U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR PART 12

CBP DEC. 23–02

RIN 1515–AE78

EXTENSION OF IMPORT RESTRICTIONS IMPOSED ON CERTAIN ARCHAEOLOGICAL MATERIAL OF BELIZE

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

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect an extension of import restrictions on certain archaeological material of Belize. The Assistant Secretary for Educational and Cultural Affairs, United States Department of State (Department of State), has determined that conditions continue to warrant the imposition of import restrictions and that no cause for suspension exists. The restrictions, originally imposed by CBP Dec. 13–05, will be extended for an additional five-year period through February 23, 2028, and the CBP regulations are being amended to reflect this extension. CBP Dec. 13–05 contains the Designated List of archaeological materials from Belize to which the restrictions apply.

DATES: Effective on February 23, 2023.

FOR FURTHER INFORMATION CONTACT: For legal aspects, W. Richmond Beevers, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325–0084, *ot-otrrculturalproperty@cbp.dhs.gov.* For operational aspects, Julie L. Stoeber, Chief, 1USG Branch, Trade Policy and Programs, Office of Trade, (202) 945–7064, *1USGBranch@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*) (CPIA), which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)) (Convention), the United States may enter into an international agreement with another State Party to the Convention to impose import restrictions on eligible archaeological and ethnological materials. Under CPIA and the applicable U.S. Customs and Border Protection (CBP) regulations, found in section 12.104 of title 19 of the Code of Federal Regulations (19 CFR 12.104), the restrictions are effective for no more than five years beginning on the date on which an agreement enters into force with respect to the United States (19 U.S.C. 2602(b)). This period may be extended for additional periods, each extension not to exceed five years, if it is determined that the factors justifying the initial agreement still pertain and no cause for suspension of the agreement exists (19 U.S.C. 2602(e); 19 CFR 12.104g(a)).

On February 27, 2013, the United States entered into a memorandum of understanding with the Government of Belize (Belize), concerning the imposition of import restrictions on certain categories of archaeological material of Belize (2013 MOU). On March 5, 2013, CBP published a final rule, CBP Dec. 13–05, in the **Federal Register** (78 FR 14183), amending 19 CFR 12.104g(a) to reflect the imposition of restrictions on this material, including a list designating the types of archaeological material covered by the restrictions. Consistent with the requirements of 19 U.S.C. 2602(b) and 19 CFR 12.104g, these restrictions were effective for a period of five years, through February 27, 2018.

The import restrictions were subsequently extended once in accordance with 19 U.S.C. 2602(e) and 19 CFR 12.104g(a)). On February 23, 2018, the United States entered into a memorandum of understanding with Belize to extend the import restrictions (2018 MOU). Accordingly, CBP published a final rule, CBP Dec. 18–02, in the **Federal Register** (83 FR 8354) reflecting the agreement to extend the import restrictions for an additional five-year period.

On June 21, 2022, the United States Department of State (Department of State) proposed in the **Federal Register** (87 FR 36910) to extend the MOU between the United States and Belize concerning the import restrictions on certain categories of archaeological material from Belize. On December 9, 2022, after considering the views and recommendations of the Cultural Property Advisory Committee,

the Assistant Secretary for Educational and Cultural Affairs, Department of State, determined that the cultural heritage of Belize continues to be in jeopardy from pillage of certain archeological material, and that the import restrictions should be extended for an additional five years, in accordance with 19 U.S.C. 2602(e). Through the exchange of diplomatic notes, the Department of State and the Ministry of Foreign Affairs of the Government of Belize have agreed to extend the 2018 MOU for an additional five-year period.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions. The restrictions on the importation of archaeological material are to extend through February 23, 2028. Importation of such material from Belize continues to be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

The Designated List and additional information may also be found at the following website address: *https://eca.state.gov/cultural-heritage-center/cultural-property/current-agreements-and-import-restrictions* by selecting the material for "Belize."

Inapplicability of Notice and Delayed Effective Date

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

Regulatory Flexibility Act

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

Executive Order 12866

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

Signing Authority

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

Troy A. Miller, the Acting Commissioner of CBP, having reviewed and approved this document, has delegated the authority to electroni-

cally sign this document to Robert F. Altneu, the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 12

Cultural exchange programs, Cultural property, Foreign relations, Freight, Imports, Prohibited or restricted importations, Reporting and recordkeeping requirements.

Amendment to the CBP Regulations

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

PART 12—SPECIAL CLASSES OF MERCHANDISE

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

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

* * * * *

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

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

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

(a) * * *

State party	Cultural property	Decision No.
	* * * * *	
Belize	Archaeological material, representing Belize's cultural heritage that is at least 250 years old, dating from the Pre-Ceramic (from approximately 9000 B.C.), Pre-Classic, Classic, and Post-Classic Periods of the Pre-Columbian era through the Early and Late Colonial Periods.	CBP Dec. 13–05 extended by CBP Dec. 23–02.
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ROBERT F. ALTNEU,
Director, Regulations & Disclosure
Law Division,
Regulations & Rulings, Office of Trade
U.S. Customs and Border Protection

Approved:

THOMAS C. WEST, JR.,
Deputy Assistant Secretary of the Treasury
for Tax Policy.

[Published in the Federal Register, February 23, 2023 (88 FR 11386)]

DEPARTMENT OF THE TREASURY

19 CFR PART 12

CBP DEC. 23–03

RIN 1515–AE79

EXTENSION OF IMPORT RESTRICTIONS ON ARCHAEOLOGICAL AND ETHNOLOGICAL MATERIALS OF LIBYA

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

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect an extension of import restrictions on certain categories of archaeological and ethnological materials of Libya. The Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has made the requisite determinations for extending the import restrictions and no cause for suspension exists. The restrictions, originally imposed by CBP Decision (CBP Dec.) 18–07, will be extended for an additional five-year period, through February 23, 2028, and the CBP regulations are being amended to reflect this extension. The Designated List of archaeological and ethnological material of Libya to which the restrictions apply is reproduced below with a statement clarifying that ethnological material on the Designated List excludes Jewish ceremonial and ritual objects.

DATES: Effective on February 23, 2023.

FOR FURTHER INFORMATION CONTACT: For legal aspects, W. Richmond Beevers, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325–0084, *ot-otrrculturalproperty@cbp.dhs.gov.* For operational aspects, Julie L. Stoeber, Chief, 1USG Branch, Trade Policy and Programs, Office of Trade, (202) 945–7064, *1USGBranch@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*) (CPIA), which implements the 1970 United Nations Educational, Scientific and Cultural Organiza-

tion (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)) (Convention), the United States may enter into international agreements with another State Party to the Convention to impose import restrictions on eligible archaeological and ethnological materials. Under the CPIA and the applicable U.S. Customs and Border Protection (CBP) regulations, found in section 12.104 of Title 19 of the Code of Federal Regulations (19 CFR 12.104), the restrictions are effective for no more than five years beginning on the date on which an agreement enters into force with respect to the United States (19 U.S.C. 2602(b)). This period may be extended for additional periods, each extension not to exceed five years, if it is determined that the factors justifying the initial agreement still pertain and no cause for suspension of the agreement exists (19 U.S.C. 2602(e); 19 CFR 12.104g(a)). In certain limited circumstances, the CPIA authorizes the imposition of restrictions on an emergency basis (19 U.S.C. 2603). The emergency restrictions are effective for no more than five years from the date of the State Party's request and may be extended for three years where it is determined that the emergency condition continues to apply with respect to the covered material (19 U.S.C. 2603(c)(3)). These restrictions may also be continued pursuant to an agreement concluded within the meaning of the Act (19 U.S.C. 2603(c)(4)).

On December 5, 2017, CBP published a final rule, CBP Dec. 17–19 (82 FR 57346), amending 19 CFR 12.104g(b) to reflect the imposition of emergency restrictions on the importation of certain categories of archaeological and ethnological materials of Libya, pursuant to 19 U.S.C. 2603(c). On February 23, 2018, the United States entered into a memorandum of understanding (2018 MOU) with the Government of Libya (Libya), concerning the imposition of import restrictions on archaeological and ethnological material of Libya. The 2018 MOU covered the same archaeological and ethnological materials subject to the emergency restrictions.

On July 9, 2018, CBP published a final rule, CBP Dec. 18–07, in the **Federal Register** (83 FR 31654) amending 19 CFR 12.104g(a) to reflect the imposition of restrictions pursuant to the 2018 MOU. CBP Dec. 18–07 extended the import restrictions implemented in 19 CFR 12.104g(b) by CBP Dec. 17–19 for a five-year period, through February 23, 2023.

On June 21, 2022, the United States Department of State proposed in the **Federal Register** (87 FR 36911) to extend the MOU between the United States and Libya concerning the import restrictions on certain categories of archaeological and ethnological material from Libya. On December 14, 2022, after considering the views and rec-

ommendations of the Cultural Property Advisory Committee, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, determined that the cultural heritage of Libya continues to be in jeopardy from pillage of certain archeological and ethnological materials, and that the import restrictions should be extended for an additional five years, pursuant to 19 U.S.C. 2602(e). Following the exchange of diplomatic notes, the United States Department of State and the Ministry of Foreign Affairs of the Government of Libya have agreed to extend the 2018 MOU for an additional five-year period.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions through February 23, 2028, and is adding a statement to the Designated List clarifying that Jewish ceremonial and ritual objects are not covered by import restrictions on ethnological material. Importation of designated material from Libya continues to be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

The Designated List and additional information may also be found at the following website address: *https://eca.state.gov/cultural-heritage-center/cultural-property/current-agreements-and-import-restrictions* by selecting the material for "Libya." The designated list is included below with the addition of the clarifying statement on Jewish ceremonial and ritual objects.

