence over Rosneft. Additionally, EuroChem's submission did not cure the gap in the record created by the GOR's failure to submit the requisite information. Pursuant to § 1677e(a), Commerce was authorized to fill in the relevant gap in the record by selecting from facts available. *See, e.g.*, *Jindal Poly Films Ltd. of India v. United States*, 44 CIT __, __, 439 F. Supp. 3d 1354, 1361 (2020); 19 U.S.C. § 1677e(a).

B. The GOR did not cooperate with Commerce's requests for information to the best of its ability

The second prong in the AFA statute authorizes Commerce to apply adverse inferences by selecting from facts otherwise available when "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." *See* 19 U.S.C. § 1677e(b)(1). An interested party, such as a foreign government, fails to meet the "best of its ability" statutory standard if it has not demonstrated "maximum effort." *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (stating that "[c]ompliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation"). When a foreign government fails to respond to the best of its ability, Commerce may apply AFA to find that a government authority provided a financial contribution to a specific industry. *Archer Daniels Midland Co. v. United States*, 37 CIT 760, 769, 917 F. Supp. 2d 1331, 1342 (2013) ("*Archer Daniels*"). Although Commerce should seek to avoid collateral impact to a cooperating party in an investigation if

relevant information exists elsewhere on the record, absent satisfactory record evidence, Commerce may lawfully apply AFA based on noncooperation. *See, e.g.*, *Fine Furniture*, 748 F.3d at 1372–73.

Substantial evidence supports a finding that the GOR did not cooperate to the best of its ability during the investigation. Commerce requested, twice, that the GOR submit an Input Producer Appendix for both Rosneft and Rosneftegaz. *See* Suppl. 2d Qnaire to GOR at Attach. I; GOR Post-Prelim. Qnaire at Section II. After the first request, the GOR responded with a statement that neither Rosneft nor Rosneftegaz were vested government authorities. *See* GOR 2d SQR at 1. The GOR declined to provide any record evidence to support its statement. *See id.* at 1–2. After its preliminary determination, Commerce again requested the GOR to furnish the appendices, but the GOR refused to do so claiming that [[

]]. *See* GOR 3rd SQR at 6. [[

]]. *Id.* ([[

]]). Even if the GOR believed that the information was not relevant, the information sought was related to Commerce's proper investigatory purpose, and Commerce, not the GOR, determines what information is relevant to the investigation. *See Ansaldo Componenti, S.p.A. v. United States*, 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986).

The court has held that Commerce must "tread carefully" when its use of an adverse inference would injure a cooperating party such that Commerce must provide respondents with a "meaningful opportunity" to submit factual evidence that weighs in their factor. *See Yama Ribbons and Bows Co. v. United States*, 43 CIT __, __, 419 F. Supp. 3d 1341, 1347, 1356 (2019) (holding that Commerce erred in applying AFA and "overlooked that there was a complete lack of evidence that [the plaintiff] had obtained a benefit" through the Government of China's Export Buyer's Credit Program). Commerce provided both EuroChem and the GOR a meaningful opportunity to provide alternative evidence before the final determination. *See, e.g.*, EuroChem Factual Submission; GOR 3rd SQR. Commerce did not simply ignore the factual evidence submitted; rather, Commerce explained that it preliminarily found conflicting record evidence and after the GOR's repeated failure to furnish the necessary information for Rosneft and Rosneftegaz, it lawfully substituted the missing information in accordance with 19 U.S.C. § 1677e(b). *See IDM* at 35–37.

Specifically, Commerce requested that the GOR explain the discrepancy between the GOR's contention that neither Rosneft nor Rosneft-

egaz are vested government authorities in the natural gas market in Russia and the factual submission by EuroChem which stated that the main shareholder of Rosneft is Rosneftegaz, which is 100 percent owned by the state. *See, e.g.*, GOR 3rd SQR at 7–8; *see also* EuroChem 1st SQR at 13, Ex. SQ-16.2. The GOR's response merely emphasized that [[

]] *See* GOR 3rd SQR at 8 (emphasis in original). Even if the GOR deemed that Rosneftegaz was not directly engaged in the provision of oil or raw gas materials to EuroChem's cross-affiliate, the court has found that a holding company exerts indirect control when it entrusts or directs a private entity to make a financial contribution within the meaning of 19 U.S.C. § 1677(5)(B). *Guangdong Wireking Housewares & Hardware Co. v. United States*, 37 CIT 319, 333–34, 900 F. Supp. 2d 1362, 1377 (2013), *aff'd*, 745 F.3d 1194 (Fed. Cir. 2014) ("Commerce's interpretation of 'public entities' reflects the realities of corporate ownership and control and enables it to detect certain forms of subsidization which are not provided directly by the government but instead pass through private or quasi-private channels."). Commerce explained in its final determination that the GOR failed to cooperate by not complying with Commerce's request for information because it did not respond by the deadline dates, nor did it adequately explain why it was unable to provide the requested information. *See IDM* at 35–37. Therefore, Commerce's use of AFA satisfies both prongs in identifying a relevant gap in the record and the GOR's failure to cooperate to the best of its ability. Accordingly, Commerce did not err in concluding that Rosneft was a government authority.

II. *De Facto* Specificity for the Provision of Natural Gas

EuroChem challenges Commerce's *de facto* specificity analysis for the provision of natural gas at LTAR, arguing that the fertilizer industry is not a predominant user of natural gas and therefore *de facto* specificity was lacking. EuroChem argues that Commerce's explanation does not support the specificity finding because Commerce relied only on the fact that "the Agro-chemistry industry is a predominant consumer of natural gas when compared to other industrial sectors." EuroChem Br. at 11 (internal citation omitted). EuroChem asserted that *Bethlehem Steel*[2] instructs that Commerce must rely on more than just "predominant usage" when a subsidy, such as natural gas in Russia, is available and widely used throughout the market.

[2] *Bethlehem Steel Corp. v. United States*, 25 CIT 307, 322, 140 F. Supp. 2d 1354, 1369 (2001).

Id. at 11–12. EuroChem contends that the fertilizer industry must consume some natural gas, but it only consumed 4.7 percent of Russian natural gas, and thus, there was not *de facto* specificity. *Id.* at 12.

Under 19 U.S.C. § 1677(5A)(D)(iii), a subsidy is *de facto* specific if one or more of the following factors exist: (1) the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number; (2) the enterprise or industry is a predominant user of the subsidy; (3) the enterprise or industry receives a disproportionately large amount of the subsidy; and (4) the manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others. 19 U.S.C. § 1677(5A)(D)(iii). "Because neither 'dominant' nor 'disproportionate' are defined in the relevant statute, [the court] is obligated to defer to Commerce's reasonable interpretation thereof." *Bethlehem Steel*, 25 CIT at 322, 140 F. Supp. 2d at 1369.