Designated List

The bilateral agreement between Libya and the United States covers the material set forth below in a Designated List of Archaeological and Ethnological Material of Libya. Importation of material on this list is restricted unless the material is accompanied by documentation certifying that the material left Libya legally and not in violation of the export laws of Libya. In order to clarify certain provisions of the Designated List contained CBP Dec. 18–07, the Designated List has been updated in this document with minor revisions clarifying that Jewish ceremonial and ritual objects are not covered by import restrictions on ethnological material.

The Designated List covers archaeological material of Libya and Ottoman ethnological material of Libya (as defined in section 302 of the Convention on Cultural Property Implementation Act (19 U.S.C. 2601)), including, but not limited to, the following types of material. The archaeological material represents the following periods and cultures: Paleolithic, Neolithic, Punic, Greek, Roman, Byzantine, Islamic and Ottoman dating approximately 12,000 B.C. to 1750 A.D. The ethnological material represents categories of Ottoman objects derived from sites of Islamic cultural importance, made by a nonin-

dustrial society (Ottoman Libya), and important to the knowledge of the history of Islamic Ottoman society in Libya from 1551 A.D. through 1911 A.D. This would exclude Jewish ceremonial and ritual objects.

The Designated List set forth below is representative only. Any dimensions are approximate.

I. Archaeological Material

A. Stone

1. *Sculpture*

a. *Architectural Elements*—In marble, limestone, sandstone, and gypsum, in addition to porphyry and granite. From temples, forts, palaces, mosques, synagogues, churches, shrines, tombs, monuments, public buildings, and domestic dwellings, including doors, door frames, window fittings, columns, capitals, bases, lintels, jambs, friezes, pilasters, engaged columns, altars, mihrabs (prayer niches), screens, fountains, mosaics, inlays, and blocks from walls, floors, and ceilings. May be plain, molded, or carved. Often decorated with motifs and inscriptions. Approximate date: 1st millennium B.C. to 1750 A.D.

b. *Architectural and Non-architectural Relief Sculpture*—In marble, limestone, sandstone, and other stone. Types include carved slabs with figural, vegetative, floral, geometric, or other decorative motifs, carved relief vases, stelae, and plaques, sometimes inscribed in Greek, Punic, Latin, or Arabic. Used for architectural decoration, funerary, votive, or commemorative monuments. Approximate date: 1st millennium B.C. to 1750 A.D.

c. *Monuments*—In marble, limestone, and other kinds of stone. Types include votive statues, funerary and votive stelae, and bases and base revetments. These may be painted, carved with relief sculpture, decorated with moldings, and/or carry dedicatory or funerary inscriptions in Greek, Punic, Latin, or Arabic. Approximate date: 1st millennium B.C. to 1750 A.D.

d. *Statuary*—Primarily in marble, but also in limestone and sandstone. Large-and small-scale, including deities, human, animal, and hybrid figures, as well as groups of figures in the round. Common types are large-scale and free-standing statuary from approximately 3 to 8 ft. in height, life-sized portrait or funerary busts (head and shoulders of an individual), waist-length female busts that are either faceless (aniconic) and/or veiled (head or face), and statuettes typically 1 to 3 ft. in height. Includes fragments of statues. Approximate date: 1st millennium B.C. to 1750 A.D.

e. *Sepulchers*—In marble, limestone, and other kinds of stone. Types of burial containers include sarcophagi, caskets, and chest

urns. May be plain or have figural, geometric, or floral motifs painted on them, be carved in relief, and/or have decorative moldings. Approximate date: 1st millennium B.C. to 1750 A.D.

2. *Vessels and Containers*—In marble and other stone. Vessels may belong to conventional shapes such as bowls, cups, jars, jugs, lamps, and flasks, and also include smaller funerary urns. Funerary urns can be egg-shaped vases with button-topped covers and may have sculpted portraits, painted geometric motifs, inscriptions, scroll-like handles and/or be ribbed.

3. *Furniture*—In marble and other stone. Types include thrones, tables, and beds. May be funerary, but do not have to be. Approximate date: 1st millennium B.C. to 15th century A.D.

4. *Inscriptions*—Primarily in marble and limestone. Inscribed stone material date from the late 7th century B.C. to 5th century A.D. May include funerary stelae, votive plaques, tombstones, mosaic floors, and building plaques in Greek, Punic, Latin, or Arabic. Approximate date: 1st millennium B.C. to 1750 A.D.

5. *Tools and Weapons*—In flint, chert, obsidian, and other hard stones. Prehistoric and Protohistoric microliths (small stone tools). Chipped stone types include blades, borers, scrapers, sickles, cores, and arrow heads. Ground stone types include grinders (*e.g.,* mortars, pestles, millstones, whetstones), choppers, axes, hammers, and mace heads. Approximate date: 12,000 B.C. to 1,400 B.C.

6. *Jewelry, Seals, and Beads*—In marble, limestone, and various semi-precious stones, including rock crystal, amethyst, jasper, agate, steatite, and carnelian. Approximate date: 1st millennium B.C. to 12th century A.D.

B. Metal

1. *Sculpture*

a. *Statuary*—Primarily in bronze, iron, silver, or gold, including fragments of statues. Large- and small-scale, including deities, human, and animal figures, as well as groups of figures in the round. Common types are large-scale, free-standing statuary from approximately 3 to 8 ft. in height and life-size busts (head and shoulders of an individual) and statuettes typically 1 to 3 ft. in height. Approximate date: 1st millennium B.C. to 324 A.D.

b. *Reliefs*—Relief sculpture, including plaques, appliques, stelae, and masks. Often in bronze. May include Greek, Punic, Latin, and Arabic inscriptions. Approximate date: 1st millennium B.C. to 324 A.D.

c. *Inscribed or Decorated Sheet*—In bronze or lead. Engraved inscriptions, "curse tablets," and thin metal sheets with engraved or

impressed designs often used as attachments to furniture. Approximate date: 1st millennium B.C. to 15th century A.D.

2. *Vessels and Containers*—In bronze, silver, and gold. These may belong to conventional shapes such as bowls, cups, jars, jugs, strainers, cauldrons, and oil lamps, or may occur in the shape of an animal or part of an animal. Also include scroll and manuscript containers for manuscripts. All can portray deities, humans or animals, as well as floral motifs in relief. Islamic Period objects may be inscribed in Arabic. Approximate date: 1st millennium B.C. to 15th century A.D.

3. *Jewelry and Other Items for Personal Adornment*—In iron, bronze, silver, and gold. Metal can be inlaid (with items such as red coral, colored stones, and glass). Types include necklaces, chokers, pectorals, rings, beads, pendants, belts, belt buckles, earrings, diadems, straight pins and fibulae, bracelets, anklets, girdles, belts, mirrors, wreaths and crowns, make-up accessories and tools, metal strigils (scrapers), crosses, and lamp-holders. Approximate date: 1st millennium B.C. to 15th century A.D.

4. *Seals*—In lead, tin, copper, bronze, silver, and gold. Types include rings, amulets, and seals with shank. Approximate date: 1st millennium B.C. to 15th century A.D.

5. *Tools*—In copper, bronze and iron. Types include hooks, weights, axes, scrapers, trowels, keys and the tools of crafts persons such as carpenters, masons and metal smiths. Approximate date: 1st millennium B.C. to 15th century A.D.

6. *Weapons and Armor*—Body armor, including helmets, cuirasses, shin guards, and shields, and horse armor often decorated with elaborate engraved, embossed, or perforated designs. Both launching weapons (spears and javelins) and weapons for hand to hand combat (swords, daggers, etc.). Approximate date: 8th century B.C. to 4th century A.D.

7. *Coins*

a. *General*—Examples of many of the coins found in ancient Libya may be found in: A. Burnett and others, *Roman Provincial Coinage,* multiple volumes (British Museum Press and the Bibliothe′que Nationale de France, 1992–), R. S. Poole and others, *Catalogue of Greek Coins in the British Museum,* volumes 1–29 (British Museum Trustees 1873–1927) and H. Mattingly and others, *Coins of the Roman Empire in the British Museum,* volumes 1–6 (British Museum Trustees 1923–62). For Byzantine coins, *see* Grierson, Philip, *Byzantine Coins,* London, 1982. For publication of examples of coins circulating in archaeological sites, *see La moneta di Cirene e della Cirenaica nel Mediterraneo. Problemi e Prospettive,* Atti del V Congresso Internazi-

onale di Numismatica e di Storia Monetaria, Padova, 17–19 marzo 2016, Padova 2016 (Numismatica Patavina, 13).

b. *Greek Bronze Coins*—Struck by city-states of the Pentapolis, Carthage and the Ptolemaic kingdom that operated in territory of the Cyrenaica in eastern Libya. Approximate date: 4th century B.C. to late 1st century B.C.

c. *Greek Silver and Gold Coins*—This category includes coins of the city-states of the Pentapolis in the Cyrenaica and the Ptolemaic Kingdom. Coins from the city-state of Cyrene often bear an image of the silphium plant. Such coins date from the late 6th century B.C. to late 1st century B.C.

d. *Roman Coins*—In silver and bronze, struck at Roman and Roman provincial mints including Apollonia, Barca, Balagrae, Berenice, Cyrene, Ptolemais, Leptis Magna, Oea, and Sabratha. Approximate date: late 3rd century B.C. to 1st century A.D.

e. *Byzantine Coins*—In bronze, silver, and gold by Byzantine emperors. Struck in Constantinople and other mints. From 4th century A.D. through 1396 A.D.

f. *Islamic Coins*—In bronze, silver, and gold. Dinars with Arabic inscriptions inside a circle or square, may be surrounded with symbols. Struck at mints in Libya (Barqa) and adjacent regions. From 642 A.D. to 15th century A.D.

g. *Ottoman*—Struck at mints in Istanbul and Libya's neighboring regions. Approximate date: 1551 A.D. through 1750 A.D.

C. Ceramic and Clay

1. *Sculpture*

a. *Architectural Elements*—Baked clay (terracotta) elements used to decorate buildings. Elements include acroteria, antefixes, painted and relief plaques, revetments. Approximate date: 1st millennium B.C. to 30 B.C.

b. *Architectural Decorations*—Including carved and molded brick, and tile wall ornaments and panels.

c. *Statuary*—Large- and small-scale. Subject matter is varied and includes deities, human and animal figures, human body parts, and groups of figures in the round. May be brightly colored. These range from approximately 4 to 40 in. in height. Approximate date: 1st millennium B.C. to 3rd century A.D.

d. *Terracotta Figurines*—Terracotta statues and statuettes, including deities, human, and animal figures, as well as groups of figures in the round. Late 7th century B.C. to 3rd century A.D.

2. *Vessels*

a. *Neolithic Pottery*—Handmade, often decorated with a lustrous burnish, decorated with appliqué and/or incision, sometimes with added paint. These come in a variety of shapes from simple bowls and vases to large storage jars. Approximate date: 10th millennium B.C. to 3rd millennium B.C.

b. *Greek Pottery*—Includes both local and imported fine and coarse wares and amphorae. Also imported Attic Black Figure, Red Figure and White Ground Pottery—these are made in a specific set of shapes (*e.g.,* amphorae, kraters, hydriae, oinochoi, kylikes) decorated with black painted figures on a clear clay ground (Black Figure), decorative elements in reserve with background fired black (Red Figure), and multi-colored figures painted on a white ground (White Ground). Corinthian Pottery—Imported painted pottery made in Corinth in a specific range of shapes for perfume and unguents and for drinking or pouring liquids. The very characteristic painted and incised designs depict human and animal figural scenes, rows of animals, and floral decoration. Approximate date: 8th century B.C. to 6th century B.C.

c. *Punic and Roman Pottery*—Includes fine and coarse wares, including terra sigillata and other red gloss wares, and cooking wares and mortaria, storage and shipping amphorae.

d. *Byzantine Pottery*—Includes undecorated plain wares, lamps, utilitarian, tableware, serving and storage jars, amphorae, special shapes such as pilgrim flasks. Can be matte painted or glazed, including incised "sgraffitto" and stamped with elaborate polychrome decorations using floral, geometric, human, and animal motifs. Approximate date: 324 A.D. to 15th century A.D.

e. *Islamic and Ottoman Pottery*—Includes plain or utilitarian wares as well as painted wares.

f. *Oil Lamps and Molds*—Rounded bodies with a hole on the top and in the nozzle, handles or lugs and figural motifs (beading, rosette, silphium). Include glazed ceramic mosque lamps, which may have a straight or round bulbous body with flared top, and several branches. Approximate date: 1st millennium B.C. to 15th century A.D.

3. *Objects of Daily Use*—Including game pieces, loom weights, toys, and lamps.

D. Glass, Faience, and Semi-Precious Stone

1. *Architectural Elements*—Mosaics and glass windows.

2. *Vessels*—Shapes include small jars, bowls, animal shaped, goblet, spherical, candle holders, perfume jars (unguentaria), and mosque lamps. Those from prehistory and ancient history may be engraved and/or colorless or blue, green or orange, while those from the Islamic

Period may include animal, floral, and/or geometric motifs. Approximate date: 1st millennium B.C. to 15th century A.D.

3. *Beads*—Globular and relief beads. Approximate date: 1st millennium B.C. to 15th century A.D.

4. *Mosque Lamps*—May have a straight or round bulbous body with flared top, and several branches. Approximate date: 642 A.D. to 1750 A.D.

E. Mosaic

1. *Floor Mosaics*—Including landscapes, scenes of deities, humans, or animals, and activities such as hunting and fishing. There may also be vegetative, floral, or geometric motifs and imitations of stone. Often have religious imagery. They are made from stone cut into small bits (tesserae) and laid into a plaster matrix. Approximate date: 5th century B.C. to 4th century A.D.

2. *Wall and Ceiling Mosaics*—Generally portray similar motifs as seen in floor mosaics. Similar technique to floor mosaics, but may include tesserae of both stone and glass. Approximate date: 5th century B.C. to 4th century A.D.

F. Painting

1. *Rock Art*—Painted and incised drawings on natural rock surfaces. There may be human, animal, geometric and/or floral motifs. Include fragments. Approximate date: 12,000 B.C. to 100 A.D.

2. *Wall Painting*—With figurative (deities, humans, animals), floral, and/ or geometric motifs, as well as funerary scenes. These are painted on stone, mud plaster, lime plaster (wet—buon fresco—and dry—secco fresco), sometimes to imitate marble. May be on domestic or public walls as well as in tombs. Approximate date: 1st millennium B.C. to 1551 A.D.

G. Plaster

Stucco reliefs, plaques, stelae, and inlays or other architectural decoration in stucco.

H. Textiles, Basketry, and Rope

1. *Textiles*—Linen cloth was used in Greco-Roman times for mummy wrapping, shrouds, garments, and sails. Islamic textiles in linen and wool, including garments and hangings.

2. *Basketry*—Plant fibers were used to make baskets and containers in a variety of shapes and sizes, as well as sandals and mats.

3. *Rope*—Rope and string were used for a great variety of purposes, including binding, lifting water for irrigation, fishing nets, measuring, and stringing beads for jewelry and garments.

I. Bone, Ivory, Shell, and Other Organics

1. *Small Statuary and Figurines*— Subject matter includes human, animal, and hybrid figures, and parts thereof as well as groups of figures in the round. These range from approximately 4 to 40 in. in height. Approximate date: 1st millennium B.C. to 15th century A.D.

2. *Reliefs, Plaques, Stelae, and Inlays*—Carved and sculpted. May have figurative, floral and/or geometric motifs.

3. *Personal Ornaments and Objects of Daily Use*—In bone, ivory, and spondylus shell. Types include amulets, combs, pins, spoons, small containers, bracelets, buckles, and beads. Approximate date: 1st millennium B.C. to 15th century A.D.

4. *Seals and Stamps*—Small devices with at least one side engraved with a design for stamping or sealing; they can be discoid, cuboid, conoid, or in the shape of animals or fantastic creatures (*e.g.,* a scarab). Approximate date: 1st millennium B.C. to 2nd millennium B.C.

5. *Luxury Objects*—Ivory, bone, and shell were used either alone or as inlays in luxury objects including furniture, chests and boxes, writing and painting equipment, musical instruments, games, cosmetic containers, combs, jewelry, amulets, seals, and vessels made of ostrich egg shell.

J. Wood

Items such as tablets (tabulae), sometimes pierced with holes on the borders and with text written in ink on one or both faces, typically small in size (4 to 12 in. in length), recording sales of property (such as slaves, animals, grain) and other legal documents such as testaments. Approximate date: late 2nd to 4th centuries A.D.

II. Ottoman Ethnological Material

A. Stone

1. *Architectural Elements*—The most common stones are marble, limestone, and sandstone. From sites such as forts, palaces, mosques, shrines, tombs, and monuments, including doors, door frames, window fittings, columns, capitals, bases, lintels, jambs, friezes, pilasters, engaged columns, altars, mihrabs (prayer niches), screens, fountains, mosaics, inlays, and blocks from walls, floors, and ceilings. Often decorated in relief with religious motifs.

2. *Architectural and Non-architectural Relief Sculpture*—In marble, limestone, and sandstone. Types include carved slabs with religious, figural, floral, or geometric motifs, as well as plaques and stelae, sometimes inscribed.

3. *Statuary*—Primarily in marble, but also in limestone and sandstone. Large-and small-scale, such as human (including historical portraits or busts) and animal figures.

4. *Sepulchers*—In marble, limestone, and other kinds of stone. Types of burial containers include sarcophagi, caskets, coffins, and chest urns. May be plain or have figural, geometric, or floral motifs painted on them, be carved in relief, and/or have decorative moldings.

5. *Inscriptions, Memorial Stones, and Tombstones*—Primarily in marble, most frequently engraved with Arabic script.

6. *Vessels and Containers*—Include stone lamps and containers such as those used in religious services, as well as smaller funerary urns.

B. Metal

1. *Architectural Elements*—Primarily copper, brass, lead, and alloys. From sites such as forts, palaces, mosques, shrines, tombs, and monuments, including doors, door fixtures, other lathes, chandeliers, screens, and sheets to protect domes.