In *Bethlehem Steel*, the court found that it was reasonable for Commerce to consider an industry's relative usage of an alleged subsidy program in determining whether the industry was a "dominant" or "disproportionate" user of the program. *Id.* The alleged subsidy program at issue in *Bethlehem Steel* provided discounted electricity to large users that curtailed their usage by at least 20 percent during designated times. *Id.* at 1367. The court stated that although the Korean "steel industry received over 51 [percent] of the [] benefits [of the subsidy program], . . . there is nothing in the record to indicate this percentage was disproportionately higher than would be expected." *See id.* at 1369 (concluding that the large consumption of energy was inherent in the Korean steel industry; therefore, the discounted rate per unit resulted in a significant benefit overall). The court thus sustained Commerce's determination that the steel industry's usage was neither dominant nor disproportionate if indeed it was a subsidy. *Id.*

In its *IDM* here, Commerce affirmed its preliminary finding that the provision of natural gas for LTAR program was *de facto* specific. *See IDM* at 44–45; *PDM* at 12. Commerce asked the GOR to provide purchase data for natural gas based on industrial classification, and the GOR responded that it did not maintain the requested statistics but referred Commerce to Gazprom's 2019 annual report. *See Initial Qnaire at Section II, Provision of Natural Gas for LTAR (Questions Regarding the Natural Gas Industry, Question 8)* ; GOR 2d SQR at 4–5. The report indicated that the agrochemical industry consumed 4.7 percent of all Russian natural gas provided in 2019. GOR 2d SQR at 4–6. The report showed that electricity, communal services, and

households used greater amounts of natural gas, but in relation to other industrial uses the agrochemical industry used significantly more than any other industry. *Id.* at 6.[3]

In its final determination, Commerce relied on the annual report to conclude that the agrochemical industry was a predominant user of the subsidy because the agrochemical sector was the single largest industrial consumer of natural gas sold by Gazprom. *See IDM* at 44. Commerce explained that the next three largest industries accounted "for a small percentage less than half that of the agro-chemical industry." *Id.* Commerce excluded the natural gas consumption by households, services, and electricity because they were not industrial users. *Id.* Commerce explained that, when compared to other industrial users of natural gas, the agrochemical industry used a predominant amount and, thus, the subsidy was *de facto* specific. *Id.*

Here, substantial evidence supports Commerce's determination that the provision of natural gas was *de facto* specific. Although the agrochemical industry purchased only a small percentage of Gazprom's total natural gas sales, that ratio included a comparison of all industrial and household, electrical, and communal services purchases. *See* GOR 2d SQR at 4–6. Commerce has discretion to determine what predominant means in the context of § 1677(5A)(D)(iii), and it reasonably chose to exclude certain users in order to evaluate predominate industrial use. *See IDM* at 44; *Bethlehem Steel*, 25 CIT at 322, 140 F. Supp. 2d at 1369. When comparing only industrial users' purchases, the record reflects that the agrochemical industry purchased a far greater amount than any other industrial user, perhaps because of the specific uses here of natural gas, not just for power, but in the production of ammonia (a component in the production of phosphate fertilizer) and fertilizer. *See* EuroChem 1st SQR at 8–9; GOR 2d SQR at 4–6. Thus, the agrochemical industry was "a predominant user of the subsidy." *See* 19 U.S.C. § 1677(5A)(D)(iii)(2). EuroChem wrongly points to *Bethlehem Steel* for support because it is distinguished by the kind of program at issue there (encouragement of off-hours electricity usage) and how increased consumption was part of the inherent nature of the program. *See Bethlehem Steel*, 25 CIT at 320, 140 F. Supp. 2d at 1367. Substantial evidence supports Commerce's *de facto* specificity determination here.

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[3] Gazprom sold a total of [[ ]] million cubic meters of natural gas to Russian consumers in 2019. GOR 2d SQR at 6. Gazprom sold the Russian agrochemical industry [[ ]] million cubic meters of natural gas. *Id.* Electricity, households, and communal services purchased [[ ]], [[ ]], and [[ ]] million cubic meters respectively. *Id.* The agro-industrial complex purchased [[ ]] million cubic meters. *Id.* The oil industry, metallurgical industry, cement industry, and petrochemical industry purchased [[ ]], [[ ]], [[ ]], and [[ ]] million cubic meters respectively. *Id.* All other industries purchased [[ ]] million cubic meters. *Id.*

III. Natural Gas Benchmark Analysis

To calculate the benefit for the *ad valorem* subsidy rate, Commerce utilized a tier-three benchmark to assess the unsubsidized value of natural gas used by EuroChem and PhosAgro. The parties argue that Commerce's use of tier-three benchmark, sourced from European Organisation for Economic Co-operation and Development ("OECD") natural gas export prices, was unlawful and unsupported by substantial evidence because: (1) Commerce should have used actual transaction prices in Russia as a tier-one benchmark, *see* PhosAgro Br. at 16–24; EuroChem Br. at 13–17; (2) Commerce erred by using OECD natural gas prices because they did not reflect prevailing market conditions and the information submitted by Plaintiffs was more accurate, *see* PhosAgro Br. at 26–31; EuroChem Br. at 17–23; and (3) Commerce did not properly adjust the selected benchmark, *see* PhosAgro Br. at 31–32; Mosaic Br. at 35–38.

A foreign government's provision of goods to a respondent for LTAR constitutes a benefit. 19 U.S.C. § 1677(5)(E)(iv). In such circumstances, Commerce determines the amount of the subsidy by comparing remuneration actually paid to a market-determined price for the goods or services, under "a three-tiered hierarchy" employed by Commerce "to determine the appropriate remuneration benchmark." *Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, __, 352 F. Supp. 3d 1316, 1332 (2018) ("*Changzhou I*"); *see* 19 C.F.R. § 351.511(a)(2)(i)–(iii).

The Brattle Report, submitted by the Plaintiffs, provided data proposed to be used as a benchmark price for natural gas from independent Russian natural gas producers. *See Letter from Crowell & Moring to Sec of Commerce Pertaining to PhosAgro and EuroChem Benchmark Data* at App. 2, P.R. 279, C.R. 464 (Nov. 2, 2020) ("Brattle Report"). The Brattle Report contained prices compiled from actual transactions in Russia during the POI. *See id.* at v. The Brattle Report stated that Gazprom's prices were higher than those of the unregulated Russian market, which it also stated were equal to or higher than regional European prices, and thus consistent with market principles. *Id.* at v, viii. It concluded that the independent gas producers exerted market pressure on Gazprom. *Id.* at vi. The Brattle Report identified Rosneft as one of the two largest independent gas suppliers. *Id.* at v.

Mosaic, for its part, proposed International Energy Agency ("IEA") data regarding OECD and European countries' natural gas prices as

a benchmark. *Letter from Wilmer Hale Pickering Hale and Dorr LLP to Sec of Commerce Pertaining to Mosaic Benchmark Submission, Mosaic Russia* at Ex. 14, Part II.B, P.R. 245 (Nov. 2, 2020) ("Petitioner's Benchmark Submission").

In its decision, Commerce determined that it was unable to rely on tier-one or tier-two benchmarks. *See IDM* at 49–52. First, in its analysis, Commerce reasoned that the market was distorted because the GOR provided "the majority, or a substantial portion of the market," when a substantial portion of the domestic production was attributable to companies the GOR directly or indirectly managed and Gazprom itself accounted for a majority of the production. *Id.* at 49. Commerce specifically noted that, in 2019, "Gazprom alone produced 68 percent of the natural gas consumed in Russia." *Id.* The GOR stated that there was a regulated and unregulated market. *Id.* Commerce, however, found that the regulated market "account[ed] for a majority of the domestic natural gas market," and only two percent of domestic consumption came from imported natural gas. *Id.* Commerce cited record evidence that the GOR made significant interventions into the market through a value added tax ("VAT") of 20 percent, an import tariff of 5 percent, an export duty of 30 percent, and by giving Gazprom the exclusive right to transport and export natural gas. *Id.* Commerce thus concluded that Russian prices could not be considered market-determined prices. *Id.* at 49–50. Commerce also stated that a tier-two benchmark was not possible because the Russian natural gas pipelines were not capable of conveying imports into Russia. *Id.* at 51–52.

Next, Commerce moved through a tier-three analysis based on the OECD natural gas prices because any data from the Russian market was distorted, including unregulated private market. *Id.* at 53–54. Commerce explained that the OECD data was clearly related to industry use. *Id.* at 54. Commerce also explained that it did not use the Brattle Report because it was prepared at the request of the respondents for the investigation, did not contain the original source documentation or the methodology, and had not been used as a benchmark before, making it less reliable in comparison to the previously used benchmark source. *Id.* Regarding the OECD natural gas prices, Commerce did not remove sales of natural gas from Russia in Europe from the data because there was no record evidence of market distortion in Russian sales to European countries. *Id.* at 56. Finally, Commerce added VAT and import duties to the benchmark price in order to reflect the price a firm would pay if it imported natural gas from Europe into Russia. *Id.* at 57.

A. Tier-One Benchmark

Plaintiffs argue that Commerce erred in not employing a tier-one benchmark because supply and demand affected the Russian market, reflecting that actual transactions would have been the most reasonable benchmark. *See* PhosAgro Br. at 16–17; EuroChem Br. at 13–17. Further, Plaintiffs assert that Commerce erred by applying a "*per se*" rule of market distortion due to a government-owned supplier constituting a substantial portion of the market. *See* EuroChem Br. at 13–15. Plaintiffs contend that Commerce should have relied on the private market prices, those reported in the Brattle Report or prices otherwise available, because they are not distorted, are lower than the Gazprom rates, and are independent from the GOR. *See* PhosAgro Br. at 24–26; EuroChem Br. at 16–17.

Commerce derives a tier-one benchmark "by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question." 19 C.F.R. § 351.511(a)(2)(i). Government involvement "will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market." *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,377 (Dep't Commerce Nov. 25, 1998) ("*Preamble*"). If so, then Commerce may reasonably "conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market," and decline to apply a tier-one benchmark. *Id.* Commerce cannot, however, apply "what amount[s] to a *per se* rule of market distortion" after finding a government "controlled a substantial portion of the market." *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1362 (Fed. Cir. 2017) (discussing that the record evidence only established that a government authority accounted for a substantial portion of the market, not a majority of the market).

In *Archer Daniels*, the court upheld Commerce's rejection of a tier-one benchmark where the government controlled 56 percent of production and there was an export tax. *See Archer Daniels*, 37 CIT at 765–72, 917 F. Supp. 2d at 1339–45. And in *Guangdong Wireking*, the court upheld Commerce's finding of market distortion where the government controlled 47.97 percent of production, imports comprised only 1.53 percent of the market, and there was an export tax. *See Guangdong Wireking*, 37 CIT at 338–40, 900 F. Supp. 2d at 1380–82.

Similarly, here Commerce reasonably determined that GOR influence sufficiently distorted the Russian natural gas market to preclude identifying a market-based price for the purposes of a tier-one bench-

mark. *See IDM* at 49. Government-owned or managed companies produced a majority of natural gas in 2017, 2018, and 2019, reflecting that the GOR played a significant role in the market. *See* GOR IQR at 42–44.[4] Contrary to Plaintiffs' arguments, however, Commerce did not rely exclusively on the amount of government production or create a *per se* rule. *Compare* EuroChem Br at 13–15, *with IDM* at 49. Commerce relied on record evidence showing that, in 2017, 2018, and 2019, 98 percent of Russian domestic consumption of natural gas came from Russian production. *See* GOR IQR at 43; *see also IDM* at 49. During the POI, Gazprom also held the exclusive right to transport and export natural gas, meaning that non-government producers could only sell to the Russian market, and the GOR imposed a VAT of 20 percent, import tariffs of 5 percent, and export duties of 30 percent. *See IDM* at 49–50; *see also* GOR IQR at 54–55. Substantial evidence supports Commerce's explanation that these restrictions would distort the Russian market because government authorities controlled the majority of the market and there existed restrictions on private natural gas companies. *See Preamble*, 63 Fed. Reg. at 65,377; *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 39 CIT __, __, 61 F. Supp. 3d 1306, 1327 (2015). Thus, Commerce did not err in disregarding sales data for natural gas from private Russian companies.

PhosAgro more specifically argues that Commerce should have accepted data about private Russian producers in the Brattle Report as a tier-one benchmark. *See* PhosAgro Br. at 24–26. Commerce, however, rejected the data in the Brattle Report and found it not "useable in the natural gas benchmark calculation" because PhosAgro had the report prepared for the investigation and it did not include the original documentation containing its sources, data, or methodology. *See IDM* at 54; *see e.g.*, Brattle Report at 40–45. Commerce reasonably declined to use the data in the Brattle Report based on these flaws. Further, the Brattle Report's data on Russia's independent gas suppliers included Rosneft, contrary to Commerce's authority finding based on this record. *See* Brattle Report at v. Additionally, Commerce found the entire Russian natural gas market to be distorted, which would affect the independent gas suppliers as well.

[4] Specifically, GOR companies produced [[ ]] billion cubic meters of natural gas in 2017, 2018, and 2019, respectively, when the total volume of domestic production was 691.1, 725.4, and 737.7 billion cubic meters for those corresponding years. *See* GOR IQR at 42–44.

See IDM at 49. Thus, Commerce's decision not to rely on the data in the Brattle Report was reasonable as is its overall decision was not to use a tier-one benchmark.[5]

B. Tier-Three Benchmark

Plaintiffs argue that Commerce unlawfully rejected the data from the Brattle Report and the actual transactions in the private Russian market as a tier-three benchmark because private Russian companies operated on market principles. *See* PhosAgro Br. at 26–27. They also assert that the IEA data was not reflective of prevailing market conditions because the prices were not available to Russian buyers, natural gas was difficult to import, and Russia was the lowest cost producer compared to the sources for the IEA data. *See id.* at 27–30. Finally, Plaintiffs contend that Commerce unnecessarily adjusted the benchmark upward to account for the European 20 percent VAT and Russian 5 percent import duty, which did not reflect prevailing market conditions in Russia, thus, the cost of importing natural gas and effectively double counted taxes already reflected in the benchmark. *Id.* at 31–32.[6] At the same time, Mosaic argues that Commerce erred by refusing to adjust the IEA benchmark by excluding Russian exports, which would be including alleged distorted prices, as Commerce did in *Turkey Rebar*[7]. *See* Mosaic Br. at 35–38.