2. *Architectural and Non-architectural Relief Sculpture*— Primarily bronze and brass. Includes appliques, plaques, and stelae. Often with religious, figural, floral, or geometric motifs. May have inscriptions in Arabic.

3. *Vessels and Containers*—In brass, copper, silver, or gold, plain, engraved, or hammered. Types include jugs, pitchers, plates, cups, lamps, and containers used for religious services (like Qur'an boxes). Often engraved or otherwise decorated.

4. *Jewelry and Personal Adornments*—In a wide variety of metals such as iron, brass, copper, silver, and gold. Includes rings and ring seals, head ornaments, earrings, pendants, amulets, bracelets, talismans, and belt buckles. May be adorned with inlaid beads, gemstones, and leather.

5. *Weapons and Armor*—Often in iron or steel. Includes daggers, swords, saifs, scimitars, other blades, with or without sheaths, as well as spears, firearms, and cannons. Ottoman types may be inlaid with gemstones, embellished with silver or gold, or engraved with floral or geometric motifs and inscriptions. Grips or hilts may be made of metal, wood, or even semi-precious stones such as agate, and bound

with leather. Armor consisting of small metal scales, originally sewn to a backing of cloth or leather, and augmented by helmets, body armor, shields, and horse armor.

6. *Ceremonial Paraphernalia*—Including boxes (such as Qur'an boxes), plaques, pendants, candelabra, stamp and seal rings.

7. *Musical Instruments*—In a wide variety of metals. Includes cymbals and trumpets.

C. Ceramic and Clay

1. *Architectural Decorations*—Including carved and molded brick, and engraved and/or painted tile wall ornaments and panels, sometimes with Arabic script. May be from forts, palaces, mosques, shrines, tombs, or monuments.

2. *Vessels and Containers*—Includes glazed, molded, and painted ceramics. Types include boxes, plates, lamps, jars, and flasks. May be plain or decorated with floral or geometric patterns, or Arabic script, primarily using blue, green, brown, black, or yellow colors.

D. Wood

1. *Architectural Elements*—From sites such as forts, palaces, mosques, shrines, tombs, monuments, and madrassas, including doors, door fixtures, panels, beams, balconies, stages, screens, ceilings, and tent posts. Types include doors, door frames, windows, window frames, walls, panels, beams, ceilings, and balconies. May be decorated with religious, geometric or floral motifs or Arabic script.

2. *Architectural and Non-architectural Relief Sculpture*—Carved and inlaid wood panels, rooms, beams, balconies, stages, panels, ceilings, and doors, frequently decorated with religious, floral, or geometric motifs. May have script in Arabic or other languages.

3. *Qur'an Boxes*—May be carved and inlaid, with decorations in religious, floral, or geometric motifs, or Arabic script.

4. *Study Tablets*—Arabic inscribed training boards for teaching the Qur'an.

E. Bone and Ivory

1. *Ceremonial Paraphernalia*—Types include boxes, reliquaries (and their contents), plaques, pendants, candelabra, stamp and seal rings.

2. *Inlays*—For religious decorative and architectural elements.

F. Glass

Vessels and containers in glass from mosques, shrines, tombs, and monuments, including glass and enamel mosque lamps and ritual vessels.

G. Textiles

In linen, silk, and wool. Religious textiles and fragments from mosques, shrines, tombs, and monuments, including garments, hangings, prayer rugs, and shrine covers.

H. Leather and Parchment

1. *Books and Manuscripts*—Either as sheets or bound volumes. Text is often written on vellum or other parchment (cattle, sheep, goat, or camel) and then gathered in leather bindings. Paper may also be used. Types include the Qur'an and other Islamic books and manuscripts, often written in brown ink, and then further embellished with colorful floral or geometric motifs.
2. *Musical Instruments*—Leather drums of various sizes (*e.g.,* bendir drums used in Sufi rituals, wedding processions and Mal'uf performances).

I. Painting and Drawing

Ottoman Period paintings may depict courtly themes (*e.g.,* rulers, musicians, riders on horses) and city views, among other topics.

Inapplicability of Notice and Delayed Effective Date

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

Regulatory Flexibility Act

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

Executive Order 12866

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

Signing Authority

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

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

List of Subjects in 19 CFR Part 12

Cultural exchange programs, Cultural property, Foreign Relations, Freight, Imports, Prohibited or restricted importations, and Reporting and recordkeeping requirements.

Amendment to the CBP Regulations

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

PART 12—SPECIAL CLASSES OF MERCHANDISE

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

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

* * * * *

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

* * * * *

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

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

(a) * * *

State party	Cultural property	Decision No.
	* * * * *	
Libya	Archaeological material and ethnological material from Libya	CBP Dec. 23–03.
	* * * * *	

* * * * *

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

Approved:

THOMAS C. WEST, JR.,
Deputy Assistant Secretary of the Treasury
for Tax Policy.

[Published in the Federal Register, February 23, 2023 (88 FR 11388)]

U.S. Court of International Trade

Slip Op. 23–18

SIEMENS GAMESA RENEWABLE ENERGY, Plaintiff, v. UNITED STATES, Defendant, and WIND TOWER TRADE COALITION, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 21–00449

[Remanding an agency decision concluding an antidumping duty investigation of wind towers from Spain]

Dated: February 16, 2023

Daniel J. Cannistra, Crowell & Moring LLP, of Washington, D.C., for plaintiff. With him on the briefs were *Simeon Yerokun* and *Michael K. Bowen*.

Sara E. Kramer, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Shelby M. Anderson*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Alan H. Price, Wiley Rein LLP, of Washington, D.C., for defendant-intervenor. With him on the brief were *Robert E. DeFrancesco, III* and *Laura El-Sabaawi*.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff contests a decision that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued in an antidumping duty ("AD") investigation of certain wind towers from Spain. Concluding that Commerce did not conduct the investigation according to law, the court issues an order for corrective action.

I. BACKGROUND

A. The Contested Decision

Commerce published the contested decision (the "Final Determination") as *Utility Scale Wind Towers From Spain: Final Determination of Sales at Less Than Fair Value*, 86 Fed. Reg. 33,656 (Int'l Trade Admin. June 25, 2021) ("*Final Determination*"). Commerce incorporated by reference an explanatory "Issues and Decision Memoran-

dum." *Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Spain* (Int'l Trade Admin. June 14, 2021), P.R. 149 ("*Final I&D Mem.*").[1]

The Final Determination pertains to imports of utility scale wind towers from Spain (the "subject merchandise") that were made during a period (the "period of investigation" or "POI") of July 1, 2019, through June 30, 2020. In the Final Determination, Commerce assigned an estimated dumping margin of 73.00% *ad valorem* to all imports of the subject merchandise. After receiving, on August 9, 2021, notice of an affirmative determination of material injury by the U.S. International Trade Commission ("ITC"), Commerce published an antidumping duty order (the "Order"). *Utility Scale Wind Towers From Spain: Antidumping Duty Order*, 86 Fed. Reg. 45,707 (Int'l Trade Admin. Aug. 16, 2021). In the Order, Commerce directed U.S. Customs and Border Protection to collect 73.00% cash deposits on all imports of subject merchandise, "effective on the date of publication in the Federal Register of the ITC's final affirmative injury determination." *Id.*, 86 Fed. Reg. at 45,708. The ITC had published its final injury determination on August 13, 2021. *Utility Scale Wind Towers From Spain; Determination*, 86 Fed. Reg. 44,748.

B. The Parties

Plaintiff Siemens Gamesa Renewable Energy ("Siemens Gamesa" or "SGRE") is a Spanish exporter of utility scale wind towers. Defendant is the United States. Defendant-intervenor Wind Tower Trade Coalition is an association of U.S. producers of utility scale wind towers that was the petitioner in the antidumping duty investigation.[2]

C. Proceedings Before the Court

Plaintiff commenced this action on August 18, 2021. Summons, ECF No. 1; Compl., ECF No. 8. On January 14, 2022, plaintiff moved for judgment on the agency record under USCIT Rule 56.2. Pl.'s Mot. for J. on the Agency R., ECF No. 27; Br. of Pl. Siemens Gamesa Renewable Energy in Supp. of its Mot. for J. on the Agency R., ECF No. 28 ("Pl.'s Br."). Defendant and defendant-intervenor opposed

[1] Documents in the Joint Appendix (May 26, 2022), ECF Nos. 41 (public), 42 (conf.) are cited as "P.R. __" (for public documents). All information disclosed in this Opinion and Order is information for which there is no claim for confidential treatment. Page numbers are references to the public Joint Appendix ("J.A."), ECF No. 41.

[2] "The members of the Wind Tower Trade Coalition are Arcosa Wind Towers Inc. and Broadwind Towers, Inc." *Utility Scale Wind Towers From Spain: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 86 Fed. Reg. 17,354, 17355 n.6. (Int'l Trade Admin. Apr. 2, 2021) ("*Prelim. Determination*").

plaintiff's motion. Def.'s Resp. to Pl.'s Mot. for J. upon the Agency R. (Apr. 14, 2022), ECF No. 36 ("Def.'s Br."); Wind Tower Trade Coalition's Resp. Br. (Apr. 14, 2022), ECF Nos. 37 (conf.), 38 (public) ("Def.-Int.'s Br."). Plaintiff replied on May 12, 2022. Reply Br. of Pl. Siemens Gamesa Renewable Energy in Supp. of its Mot. for J. on the Agency R., ECF No. 40. Plaintiff also requested an oral argument, Pl.'s Unopposed Mot. for Oral Argument (June 2, 2022), ECF No. 43, and submitted a "Notice of Supplemental Authority," Notice of Suppl. Authority (Sept. 23, 2022), ECF No. 44. Defendant filed a response to this notice. Def.'s Resp. to Pl.'s Notice of Suppl. Authority (Sept. 29, 2022), ECF No. 45.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c),[3] pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an antidumping duty investigation.

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

B. The Department's Respondent Selection Decision

In response to petitions from the Wind Tower Trade Coalition, Commerce initiated antidumping duty investigations of utility scale wind towers from India, Malaysia, and Spain (the "Initiation Notice"). *Utility Scale Wind Towers From India, Malaysia, and Spain: Initiation of Less-Than-Fair-Value Investigations*, 85 Fed. Reg. 73,023 (Int'l Trade Admin. Nov. 16, 2020).

Commerce published a preliminary affirmative less-than-fair-value determination for the Spain investigation in April 2021 (the "Preliminary Determination"). *Utility Scale Wind Towers From Spain: Preliminary Affirmative Determination of Sales at Less Than Fair Value*,

[3] All citations to the United States Code herein are to the 2018 edition.

86 Fed. Reg. 17,354 (Int'l Trade Admin. Apr. 2, 2021) ("*Prelim. Determination*"). Commerce incorporated by reference an explanatory document, the "Preliminary Decision Memorandum." *Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Spain* (Int'l Trade Admin. Mar. 29, 2021), P.R. 134 ("*Prelim. Decision Mem.*"). Commerce described its methodology in these documents.

Commerce explained that in preparing to limit the respondents it would select for individual examination, it sent "Quantity and Value" ("Q&V") questionnaires to nineteen known exporters and producers of the subject merchandise, thirteen of which filed responses. *Id.* at 2, J.A. at 188. On December 23, 2020, five weeks after publication of the Initiation Notice, Commerce announced that, due to its resource constraints and the complexity of the investigation, it would examine individually only one respondent (i.e., a "mandatory respondent") in the investigation. Commerce informed interested parties of this decision in a "Respondent Selection Memorandum." *Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Spain: Respondent Selection* (Int'l Trade Admin. Dec. 23, 2020), P.R. 106 ("*Respondent Selection Mem.*"). In the Respondent Selection Memorandum, Commerce stated as follows:

> Commerce reviewed the Q&V questionnaire responses for each exporter or producer. After carefully considering these Q&V questionnaire data, our resource constraints, as well as the complexity of the issues involved in the investigation, we find that the office responsible for this investigation has the resources to examine individually one mandatory respondent.

Id. at 6, J.A. at 144. Commerce announced, further, that the mandatory respondent would be Vestas Eolica S.A.U. ("Vestas Eolica" or "Vestas"). *Id.* ("Based on our analysis of the Q&V questionnaire data submitted by exporters and producers, the exporter/producer with the largest value of entries of subject merchandise is Vestas Eolica." (footnote omitted)); *id.* at 7, J.A. at 145 (approving the choice of the single mandatory respondent).

After several communications with Commerce, Vestas Eolica and its affiliates informed Commerce on January 28, 2021 that "Vestas Eolica will not continue to participate in the antidumping duty investigation." *Utility Scale Wind Towers from Spain: Notice of Decision to Not Participate in the Investigation* at 1, P.R. 124.

C. The Department's Rejection of Siemens Gamesa's Request to Be a Mandatory Respondent

Siemens Gamesa filed a request to be a mandatory respondent on February 17, 2021. *Less-Than-Fair-Value Investigation of Utility Scale Wind Towers from Spain: Request for Mandatory Respondent Selection*, P.R. 128. In its letter, Siemens Gamesa stated: (1) that it was timely in responding to the Department's Quantity and Value questionnaire, (2) that Commerce had stated in its "Respondent Selection Memorandum" that it had the resources to examine individually one mandatory respondent, and (3) that 40 days remained before the deadline for issuance of a preliminary determination, a deadline Commerce has discretion to extend. *Id*. at 1–3, J.A. at 164–66. Noting that Commerce already had found it had resources to examine one mandatory respondent and that the selected mandatory respondent was no longer participating, Siemens Gamesa added that "as with the question of time, there should be no concern as to Department resources." *Id*. at 3, J.A. at 166. Siemens Gamesa requested that Commerce promptly issue it an antidumping duty questionnaire. *Id*. at 2, J.A. at 165.

The petitioner, the Wind Tower Trade Coalition, opposed Siemens Gamesa's request. *Utility Scale Wind Towers From Spain: Response to SGRE's Request for Additional Mandatory Respondent Selection* (Feb. 19, 2021), P.R. 129. The Wind Tower Trade Coalition argued, *inter alia*, that granting Siemens Gamesa's request would unfairly prejudice it by unduly impeding the investigation, the request having been submitted "56 days after the original respondent selection memorandum in this case, and only 40 days before the preliminary determination." *Id*. at 1, J.A. at 173. Maintaining that there was insufficient time to conduct a complete investigation with a new respondent, and pointing to possible delay in the requirement to post cash deposits, the Wind Tower Trade Coalition argued that "[s]electing a new respondent at this late stage would deprive Petitioner of this expedient relief." *Id*. at 2–3, J.A. 174–75. The Wind Tower Trade Coalition argued, further, that Siemens Gamesa "waited nearly *three weeks* after Vestas' notification of non-participation to submit its request" and also that it "had the opportunity to request voluntary respondent status and submit questionnaire responses, but it chose to waive this status." *Id*. at 7, J.A. at 179 (citing 19 U.S.C. § 1677m(a)(1)).

Commerce rejected Siemens Gamesa's mandatory respondent request on March 5, 2021. *Utility Scale Wind Towers from Spain: Request to Select Replacement Mandatory Respondent*, P.R. 132. Commerce gave as reasons for the rejection that "SGRE's request has come late in the proceeding, only six weeks before the scheduled date

for issuing the preliminary determination," that "SGRE did not make its request until several weeks had passed after Vestas withdrew from participation in this investigation on January 28, 2021," and that "SGRE did not seek to participate as a voluntary respondent; had it done so, it would have provided Commerce with a questionnaire response for SGRE at a far earlier date." *Id*. at 1, J.A. at 184.

D. The Department's Assignment of 73.00% Preliminary Dumping Margins to Seven Respondents and its Selection of a Preliminary 73.00% "All-Others" Rate

In the Preliminary Determination, Commerce preliminarily assigned a rate of 73.00% *ad valorem* to Vestas Eolica based on "facts otherwise available" determined under 19 U.S.C. § 1677e(a) and an "adverse inference" determined under 19 U.S.C. § 1677e(b), based on its finding that Vestas Eolica failed to cooperate by not acting to the best of its ability when it did not respond to the Department's antidumping duty questionnaire.[4] *Prelim. Determination*, 86 Fed. Reg. at 17,355. Commerce determined that six other companies failed to cooperate by not acting to the best of their abilities, based on findings that these six companies failed to respond to the Department's Quantity and Value questionnaire.[5] Commerce assigned each of these six companies a preliminary estimated antidumping duty margin of 73.00%. *Id*. Commerce proceeded to assign the rate of 73.00% as a preliminary estimated "all-others" rate to the exporters and producers of the subject merchandise that it did not individually examine. *Id*. Commerce explained the derivation of its preliminary estimated all-others rate as follows:

> In the Petition, the Wind Tower Trade Coalition (the petitioner) provided only one dumping margin, which was based on a price-to-constructed-value comparison. Therefore, in the absence of another weighted-average dumping margin on the record of this investigation, as the all-others rate, we are preliminarily assigning the sole dumping margin in the *Initiation Notice*, which is 73.00 percent.

Id. (footnotes omitted).

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[4] When applying "facts otherwise available" under 19 U.S.C. § 1677e(a) together with an adverse inference under *id.* § 1677e(b), Commerce refers to "adverse facts available," or "AFA." When the entire margin is determined in this way, Commerce refers to "total AFA."

[5] The six companies Commerce preliminarily found not to have responded to the Quantity and Value questionnaire were Acciona Windpower S.A., Gamesa Energy Transmission, Haizea Wind Group, Kuzar Systems, S.L., Proyectos Integrales y Logisticos S.A.A., and Windar Renovables (an affiliate of Siemens Gamesa Renewable Energy ("Siemens Gamesa")). *Prelim. Determination*, 86 Fed. Reg. at 17,355 n.5.

E. The Department's Assignment of 73.00% Estimated Dumping Margins to Six Respondents and its Selection of a 73.00% Estimated "All-Others" Rate

For the Final Determination, Commerce adopted essentially the same analysis it had used for the Preliminary Determination and assigned 73.00% final estimated dumping margins applicable to all exporters and producers. *Final Determination*, 86 Fed. Reg. at 33,657. Based on "total AFA," Commerce assigned a final estimated dumping margin of 73.00% to the sole mandatory respondent, Vestas Eolica. Commerce used total AFA to assign this same estimated margin to five of the six companies it preliminarily had determined not to have cooperated by failing to respond to the Quantity and Value questionnaire.[6]

The Final Determination made no change to the Department's preliminary determination or analysis for the "all-others" rate of 73.00%. *Id.* ("As discussed in the *Preliminary Determination*, Commerce based the estimated weighted-average dumping margin for all other producers and exporters on the only dumping margin alleged in the Petition, pursuant to section 735(c)(5)(B) of the Act [19 U.S.C. §1673d(c)(5)(B)]. We made no changes to this rate for this final determination.").