In the absence of a tier-one benchmark, Commerce turns to a tier-two benchmark "by comparing the government price to a world market price where it is reasonable to conclude that such price would

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[5] At oral argument, the court raised the issue of Commerce's treatment of the Brattle Report and any obligation to provide an opportunity to remedy deficits under 19 U.S.C. § 1677m(d). When Commerce determines requested information does not comply with a request, § 1677m(d) requires Commerce to inform the submitter of the deficit and provide an opportunity to remedy it. 19 U.S.C. § 1677m(d). Commerce argues that § 1677m(d) does not apply to benchmark submissions because they are not specifically requested in a questionnaire. Obviously, benchmark data is necessary to the LTAR determination and Commerce expects parties to provide it. Section 1677m(d) likely applies whenever a party has control of information that, if not provided, would result in a gap in the record. *See id.* Here, there is no gap in the record because benchmark data is not unique to respondents and Mosaic provided an acceptable alternative benchmark. *See IDM* at 54; *see also* Petitioner's Benchmark Submission at Ex. 14. Additionally, the Brattle Report contained numerous flaws, some of which could not be remedied by clarification of the missing sources, such as including Rosneft as an independent gas supplier when Commerce determined it was a government authority. *See* Brattle Report at v, 40–45; *see also supra* at 4–12. As a result, Commerce's treatment of the Brattle Report was not an improper disregard of § 1677(m).

[6] Plaintiffs do not meaningfully raise any challenge to Commerce's determination that there was no tier-two benchmark available. *See* PhosAgro Br. at 26.

[7] *Steel Concrete Reinforcing Bar from the Republic of Turkey: Preliminary Results of Countervailing Duty Administrative Review; 2017*, 84 Fed. Reg. 48,583 (Dep't Commerce Sept. 16, 2019) along with the accompanying *Decision Memorandum for the Preliminary Results of Countervailing Duty Administrative Review: Steel Concrete Reinforcing Bar from the Republic of Turkey; 2017*, C-489–830, POR 3/1/2017–12/31/2017 at 18, 23 ("*Turkey Rebar IDM*").

be available to purchasers in the country in question." 19 C.F.R. § 351.511(a)(2)(ii). "In measuring adequate remuneration under [tier-one benchmarks] or [tier-two benchmarks], [Commerce] will adjust the comparison price to reflect the price a firm actually paid or would pay if it imported the product." *Id.* § 351.511(a)(2)(iv). "If there is no world market price available to purchasers in the country in question," however, Commerce moves on to a tier-three analysis and "measures[s] the adequacy of remuneration by assessing whether the government price is consistent with market principles." *Id.* § 351.511(a)(2)(iii). If Commerce determines that the government price is not consistent with market principles it will look to construct an external benchmark. *Canadian Solar Inc. v. United States*, 45 CIT __, __, 537 F. Supp. 3d 1380, 1389 n.6 (2021). "It is within Commerce's discretion to weigh the relevant factors." *Id.* at 1391. "Commerce's goal in setting a benchmark rate is to best approximate the market rate ... not to choose the rate respondents were most likely to pay" in a market Commerce finds is tainted by the government's interference. *Changzhou I*, 42 CIT at ___, 352 F. Supp. 3d at 1343.

"When Commerce is faced with the decision to choose between two alternatives and one alternative is favored over the other in [its] eyes, then [it has] the discretion to choose accordingly if [its] selection is reasonable." *Timken Co. v. United States*, 16 CIT 142, 147, 788 F. Supp. 1216, 1220 (1992) (internal citation omitted); *see also Heze Huayi Chem. Co. v. United States*, 45 CIT __, __, 532 F. Supp. 3d 1301, 1326 (2021) ("The record shows that Commerce exercised properly its broad discretion in selecting the best available information for the record from a reliable database."). Commerce may consider "other factors, such as price-setting and price discrimination (in a Tier 3 analysis), when market-based prices are unavailable." *POSCO v. United States*, 42 CIT __, __, 296 F. Supp. 3d 1320, 1356 (2018). The court has sustained Commerce's reliance on IEA European data in constructing a tier-three natural gas benchmark for Turkey. *See Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. v. United States, 45 CIT* __, __, 498 F. Supp. 3d 1345, 1371 (2021) (citing *Rebar Trade Action Coal. v. United States*, 43 CIT __, __, 389 F. Supp. 3d 1371 (2019)).

Here, Commerce's tier-three benchmark also is supported by substantial evidence. Commerce reasonably rejected the actual transaction prices in Russia as a tier-three benchmark for the same reasons as it rejected a tier-one benchmark. Specifically, Commerce reasonably determined the Brattle Report was unreliable and the Russian market was distorted. Regarding the IEA data, even where Commerce's explanation is "of less than ideal clarity," the court is obligated to "sustain a determination . . . where Commerce's decisional

path is reasonably discernable." *Rebar Trade Action Coal.*, 43 CIT at __, 389 F. Supp. 3d at 1381–82 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The IEA data was a reasonable benchmark selection because the data stated it was for industry users and would be comparable to natural gas for industrial use in Russia. *See IDM* at 54; Petitioner's Benchmark Submission at Ex. 15.

Further, Commerce reasonably declined to remove the Russian natural gas data from the IEA data for the benchmark. Commerce's explanation—that there was no evidence that natural gas produced in Russia and sold in Europe was distorted—was supported by substantial evidence. *See IDM* at 56. Commerce specifically distinguished the *Turkey Rebar IDM* because there was record evidence about Russian natural gas exports to Europe during that review that was not in the current administrative record. *Id.* The aim of the tier-three analysis was not to precisely estimate the price of natural gas, but to determine the market value for natural gas as consumed in Russia, relying on what data are available on the record. Commerce clearly explained its methodology in arriving at the tier-three benchmark, and the parties have not demonstrated that the record cannot reasonably be construed to support Commerce's determination.

Finally, Commerce may have erred in adjusting the benchmark price by adding the 20 percent VAT and 5 percent import duty. *See IDM* at 57. Commerce explained that it added "delivery charges and import duties" in order to "reflect the price that a firm actually paid or would pay if it imported the product." *Id.* This is the same language as § 351.511(a)(2)(iv), which expressly applies only to tier-one and tier-two benchmarks. *See* 19 C.F.R. § 351.511(a)(2)(iv). A tier-three benchmark, on the other hand, is used when "there is no world market price available," and reflects "market principles" in Russia. *See id.* § 351.511(a)(2)(iii). There appears to be no reason to treat the hypothetical market price here as an import price. Although the regulations give Commerce little guidance on how to conduct a tier-three analysis, it is important that Commerce's choices do not result in an unreasonable comparison between the benchmark price and the government price. It is unreasonable to rely only on a regulation pertaining to tier-one and tier-two benchmarks to adjust a tier-three benchmark price without some compelling reason. Further, the IEA benchmark price already included the European export VAT, and by adding the import costs, Commerce may have double counted VAT for the benchmark. *See generally* Petition Benchmark Submission at Ex.

14; *see also IDM* at 57 ("Therefore, to the monthly benchmark prices, we added import-specific VAT and the import duty in addition to the EU export VAT that was included in the IEA benchmark price to reflect the price that a firm would pay if it imported the product into Russia."). Thus, by trying to construct a tier-two type import price rather than a general market principle price under tier-three, Commerce appears to have unlawfully added the 20 percent VAT and 5 percent import duty to the benchmark price.[8]

Accordingly, Commerce, in part, reasonably measured the adequacy of remuneration pursuant to 19 U.S.C. § 1677(5)(E)(iv) by using on IEA natural gas prices to constitute a tier-three benchmark. The court, however, remands to Commerce to remove the added VAT and import duties from the benchmark price or offer further explanation why, when tier-one and tier-two are rejected, it is reasonable to add additional VAT and import duties and why there is not double counting, particularly based on this record.