F. Plaintiff's Claim and Supporting Grounds

Stated in summary, plaintiff's claim is that Commerce unlawfully assigned it the rate of 73.00% in the investigation. It asserts, in effect, two grounds in support of its claim.

First, Siemens Gamesa argues that Commerce unlawfully refused to examine it individually during the investigation. Plaintiff submits that following notification that Vestas Eolica would no longer participate in the investigation, Siemens Gamesa, "which was initially identified by Commerce as the second largest exporter, thus became the largest and only remaining fully participating exporter of subject merchandise in this investigation." Pl.'s Br. 6. Plaintiff characterizes the Department's reasoning for denying its request, based on "time and resources," as "excuses" that are not supported by the record

[6] Commerce concluded that one of the six companies it preliminarily found to have failed to cooperate by not responding to the Quantity and Value questionnaire, Proyectos Integrales y Logisticos S.A.A. ("Proinlosa"), "attempted to contact Commerce in a timely manner regarding the Q&V questionnaire in an effort to timely submit its Q&V questionnaire response. Accordingly . . . we no longer find that application of total AFA is appropriate with respect to Proinlosa." *Utility Scale Wind Towers From Spain: Final Determination of Sales at Less Than Fair Value*, 86 Fed. Reg. 33,656, 33,657 (Int'l Trade Admin. June 25, 2021). Because Commerce assigned a final estimated "all-others" margin of 73.00%, the redetermination as to Proinlosa was of no practical significance.

facts. *Id.* at 8–9. It argues that Commerce, freed of the obligation to investigate Vestas, had the resources to investigate Siemens Gamesa individually and had sufficient time to do so, in particular because it had authority to extend the deadlines for the preliminary and final determinations. *Id*. at 9 ("Commerce had both the authority and obligation to extend one or both of the determination deadlines."). Quoting 19 U.S.C. §§ 1677f-1(c)(1)–(2), plaintiff argues, further, that Commerce, which was under a general obligation to determine individual dumping margins for each known exporter, was required at least to investigate individually a "reasonable number of exporters," Pl.'s Br. 9, which Commerce, by refusing to investigate Siemens Gamesa individually, failed to do. According to plaintiff, "Commerce is not permitted to impose an AD order where there was no examination of a single exporter, given that another participating exporter remained ready and willing for such an examination." *Id.* at 18.

Second, plaintiff points to the statutory provisions governing the setting of an "all-others" rate in an antidumping duty investigation. Siemens Gamesa argues that "Commerce's decision in this investigation to assign a rate to all parties based solely on AFA, and not a single exporter's data, was directly contrary to the text" of 19 U.S.C. § 1673d(c)(5). *Id*. at 29. According to plaintiff, the Department's use of "a single, untested margin alleged in the Petition as total AFA," *id.* at 30, "in the absence of an individual examination of a single exporter, is not representative of all other exporters," *id.* at 31.

G. The Statutory Requirement to Select More Than One Respondent for Individual Investigation

In its Notice of Supplemental Authority, Siemens Gamesa directed the court's attention to the precedential decision of the Court of Appeals for the Federal Circuit ("Court of Appeals" or "CAFC") in *YC Rubber Co. (North America) LLC v. United States*, No. 21–1489, 2022 WL 3711377 (Fed. Cir. Aug. 29, 2022) ("*YC Rubber*"), which was decided after the briefing in this case was completed. Plaintiff states in its notice that "[s]pecifically, the CAFC vacated and remanded the CIT's decision, concluding that the U.S. Department of Commerce erred in restricting examination to only one exporter/producer." Notice of Suppl. Authority (Sept. 23, 2022), ECF No. 44.

YC Rubber interpreted a statutory provision, 19 U.S.C. § 1677f-1(c)(2), in a way that was contrary to the statutory interpretation Commerce applied in this case to limit its individual examination to a single respondent. The Court of Appeals held that § 1677f-1(c)(2), in providing that Commerce "may determine the weighted average

dumping margins for *a reasonable number* of exporters or producers" (emphasis added), is not satisfied when Commerce decides to examine individually only one exporter or producer: "We conclude that a 'reasonable number' is generally more than one." *YC Rubber*, 2022 WL 3711377, at *4. The Court of Appeals did not accord deference to the Department's contrary interpretation of § 1677f-1(c)(2) under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). After mentioning the government's argument that "Commerce's position that it suffices to review only one respondent warrants *Chevron* deference," the Court of Appeals concluded "that Commerce's position is contrary to the statute's unambiguous language." *YC Rubber*, 2022 WL 3711377, at *3.

While there are some factual differences between the administrative review of the antidumping duty order that was at issue in *YC Rubber* and the antidumping duty investigation at issue in this case, those differences do not support an argument that the holding in *YC Rubber*, which turned on a question of statutory interpretation, is inapplicable here. To the contrary, during this investigation Commerce interpreted § 1677f-1(c)(2)—the same statutory provision interpreted in *YC Rubber*—to allow it to investigate individually only one exporter or producer. *See Respondent Selection Mem*. at 5, J.A. at 143 ("Further, section 777A(c)(2) of the Act [19 U.S.C. § 1677f-1(c)(2)] does not require Commerce to meet a minimum threshold in determining the number of mandatory respondents."). That is the very interpretation the Court of Appeals considered and rejected in *YC Rubber*, based on the unambiguous language of § 1677f-1(c)(2).

In this case, Commerce announced its decision to examine individually only one respondent in the Respondent Selection Memorandum and never departed from that decision throughout the conduct of the entire investigation. The Department's assigning the 73.00% rate to Siemens Gamesa was a result of that unlawful decision, which, when viewed according to the holding *YC Rubber*, was not based on a permissible interpretation of 19 U.S.C. § 1677f-1(c)(2). Therefore, the court finds merit in plaintiff's challenge to the Department's respondent selection method.

In its response to plaintiff's Notice of Supplemental Authority, defendant did not argue that the holding in *YC Rubber* is inapplicable to this case. Defendant responded only by informing the court that the mandate in the case "has not yet issued and the time to seek further review has not expired. The Government has not yet determined whether it will seek further review." Def.'s Resp. to Pl.'s Notice

of Suppl. Authority (Sept. 29, 2022), ECF No. 45. The mandate in *YC Rubber* has now issued. CAFC Mandate in Appeal # 21–1489 (Jan. 18, 2023).

H. The Obligation to Determine the All-Others Rate by a "Reasonable Method"

The court also agrees with plaintiff's argument that Commerce failed to determine the all-others rate by a "reasonable method" as is expressly required by 19 U.S.C. § 1673d(c)(5)(B). The all-others rate Commerce chose because it was "the sole dumping margin alleged in the Petition," *Final Determination*, 86 Fed. Reg. at 33,657, was calculated solely by the petitioner, was not determined by Commerce according to the sales of any individually-investigated respondent, and was not demonstrated by Commerce to be representative of any rate that could have been attributed to the respondents that were not selected for individual examination. In the guise of an actual anti-dumping duty investigation, Commerce merely took a rate advocated by the petitioner and applied it to all exporters and producers of the subject merchandise.

The Tariff Act applies a "general rule" under which "the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title." 19 U.S.C. § 1673d(c)(5)(A). In the investigation, Commerce put itself in a position under which it could not apply this general rule. Having relied upon "total AFA" under 19 U.S.C. § 1677e to determine a margin for Vestas Eolica, the only exporter or producer it selected for individual investigation, Commerce had no estimated weighted average dumping margins that it could average according to § 1673d(c)(5)(A). Therefore, the agency left itself only with the "exception" to the general rule, which the Tariff Act sets forth as follows:

> If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined entirely under section 1677e of this title, the administering authority may use *any reasonable method* to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.

19 U.S.C. § 1673d(c)(5)(B) (emphasis added). The method Commerce chose was not reasonable.

The Court of Appeals addressed a highly similar situation in *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370 (Fed. Cir. 2013) ("*Yangzhou Bestpak*"). The case held that Commerce must use a method that is reasonable based on substantial record evidence in determining an all-others rate under 19 U.S.C. § 1673d(c)(5)(B), even when following the "averaging" methodology expressly permitted by that provision. In *Yangzhou Bestpak*, Commerce calculated an all-others rate in an antidumping duty investigation by taking a simple average of a 247.65% "AFA China-wide rate," which Commerce assigned to one of two mandatory respondents that failed to cooperate in the investigation, with a de minimis rate assigned to the other, cooperating mandatory respondent, resulting in a 123.83% "all others" estimated dumping margin that Commerce applied to the unexamined respondents, including plaintiff Yangzhou Bestpak Gifts & Crafts Co., Ltd. *Id*., 716 F.3d at 1375. The Court of Appeals held that the record lacked evidence to demonstrate the reasonableness of the 123.83% all-others rate. "This case is peculiar in that Commerce identified only two significant exporter/producers, yet one was assigned a *de minimis* dumping margin while the other was assigned the highest possible AFA China-wide margin." *Id.*, 716 F.3d at 1380. "The result is not only limited and frustrating, as the Court of International Trade described it, but is also unreasonable." *Id*. In this case, Commerce created for itself a situation that was even more limited and peculiar.