IV. Calculation of the *Ad Valorem* Subsidy Rate

At issue here is Commerce's calculation of the *ad valorem* subsidy rate and whether Commerce improperly inflated the rate. The *ad valorem* subsidy rate approximates the per unit manufacturing cost savings granted to the subject merchandise by dividing the benefit by the revenue generated from sales ("Total Sales").[9] Commerce calculates the benefit by subtracting the price actually paid for the input product from the benchmark price and multiplying the result by the number of units purchased. *See* 19 C.F.R. § 351.511(a)(2)(i) ("The Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions . . . ."); *see also IDM* at 47–57. To calculate Total Sales for a domestic subsidy, Commerce finds the sales value during the POI by summing the revenue from all sales external to a predefined group of companies which benefit from the subsidy. *See* 19 C.F.R. § 351.525(a). Delivery charges, surcharges, and taxes during the POI are included only as they relate to the costs and revenues of the company.

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[8] Note that as to the tier-three phosphate rock benchmark, Commerce made no similar adjustments for delivery charges or import duties. *See infra* at 39–41.

[9] *See* 19 C.F.R. § 351.525(a) ("The Secretary will calculate an *ad valorem* subsidy rate by dividing the amount of the benefit allocated to the period of investigation or review by the sales value during the same period of the product or products to which the secretary attributes the subsidy under paragraph (b) of this section.").

EuroChem contends that Commerce improperly inflated the *ad valorem* subsidy rate by adding VAT to the benchmark for the benefit but excluding VAT from the calculation of Total Sales.[10] In support of this contention, EuroChem cites *Mannesmann-Sumerbank Boru Endustrisi T.A.S. v. United States* which required Commerce to ensure both the benefit and Total Sales take into account "factors affecting value such as, in this case, inflation and foreign exchange movements." 23 CIT 1052, 1065, 86 F. Supp. 2d 1266, 1277 (1999); EuroChem Br. at 24.

EuroChem misunderstands the law. *Mannesmann-Sumerbank* applies to profits and losses that occurred as a result of changes in the foreign exchange rate during the POI, and other changes in value that depend on how Commerce choses to convert foreign currency into U.S. Dollars. *See id.* VAT does not fall into this category as it is a cost incurred rather than a factor affecting the exchange rate calculation. Furthermore, EuroChem's interpretation of *Mannesmann-Sumerbank* contradicts the plain reading of 19 C.F.R. § 351.511(a)(2)(iv) which adjusts tier-one and tier-two benchmark calculations to include VAT without adjusting the Total Sales calculation. If the benefit and the Total Sales are each calculated correctly, regardless of costs included in one but not the other, then so is the *ad valorem* subsidy rate.[11] Thus Commerce did not err in this regard.

V. Commerce's Calculation of Total Sales

Commerce calculated the Total Sales for EuroChem and affiliates as part of its *ad valorem* subsidy rate calculation regarding the provision of natural gas for LTAR by the GOR. *See PDM* at 5. EuroChem presents three challenges to Commerce's calculation of Total Sales. First, EuroChem claims that Commerce should have collapsed the sales from all companies owned by Swiss parent company EuroChem Group ("Swiss EuroChem Group") as a single entity. *See* EuroChem Br. at 30. Second, EuroChem suggests that Commerce should have included external sales from two subsidiaries Commerce excluded

[10] EuroChem does not contest the exclusion of delivery charges and surcharges from Total Sales despite their inclusion in the benefit.

[11] EuroChem also argues that Commerce erred in its calculation by not considering the "relative consumption of natural gas used in the production of subject merchandise." EuroChem Br. at 25 (citing *IDM* at 59–62). EuroChem interprets the statute wrongly. The regulations allow Commerce to attribute the subsidy to all input and downstream products produced by the company. *See* 19 C.F.R. § 351.252(5)(ii). As recently as 2021, the court has affirmed the practice, stating that it is "well-settled that Commerce is not required to examine the ultimate use of the subsidy." *Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S.*, 45 CIT at __, 498 F. Supp. 3d at 1364 (citing *Fabrique de Fer de Charleroi, SA v. United States*, 25 CIT 567, 576, 166 F. Supp. 2d 593, 603 (2001)).

from the calculation. *See* EuroChem Br. at 33–34. Finally, EuroChem claims that Commerce erred mathematically in the application of its stated methodology. *See id.*

19 C.F.R. § 351.525 instructs Commerce to "calculate an ad valorem subsidy rate by dividing the amount of the benefit allocated to the period of investigation . . . by the sales value during the same period of the product or products to which [Commerce] attributes the subsidy." *TMK IPSCO v. United States*, 41 CIT __, __, 222 F. Supp. 3d 1306, 1322 (2017) ("*TMK IPSCO II*") (citing 19 C.F.R. § 351.525(a)). To calculate Total Sales, or the sales value during the POI, the regulation generally requires Commerce to "attribute a subsidy to the products produced by the corporation that received the subsidy." 19 C.F.R. § 351.525(b)(6)(i).

Where Commerce finds cross-ownership between companies, § 351.525 provides specific guidance for Total Sales calculation. *See id.* § 351.525(b)(6). Cross-ownership "exists . . . where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets." *Id.* § 351.525(b)(6)(vi). This standard is typically met where the corporations share a majority voting interest or common ownership. *See id.*

Section 351.525 instructs Commerce how to calculate Total Sales given different relationships between cross-owned companies. *See id.* § 351.525(b)(6)(ii)–(iv). In the case of cross-owned subject merchandise producers, Commerce will "attribute subsidies received by either or both corporations to the products produced by both corporations." *Id.* § 351.525(b)(6)(ii). If the subsidy recipient is a holding or parent company, Commerce will "attribute the subsidy to consolidated sales of the holding company and its subsidiaries." *Id.* § 351.525(b)(6)(iii). If the subsidy recipient is an input supplier, Commerce will "attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations)." *Id.* § 351.525(b)(6)(iv).

If a subject merchandise producer is cross-owned with another company that neither produces the subject merchandise nor benefits from government subsidies, however, the non-benefitting corporation's sales do not factor into the total sales calculation. *See generally id.* § 351.525. Commerce employed this principle in *Yama Ribbons*, where Commerce calculated an *ad valorem* subsidy rate by attributing Chinese subsidies to the combined sales of two cross-owned subject merchandise producers, excluding sales by a Hong Kong affiliate that neither produced the subject merchandise nor benefitted from Chinese subsidies. *See Yama Ribbons and Bows Co. v. United States*,

36 CIT 1250, 1253–1254, 865 F. Supp. 2d 1294, 1298 (2012) ("*Yama Ribbons*").

Here, Commerce's stated methodology would correctly calculate Total Sales for EuroChem and affiliates in accordance with 19 C.F.R. § 351.525. The parties do not dispute that parent company Swiss EuroChem Group owns ten companies involved in the production, input supply, and distribution of the subject merchandise fertilizer. *See PDM* at 6–7; EuroChem Br. at 33; *Response from Squire Patton Boggs (US) LLP to Sec of Commerce Pertaining to EuroChem Cross Owned Affiliate QR* at 7–8, P.R. 76, C.R. 25 (Aug. 18, 2020) ("EuroChem Affiliation Resp."). Mineral and Chemical Company EuroChem, JSC ("MCC EuroChem") holds and manages Russian assets for Swiss EuroChem Group. *See PDM* at 5; EuroChem Affiliation Resp. at 3. The three subject merchandise producers are EuroChem, EuroChem-BMU, LLC ("BMU"), and JSC Nevinnomyssky Azot ("Nevinka"). *See PDM* at 5; EuroChem Affiliation Resp. at 7.

Another five companies act as input suppliers for the subject merchandise producers. *See PDM* at 6; EuroChem Affiliation Resp. at 7. NAK Azot, JSC ("NAK Azot"); EuroChem Northwest, JSC ("EuroChem Northwest"); Joint Stock Company Kovdorksy GOK ("KGOK"); and EuroChem-Energo, LLC ("EuroChem Energo") sell inputs to EuroChem. *See PDM* at 6; EuroChem Affiliation Resp. at 3. EuroChem-Usolsky Potash Complex, LLC ("UKK") sells inputs to BMU and Nevinka. *See PDM* at 6; *Response from Squire Patton Boggs (US) LLP to Sec of Commerce Pertaining to Eurochem Affiliates/Cross Owned QR* at 2, P.R. 88 (Aug. 28, 2022). Finally, export trading company EuroChem Trading Rus, LLC ("Trading Rus") sells the Russian-produced fertilizer. *See PDM* at 6; EuroChem Affiliation Resp. at 2, 7.

First at issue is whether Commerce acted reasonably in declining to treat all subsidiaries of Swiss EuroChem Group as a collapsed entity in calculating Total Sales. EuroChem argues that Commerce unreasonably departed from its precedent in failing to do so. *See* EuroChem Br. at 30. EuroChem misunderstands the process required by 19 C.F.R. § 351.525(b). Although Commerce has attributed subsidies received by cross-owned affiliates to the collapsed sales of the combined corporate entity in previous determinations, collapsing the entirety of Swiss EuroChem Group in this case would be a misapplication of 19 C.F.R. § 351.525(b), which only calls for the collapsing of cross-owned affiliates related to the production and distribution of the

subject merchandise.[12] *See* EuroChem Br. at 30–31; *see, e.g.*, 19 C.F.R. § 351.525(b)(6)(iii) (excluding parent companies from the calculation of Total Sales if the company merely served as a conduit for the transfer of the subsidy from the government to a subsidiary); *see also Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 81 Fed. Reg. 49,935 (Dep't Commerce July 29, 2016) ("*Russia Cold-Rolled Steel*"), and accompanying Issues and Decision Memorandum, *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Issues and Decision Memorandum for the Final Determination*, C-821–823, POR 1/1/2014–12/31/2014 at 10–11 (Dep't Commerce July 29, 2016) (applying 19 C.F.R. § 351.525(b)(6)(iii) to combine sales from a parent company and subsidiaries).

EuroChem further suggests that despite its legal divisions, Swiss EuroChem Group functions as a single entity, and it is thus unreasonable for Commerce to calculate Total Sales without including sales by all Swiss EuroChem Group subsidiaries. *See* EuroChem Br. at 30. Commerce responds that including sales by non-Russian Swiss EuroChem Group subsidiaries would be unreasonable, as these companies do not benefit from GOR subsidies. *See IDM* at 64. Commerce clearly explains the irrelevance of sales by Swiss EuroChem Group subsidiaries in countries like Lithuania and Kazakhstan—"Commerce is not investigating subsidies to entities outside of Russia, nor is Commerce investigating whether sales of subject merchandise to third countries are unfairly subsidized." *IDM* at 64; *see* EuroChem Affiliation Resp. at 7. In fact, excluding Swiss EuroChem Group's non-Russian affiliates from Total Sales aligns Commerce with its analysis in *Yama Ribbons* and with 19 C.F.R. § 351.525(b)'s mandate that Commerce generally attribute subsidies to the sales of

[12] EuroChem also cites *Ta Chen Stainless Steel Pipe* as an example of Commerce's supposed pattern of treating companies as collapsed entities in sales denominator calculations. *See* EuroChem Br. at 30; *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, Slip Op. 990117, 1999 WL 1001194, at *4 (CIT Oct. 28, 1999). In that case, the court affirmed Commerce's finding that two Taiwanese companies were affiliated for purposes of antidumping duties under 19 U.S.C. § 1677(33). *Id.* at *11. The court looked to evidence of shared control over subject merchandise production and pricing. *Id.* at *4. Although EuroChem cites this case as evidence that Commerce has long treated entities that "in substance and reality" operate as one company as a single entity, EuroChem's reliance is misplaced. EuroChem Br. at 30. *Ta Chen* does not concern subsidy calculations and is further distinguished on the issue of shared control of production. *See Ta Chen Stainless Steel Pipe, Ltd.*, 1999 WL 1001194 at *4.

subsidy recipients. *See Yama Ribbons*, 36 CIT at 1253–54, 865 F. Supp. 2d at 1298; 19 C.F.R. § 351.525(b)(6)(i).[13]

Finally at issue is whether Commerce erred in its mathematical calculation of Total Sales. *See* EuroChem Br. at 33–34. Commerce explains that it calculated Total Sales by combining all sales by the subject matter producers and input suppliers, minus intercompany sales among the eight subject matter producers and input suppliers, as required by 19 C.F.R. § 351.525(b)(6)(ii) and (iv). *See PDM* at 5–6. Commerce also confirms that according to its methodology MCC EuroChem and Trading Rus did not receive subsidies and should not be included in the calculation. *See id.* The court takes no issue with Commerce's asserted methodology. Nevertheless, Commerce's calculations do not reflect this methodology. In the calculation of intercompany sales, Commerce wrongly relied on a number provided by EuroChem that included sales from the eight subject matter producers and input suppliers to Trading Rus. *See IDM* at 8 (citing *Response from Squire Patton Boggs (US) LLP to Sec of Commerce Pertaining to EuroChem Suppl QR*, P.R. 332, C.R. 494 (Dec. 8, 2020)). This inclusion failed to follow Commerce's stated methodology and artificially increased the *ad valorem* rate by subtracting the sales to Trading Rus from the total rather than adding them as external sales. In a letter to the court, Commerce confirmed this error. *See Def.'s Resp. to the Ct.'s Post-Oral Arg. Questions* at 2–3, ECF No. 91 (Aug. 10, 2022).

Accordingly, although Commerce need not alter its stated methodology for calculating Total Sales, the court remands for Commerce to provide a correct Total Sales number and explanation of its calculation.[14]

VI. Refusal to Countervail Some Phosphate Mining Rights Licenses

Mosaic argues that Commerce should have countervailed all benefits for mining rights licenses issued by the GOR to EuroChem, cross-owned with KGOK and PhosAgro, cross-owned with JSC Apatit. *See* Mosaic Br. at 23; GOR IQR at Ex. II–1. KGOK reported

[13] EuroChem also argues that Commerce should have calculated Total Sales using the collapsed sales of two additional Swiss EuroChem Group subsidiaries, MCC EuroChem and Trading Rus. *See* EuroChem Br. at 30. Neither of these two affiliates received a benefit from GOR subsidies. *See generally Response from Squire Patton Boggs (US) LLP to Sec of Commerce Pertaining to EuroChem Sec III QR* at 29, P.R. 114, C.R. 44 (Sept. 24, 2020) ("EuroChem IQR); *see also PDM* at 5–6. Thus, there is no benefit to attribute. *See* 19 C.F.R. § 351.525(b)(6)(iii), (c). Accordingly, Commerce reasonably declined to treat these subsidiaries as part of a collapsed entity.