Defendant and defendant-intervenor argue that the court should deny relief on plaintiff's argument because, they assert, plaintiff failed to exhaust its administrative remedies by not raising its objection to its being assigned the all-others rate in the case brief it submitted to Commerce during the investigation. According to defendant, "the only mention of the all-others rate in SGRE's case brief is a statement that the 'representativeness of investigated exporters is the essential characteristic that justifies an "all-others" rate.'" Def.'s Br. 31 (citing SGRE's "Case Brief," *Antidumping Duty Investigation of Utility Scale Wind Towers from Spain: SGRE's Case Brief* at 6 (May 3, 2021), P.R. 141 ("*Case Brief*")). Defendant-intervenor maintains that plaintiff "never argued that the agency's calculation of the all others rate was contrary to 19 U.S.C. § 1673d, as it now argues at length in its brief to the Court." Def.-Int.'s Br. 25.

The court does not agree that plaintiff failed to exhaust its administrative remedies for its argument that Commerce unlawfully assigned it the 73.00% all-others rate. In quoting a sentence from the

Case Brief, defendant omitted an introductory citation to *Albemarle Corp. v. United States*, 821 F.3d 1345, 1353 (Fed. Cir. 2016), which rejected a separate rate determined by Commerce under 19 U.S.C. § 1673d(c)(5)(B)—the statutory provision at issue here—as unreasonable on the record evidence. *See Albemarle*, 821 F.3d at 1355–56. Further, in identifying what defendant considered to be the "only mention" of the argument addressed to the all-others rate, defendant overlooked another reference to the all-others rate that appeared later in the Case Brief. Identifying the result of the Department's rejecting the request to be a mandatory respondent, the Case Brief specifically objected that "the Department has concluded that it would be preferable to irreversibly issue an order and base the dumping rate *for all exporters* of wind towers from Spain on adverse facts available instead." *Case Brief* at 7 (emphasis added). Thus, the Case Brief not only objected to the unreasonableness of the Department's all-others rate but did so on the specific grounds that it was unrepresentative and based entirely on "adverse facts available."

Defendant also argues that, the exhaustion issue aside, "SGRE's arguments are unpersuasive" because "SGRE is incorrect that Commerce applied AFA to calculate the all-others rate." Def.'s Br. 32. Defendant-intervenor makes the same argument. Def.-Int.'s Br. 26. This argument is also unconvincing.

Defendant quotes the Preliminary Decision Memorandum, which stated that "there are no additional dumping margins available to include in the all-others rate" and that "Commerce is using the dumping margin alleged in the Petition of 73.00 percent as the all-others rate," Def.'s Br. 32 (quoting *Prelim. Decision Mem.* at 9–10), but undeniably, this was the same rate Commerce applied as "total AFA" to the only individually investigated respondent. And whether labeled an "AFA" rate or not, the 73.00% all-others rate was not shown by Commerce to be a reasonable rate for cooperative respondents that were not individually examined. *See Yangzhou Bestpak*, 716 F.3d at 1380. Commerce obtained it from the petition rather than from a "reasonableness" analysis Commerce itself conducted based on its own review of record evidence. Congress entrusted Commerce with the responsibility to conduct an antidumping duty investigation, and to assign individual and, if necessary, all-others rates, according to the detailed requirements set forth in the Tariff Act. Here, it was not lawful for Commerce to evade that investigative responsibility by outsourcing the critical determination to the petitioner.

I. Siemens Gamesa's Decision Not to Seek Voluntary Respondent Status

Defendant also attempts to cast the blame upon Siemens Gamesa for the "paucity of information" with which Commerce could determine an all-others rate:

> The paucity of information on the record due to Vestas's non-cooperation, and SGRE's decision not to seek voluntary respondent status and to timely submit an antidumping questionnaire response, ultimately led to the AFA and the all-others rate being the same, but that does not mean that Commerce applied AFA to SGRE and other exporters who responded to Q&V questionnaires.

Id. at 32–33 (footnote omitted). This argument is meritless.

Siemens Gamesa was under no obligation to request to be a voluntary respondent (or, for that matter, to request to be a substitute mandatory respondent) in order to exhaust its administrative remedies and thereby preserve its right to contest the Department's assigning it the 73.00% rate as an all-others rate, as any respondent adversely affected by that rate potentially could have done. The inadequacy of the 73.00% all-others rate, like the "paucity" of substantial evidence to support it, resulted from the Department's unlawful conduct of the investigation, not from any failure of Siemens Gamesa to participate in that investigation as it was required to do.

The court concludes, further, that Siemens Gamesa's decision not to seek voluntary respondent status during the investigation, even if characterized as a failure to exhaust administrative remedies, does not preclude plaintiff's arguing before the court that the Department's respondent selection method was unlawful. Siemens Gamesa contested that method during the investigation, and its position later was sustained by the holding in *YC Rubber*. Courts long have recognized "intervening legal authority" as an exception to the exhaustion requirement. *See Hormel v. Helvering*, 312 U.S. 552 (1941). Here, there has been an intervening judicial interpretation of existing law "which if applied might have materially altered the result." *Id.*, 312 U.S. at 558–59 (footnote omitted). As discussed above, the CAFC's opinion in *YC Rubber* interpreted a statutory provision, 19 U.S.C. § 1677f-1(c)(2), in a way that was directly contrary to the statutory interpretation Commerce applied in this case to limit its individual examination to a single respondent. Thus, even if it were presumed, *arguendo*, that seeking voluntary respondent status would not have been futile despite the Department's prior statement in the Respondent Selection Memorandum that only one respondent would be ex-

amined individually, another exception to the exhaustion requirement applies to allow Siemens Gamesa to assert the "respondent selection" argument it raises before the court.[7]

III. CONCLUSION AND ORDER

The assignment of the 73.00% rate to Siemens Gamesa was unlawful because it resulted from an unlawful respondent selection method, Commerce having limited its individual examination to a single respondent, contrary to 19 U.S.C. § 1677f-1(c)(2) as interpreted in *YC Rubber*. The 73.00% rate also was unlawful as an "all-others" rate because it was not determined according to a reasonable method as required by 19 U.S.C. § 1673d(c)(5)(B).

On remand, Commerce must correct the error it made when it decided, contrary to 19 U.S.C. § 1677f-1(c)(2), to examine individually only one respondent and, having also decided to proceed according to largest export volume under 19 U.S.C. § 1677f-1(c)(2)(B), not to examine Siemens Gamesa in particular. By the time Commerce decided, on March 5, 2021, not to investigate Siemens Gamesa individually, Commerce already had reached the decision, on December 23, 2020, to proceed under 19 U.S.C. § 1677f-1(c)(2)(B), which is directed to largest export volume, in conducting respondent selection. *See Respondent Selection Mem*. The agency decision to proceed by largest export volume under § 1677f-1(c)(2)(B) is not challenged in this litigation and is, therefore, final. Plaintiff challenges instead the Department's subsequent decision not to examine Siemens Gamesa individually as the largest remaining exporter, and that unlawful decision must be remedied by an individual investigation of Siemens Gamesa during the remand proceeding the court is ordering. The court is allowing 90 days for this investigation but will consider a motion for a longer time period upon a showing of good cause.

Therefore, upon consideration of plaintiff's Rule 56.2 motion and all papers and proceedings had herein, and upon due diligence, it is hereby

ORDERED that Plaintiff's Motion for Judgment on the Agency Record (Jan. 14, 2022), ECF No. 27, be, and hereby is, granted; it is further

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[7] In *YC Rubber Co. (North America) LLC v. United States*, No. 21–1489, 2022 WL 3711377 (Fed. Cir. Aug. 29, 2022) at *2 ("*YC Rubber*"), the Court of Appeals for the Federal Circuit ("Court of Appeals" or "CAFC") noted that the agency stated after the withdrawal of one of the mandatory respondents that no exporter or producer subject to the administrative review requested voluntary respondent status. The CAFC's opinion does not address the question of exhaustion of administrative remedies as to this issue.

ORDERED that Commerce shall submit a redetermination in compliance with this Opinion and Order (a "Remand Redetermination") within 90 days of the date of issuance of this Opinion and Order; it is further

ORDERED that plaintiff and defendant-intervenor may submit comments on the Remand Redetermination within 30 days of the date of submission of the Remand Redetermination to the court; it is further

ORDERED that defendant may submit a response to the comments of plaintiff and defendant-intervenor within 14 days of the date of the last comment submission; and it is further

ORDERED that Plaintiff's Unopposed Motion for Oral Argument (June 2, 2022), ECF No. 43, be, and hereby is, denied.

Dated: February 16, 2023
New York, New York

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

Slip Op. 23–20

SGS SPORTS INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 18–00128

[Granting Defendant's motion for rehearing. After a bench trial, holding that the Warehousing Agreement is a lease or similar use agreement and a Phase Two bench trial shall proceed to determine whether the subject merchandise is eligible for duty-free treatment under subheading 9801.00.20 of the Harmonized Tariff Schedule of the United States. Amending the Court's prior opinion to address the additional issue of whether there is a valid agreement under applicable Canadian corporate law.]