[14] It is unclear whether this issue was completely exhausted before the agency. Exhaustion may have been waived. Further, as this matter is remanded for various reasons there is no point in perpetuating an error. Here, interests of finality would not be advanced.

receiving [[ ]] phosphate mining licenses in [[ ]], and JSC Apatit reported receiving [[ ]] licenses between [[ ]], [[ ]] in [[ ]], and [[ ]] in [[ ]]. *Response from Squire Patton Boggs (US) LLP to Sec of Commerce Pertaining to EuroChem Sec III QR* at 29, P.R. 114, C.R. 44 (Sept. 24, 2020); *Response from Crowell & Moring LLP to Sec of Commerce Pertaining to PhosAgro Sec III QR* at 9–12, P.R. 115, C.R. 45 (Sept. 24, 2020).

Commerce determined that it could not measure subsidies in the Russian economy before April 1, 2002, the date on which Russia was designated a market economy ("ME"). *See IDM* at 23; *Russia Cold-Rolled Steel*, 81 Fed. Reg. at 49,935, and accompanying memorandum, *Market Economy Status for the Russian Federation*, C-821–823, POR 1/1/2014–12/31/2014 (Dep't Commerce Sept. 14, 2015) ("ME Status for the GOR Memo"). Accordingly, Commerce declined to countervail [[ ]] of the licenses. *See IDM* at 24. Commerce further determined that the benefits from the licenses could not be accounted for in the CVD calculations as the license had not undergone material alterations following the cut-off date. *Id.* at 24–25. Mosaic claims that Commerce's decision not to countervail benefits from all licenses deprived them of substantial relief, as JSC Apatit and KGOK mined [[ ]] tons of ore respectively during the POI. *See* Mosaic Br. at 27.

Mosaic challenges Commerce's cut-off date methodology on two primary grounds. *See id.* at 23–30. First, Mosaic argues that Commerce's cut-off date is inapplicable under these facts, as Commerce could identify and measure subsidies using the same methodology it utilized for the sole active license granted after the cut-off date. *See id.* at 23–26. Second, Mosaic argues that even if a cut-off date were appropriate, Commerce did not provide substantial evidence that it could only identify and measure subsidies in the Russian economy after April 1, 2002. *See id.* at 26–30. The application of a selected cut-off date may in fact be reasonable, but Commerce has not produced sufficient evidence in support of the date chosen or a viable explanation of the date's applicability to recurring benefits.[15]

[15] Mosaic further contends that the licenses at issue all materially changed following the cut-off date such that each license confers new and thus countervailable subsidies. *See* Mosaic Br. at 28–30. Commerce and the GOR concede that licenses underwent auto-renewals, technical changes such as [[ ]], and in one case, [[ ]]. *See Response from Mayer Brown, LLP to Sec of Commerce Pertaining to Ministry 1st Suppl QR* at 78, P.R. 234, C.R. 445 (Oct. 29, 2020); EuroChem IQR at 31–32. Because the court does not accept Commerce's cut-off date explanation in this case, the court is not required to decide today whether these changes are sufficient to constitute new agreements.

In 2012, Congress amended Section 701 of the Tariff Act of 1930 to require that Commerce impose countervailing duties on merchandise imported from NME countries. *See* 19 U.S.C. § 1671(f)(1). Commerce is only relieved of imposing CVDs where it cannot "identify and measure" subsidies because the NME country's economy is "essentially comprised of a single entity." *Id.* § 1671(f)(2). Following that amendment, the court has only permitted Commerce to apply a cut-off date given evidence of reforms permitting the identification and measurement of specific types of subsidies in a NME country. In *TMK IPSCO*, the court required Commerce to provide specific evidence justifying its use of the People's Republic of China's ("PRC") accession to the World Trade Organization as the cut-off date for applying CVD law. *See TMK IPSCO v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1328, 1343 (2016) ("*TMK IPSCO I*"), *aff'd on remand*, *TMK IPSCO II*, 41 CIT at __, 222 F. Supp. 3d at 1314. Remanding for further explanation, the court required Commerce to "allocate subsidies beginning on the first date it could identify and measure the subsidy considering the particular program in question" and to identify "the impact of relevant economic reforms on that program." *TMK IPSCO I*, 40 CIT at __, 179 F. Supp. 3d at 1344.

The court subsequently upheld Commerce's cut-off dates when Commerce identified four types of subsidies and specific economic reforms that made each type identifiable and measurable. *TMK IPSCO II*, 41 CIT at __, 222 F. Supp. 3d at 1314–15. Commerce noted that the PRC's 1994 Company Law permitted private actors to freely participate in commercial activity, allowing Commerce to measure grant program subsidies in the Chinese economy. *Id.* at 1314. Commerce further identified laws passed in 1994, 1996, and 1999 that created unique cutoff dates for the measurement of credit, tax, and land-oriented subsidies. *Id.* at 1314–15. In so doing, the court held that Commerce fulfilled its duty under § 1671(f) by "articulat[ing] a rational relationship between specific legal reforms in China and the effect of such reforms on Commerce's ability to identify and measure subsidies." *Id.* at 1314. Thus, although Commerce has "significant discretion in determining whether it can identify and measure subsidies . . . within the NME country," the court only found Commerce's cut-off date analysis reasonable after Commerce provided evidence of legal reforms impacting specific programs. *See id.* at 1313. Thus, with countries partially or fully transitioned to ME status, the issue is the measurability of particular subsidies.

Here, Commerce asserts that it cannot identify or measure mining rights subsidies from licenses granted prior to Russia's designation as

a ME country "notwithstanding any methodology." *See IDM* at 24. This is plainly incorrect. There is no legal impediment to calculating subsidies for previously designated NME countries. Further, in measuring the subsidies that KGOK received from its only active mining license granted after the cut-off date, Commerce did not rely on the amount of KGOK's initial financial contribution at the time the license was granted, admittedly post-NME status. *See IDM* at 26. Instead, Commerce treated the license as a recurring subsidy because KGOK benefitted each year from its GOR-subsidized mining license.[16] *See id.* Thus, Commerce calculated the benefit that KGOK received using evidence of "the actual per-unit cost build-up of KGOK's beneficiated phosphate rock" during the POI. *See id.* By Commerce's own logic, its methodology did not assume that KGOK received the license in a market-based auction, suggesting that Commerce can use the same methodology regardless of whether the mining licenses were granted under claimed market-economy principles. *See id.* at 17. Commerce can therefore identify and measure subsidies from all mining licenses in this way, regardless of whether the licenses were granted prior to its cut-off date. *See id.* Commerce's failure to do so contravenes 19 U.S.C. § 1671 and, to the extent it applies, § 1671(f)(1).

Furthermore, even if Commerce's cut-off date were applicable to the recurring subsidies at issue, Commerce's chosen cut-off date is unsupported by substantial evidence because there are no citations to specific reforms that justify the chosen cut-off date. *See IDM* at 24; *TMK IPSCO II*, 41 CIT at __, 222 F. Supp. 3d at 1314. Commerce does cite specific legal reforms underlying its determination that Russia became a ME country on April 1, 2002. *See IDM* at 23–24; *see generally* ME Status for the GOR Memo. For example, Commerce notes that the 2002 tax code revision boosted the earning potential of private businesses, and the 2002 labor code further liberalized wages

[16] 19 C.F.R. § 351.524(c)(1) provides examples of recurring and non-recurring benefits, including the provision of goods and services for LTAR. *See* 19 C.F.R. § 351.524(c)(1). Commerce has historically treated mining rights as recurring subsidies as they confer an underlying good in the form of natural resources. *See, e.g.*, *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Countervailing Duty Administrative Review*, 73 Fed. Reg. 40,295 (Dep't Commerce July 14, 2008), and accompanying *Issues and Decision Memorandum*, C-533–821, POR 1/1/06–12/31/06 at Comment 24 (Dep't Commerce July 14, 2008); *Phosphate Fertilizers from the Kingdom of Morocco: Final Affirmative Countervailing Duty Determination*, 86 Fed. Reg. 9,482 (Dep't Commerce Feb. 16, 2021), and accompanying *Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Kingdom of Morocco*, C-714–001, POR 1/1/2019–12/31/2019 at Comment 8 (Dep't Commerce Feb. 16. 2021); *Russia Cold-Rolled Steel*, 81 Fed. Reg. at 49,935, and accompanying Issues and Decision Memorandum at Comment 9.

and the market. *See* ME Status for the GOR Memo at 10–14. Nowhere in its support of this ME cut-off date, however, does Commerce reference legal reforms permitting the measurement of mining rights or similar subsidies in the Russian economy. *See id.* ; *IDM* at 23–24. Although Commerce does explain that the 2001 Law on Privatization led to the denationalization of state-owned monopolies, the GOR merely leases ore-rich land for private companies to mine in this case—land privatization is inapplicable to these facts. *See* ME Status for the GOR Memo; *see generally IDM*. Thus, unlike in *TMK IPSCO II* where Commerce "articulated a rational relationship between specific legal reforms in China and the effect of such reforms on Commerce's ability to identify and measure subsidies," Commerce here fails to provide substantial evidence in support of its cut-off date considering the "particular type of subsidy" at issue. *See TMK IPSCO II*, 41 CIT at __, 222 F. Supp. 3d at 1314; *IDM* at 23–24.

The court finds that Commerce's cut-off methodology is inapplicable to the facts of this case, as Commerce can identify and measure subsidies from all mining rights using the same methodology applied to the lone analyzed mining license. Additionally, Commerce failed to provide substantial evidence supporting its decision to treat the date of Russia's ME designation as a cut-off for CVD law applicability. If Commerce needs to apply a cut-off date for the application of CVD law, Commerce must reference specific legal reforms that permit the identification and measurement of mining rights subsidies in the relevant state's economy. The court remands for Commerce to either abandon its cut-off date methodology or to explain why it is unable to countervail recurring subsidies from the contested licenses granted by the GOR prior to its designation as a ME.

VII. Mining Rights for Phosphate Rock Benchmark

Mosaic takes issue with Commerce's tier-three benchmark for phosphate rock. It argues that Commerce erred in refusing to adjust the benchmark price for the delivered prices including freight, import duties, and VAT. Mosaic Br. at 30–32. Mosaic asserts that there is no reasonable justification for not applying delivery charges through 19 C.F.R. § 351.11(a)(2)(iv) to a tier-three benchmark when the benchmark is based on world market prices, in essence a tier-two benchmark. *Id.* at 32. It contends that Commerce's reasoning for refusing to use delivered prices was inapposite because the fact that KGOK did not itself purchase phosphate rock did not affect the benchmark calculation. *Id.* at 33.

As discussed above, Commerce applies a tier-three benchmark when "there is no world market price available" and instead "mea-

sures[s] the adequacy of remuneration by assessing whether the government price is consistent with market principles." 19 C.F.R. § 351.511(a)(2)(iii). Commerce "will adjust" benchmark prices to include "delivery charges and import duties" for tier-one and tier-two benchmarks. *Id.* § 351.511(a)(2)(iv).

In the post-preliminary decision memorandum, Commerce explained that it could not apply a tier-two benchmark for mining licenses because they were not goods that lent themselves comparison to a world market price. *Decision Memorandum for the Post-Preliminary Analysis of the Countervailing Duty Investigation of Phosphate Fertilizers from the Russian Federation*, C-821–825, POR 1/1/2019–12/31/2019 at 6–7 (Dep't Commerce Dec. 21, 2020) ("*PPDM*"). Commerce further explained that it could consider "world market prices for the underlying good that is conveyed with the mining rights, *i.e.*, phosphate, under a 'tier three' anlaysis [sic]." *Id.* at 7 (emphasis in original). Thus, in its final determination, Commerce applied a tier-three benchmark comparing "the actual per-unit cost build-up of KGOK's beneficiated phosphate rock, inclusive of all taxes paid," to the "world market price of comparable phosphate rock." *IDM* at 26. Commerce used data submitted from Global Trade Atlas and UN Comtrade to determine the price of phosphate rock. *Id.* at 25–26. Commerce declined to adjust the benchmark to include freight, VAT, and import duties because KGOK did not purchase the phosphate rock from a world market and would not have paid similar fees in the production of phosphate rock. *Id.* at 26–27.

Here, Commerce's exclusion of freight, VAT, and import duties appear reasonable and supported by substantial evidence. The regulations only require Commerce to include delivery charges and import duties for tier-one and tier-two benchmarks. *See* 19 C.F.R. § 351.511(a)(2)(iv). Although here the tier-three benchmark relies on world market prices for phosphate rock, Commerce reasonably distinguished its analysis from that of a true tier-two benchmark because KGOK never purchased phosphate ore. *See IDM* at 26–27; *PPDM* at 7. Commerce used the world market price merely to determine a reasonable price for the phosphate rock KGOK actually mined, and Commerce declined to use the benchmark to estimate what KGOK would have paid to import phosphate rock. *See* 19 C.F.R. § 351.511(a)(2); *IDM* at 26– 27. In that light, Commerce was using the benchmark to compare the Russian price with prices established by market principles. Thus, Commerce was applying a tier-three benchmark only; § 351.511(a)(2)(iv) did not apply; and freight, VAT, and import duties did not need to be included. Accordingly, Commerce's determination regarding the benchmark for the mining rights ap-

pears to be supported by substantial evidence. On remand, however, if Commerce continues to add VAT and import duties to the natural gas benchmark, for a product that is not imported, Commerce must also explain why the methodology should be different for the phosphate rock benchmark.

CONCLUSION

The court sustains Commerce's determination regarding Rosneft as a government authority and the *de facto* specificity finding, and utilization of a tier-three benchmark for natural gas. For the foregoing reasons, the court remands to Commerce for a determination consistent with this opinion on certain calculation issues and with regard to the phosphate rock input. The remand shall be issued within 60 days hereof. Comments may be filed 30 days thereafter and any response 15 days thereafter.

Dated: September 2, 2022
New York, New York

/*s*/ *Jane A. Restani*
JANE A. RESTANI, JUDGE

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