Dated: February 17, 2023

John M. Peterson and *Patrick B. Klein*, Neville Peterson, LLP, of New York, N.Y., argued for Plaintiff SGS Sports Inc. With them on the supplemental briefs was *Richard F. O'Neill*.

Monica P. Triana, Trial Attorney, International Trade Field Office, and *Edward F. Kenny*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendant United States. With them on the pretrial brief were *John V. Coghlan*, Deputy Assistant Attorney General of the Federal Programs Branch, *Jeanne E. Davidson*, Director, and *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office, and with them on the supplemental brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Justin R. Miller*, Attorney-in-Charge. Of counsel on the trial and supplemental briefs was *Sheryl A. French*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

AMENDED OPINION AND ORDER

Choe-Groves, Judge:

Plaintiff SGS Sports Inc. ("Plaintiff" or "SGS") brings this action to contest the denial of its administrative protests by U.S. Customs and Border Protection ("Customs") regarding swimwear and related accessories that Plaintiff entered into the United States in 2013 and 2014 ("subject merchandise"). The Court conducted a bench trial via videoconference to determine whether the subject merchandise was entitled to duty-free treatment under subheading 9801.00.20 of the Harmonized Tariff Schedule of the United States ("HTSUS"), which states:

> 9801.00.20.00 Articles, previously imported, with respect to which the duty was paid upon such previous importation . . . , if (1) reimported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad, after having been exported under lease or similar use agreements, and (2) reimported by or for the account of the person who imported it into, and exported it from, the United States.

HTSUS subheading 9801.00.20.[1] The bench trial focused on the issue of whether the Warehousing Agreement between SGS and 147483 Canada Inc. ("Canada 147483") constituted a lease or similar use agreement under HTSUS subheading 9801.00.20. The Court issued an Opinion and Order on March 21, 2022 (Slip. Op. 22–26), in which the Court concluded after trial, based on findings of fact and conclusions of law, that the Warehousing Agreement is a lease or similar use agreement under HTSUS subheading 9801.00.20.

Before the Court is Defendant's Motion for a New Trial or Rehearing for Slip Op. 22–26, and for The Court to Amend its Findings of Fact and Conclusions of Law and Make Additional Ones ("Defendant's Motion"), ECF No. 100. The Court grants Defendant's Motion and sets aside Slip Opinion 22–26. This Amended Opinion and Order addresses the additional issue of whether there is a valid agreement under applicable Canadian corporate law.

PROCEDURAL HISTORY

Plaintiff attempted to enter the subject merchandise pursuant to HTSUS subheading 9801.00.20. Final Pretrial Order (Phase One of Remote Bench Trial), Schedule C (Phase One Uncontested Facts) ¶ 59, ECF No. 74. Customs denied Plaintiff's claim for duty-free treatment under HTSUS subheading 9801.00.20, reclassified the subject merchandise, and liquidated the entries. *See id.*, Schedule D-1 (SGS Sports, Inc. Claims and Defenses) ¶ 2, Schedule D-2 (Def.'s Claims and Defenses) ¶¶ 2–3. Thereafter, SGS filed three timely protests challenging Customs' classification determination. *See id.* Schedule B ¶ 1; Compl. ¶ 5, ECF No. 6. When denying SGS' protests, Customs stated its determination that the subject merchandise had not been properly exported under a lease or similar use agreement as required under the duty-free HTSUS subheading 9801.00.20 because "no bailment occurred." HQ H216475 (Jan. 16, 2015); HQ H276403 (Dec. 12, 2017). SGS filed suit challenging the denial of its protests. Summons, ECF No. 1; Compl.

The Parties filed cross-motions for summary judgment. Pl.'s Mot. Summ. J., ECF No. 26; Mem. P. & A. Supp. Pl.'s Mot. Summ. J. ("Pl.'s Summ. J. Br."), ECF No. 26–2; Def.'s Cross-Mot. Summ. J., ECF No. 30. The Court denied Plaintiff's motion for summary judgment and granted the cross-motion for summary judgment filed by Defendant. *SGS Sports[] Inc. v. United States*, 44 CIT __, 463 F. Supp. 3d 1356

[1] Plaintiff stopped entering merchandise under HTSUS subheading 9801.00.20 in 2015 and now enters merchandise under HTSUS subheading 9801.00.10,Trial Tr., Day 1, at 80, ECF No. 83, which was amended in 2016 to include "any other products when returned within 3 years after having been exported," HTSUS subheading 9801.00.10. HTSUS subheading 9801.00.10 was amended after the subject merchandise was entered in 2013 and 2014.

(2020). In an order granting Plaintiff's Motion for Rehearing, ECF No. 41, the Court set aside its previous opinion and judgment, and scheduled the matter for trial. *SGS Sports Inc. v. United States*, 44 CIT __, Slip Op. 20–150 (Oct. 22, 2020).

The Court granted a motion to bifurcate the trial into Phase One and Phase Two. Am. Order ("Am. Bifurcation Order") at 1, ECF No. 66. The Court ordered that the Phase One trial would resolve the sole issue of whether the Warehousing Agreement between SGS and Canada 147483, dated September 1, 2005, is a lease or similar use agreement. *Id.* If Phase One did not resolve the case in its entirety, Phase Two would encompass the remaining issues necessary to resolve the case. *Id.* The Court stayed the remaining issues reflected in Defendant's Motion in Limine, ECF No. 52; Plaintiff's Motion in Limine to Allow Introduction at Trial of an Evidence Summary Pursuant to FRE 1006 ("Plaintiff's Motion in Limine"), ECF No. 54; and the deadline for Defendant to respond to Plaintiff's Motion in Limine, pending the Court's decision in Phase One. Am. Bifurcation Order at 1–2. The Parties filed pretrial briefs and schedules. Def.'s Pretrial Br., ECF No. 67; Pl.'s Pretrial Mem. ("Pl.'s Pretrial Br."), ECF No. 68; [Proposed] Pretrial Order, ECF No. 71.

The Court conducted the Phase One trial on February 4 and 5, 2021. Docket Entries, ECF Nos. 81, 82. The Court heard testimony via videoconference from three fact witnesses: Anna Murdaca, Vice President of Finance and Chief Financial Officer of SGS since 1997 and part owner of SGS since 2007; Michael Couchman, Warehouse Manager of Canada 147483 for approximately ten years; and Steven Gellis, President of SGS since its incorporation in 1988 and President of Canada 147483 since its incorporation in 1985. Trial Tr., Day 1, at 59–298, ECF No. 83. The witnesses provided testimony that appeared to be truthful based on each witness' respective demeanor, inflection, length of employment in his or her position, and familiarity with the subject matter of the questions asked, and thus provided the Court with the necessary basis to conclude that they were credible witnesses.

In its pretrial brief, Plaintiff repeated its argument from its summary judgment response brief that Customs was bound by its previous rulings to treat the Warehousing Agreement as a similar use agreement under HTSUS subheading 9801.00.20 because Customs had not modified or revoked its previous rulings under the 19 U.S.C. § 1625(c) notice and comment procedure. Pl.'s Mem. P. & A. Opp'n Def.'s Cross-Mot. Summ. J. and Reply Supp. Pl.'s Mot. Summ. J. at 9–15, ECF No. 32; Pl.'s Pretrial Br. at 7–13. Defendant objected to the 19 U.S.C. § 1625(c) argument at the January 21, 2020 pretrial con-

ference and renewed its objection at trial. Trial Tr., Day 1, at 6–8, 27; Trial Tr., Day 2, at 340; Docket Entry (Jan. 21, 2021 Pretrial Conference), ECF No. 72. The Court ordered supplemental briefing and held oral argument on the 19 U.S.C. § 1625(c) issue on January 12, 2022. Order (Oct. 8, 2021), ECF No. 85; Pl.'s Suppl. Br. Concerning 19 U.S.C. § 1625(c) ("Pl.'s Suppl. Br."), ECF No. 86; Def.'s Suppl. Submission ("Def.'s Suppl. Br."), ECF No. 89; Pl.'s Reply Br. Concerning 19 U.S.C. § 1625(c) ("Pl.'s Reply Br."), ECF No. 90; Docket Entry (Jan. 12, 2022 Oral Arg.), ECF No. 94; Oral Arg. (on file with the U.S. Court of International Trade).

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a). The Court reviews classification cases based on the record made before the Court. 28 U.S.C. § 2640(a).

A two-step process guides the Court in determining the correct classification of merchandise. First, the Court ascertains the proper meaning of the terms in the tariff provision. *See Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1162 (Fed. Cir. 2017) (citing *Sigma-Tau HealthScience, Inc. v. United States*, 838 F.3d 1272, 1276 (Fed. Cir. 2016)). Second, the Court determines whether the subject merchandise falls within the parameters of the tariff provision. *See id.* (citing *Sigma-Tau HealthScience, Inc.*, 838 F.3d at 1276). The former is a question of law and the latter is a question of fact. *See id.* "[W]hen there is no dispute as to the nature of the merchandise, then the two-step classification analysis 'collapses entirely into a question of law.'" *Link Snacks, Inc. v. United States*, 742 F.3d 962, 965–66 (Fed. Cir. 2014) (quoting *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)).

The Court reviews classification cases de novo. *See* 28 U.S.C. § 2640(a)(1). The Court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citation omitted). The Court must determine "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

FINDINGS OF FACT

The Court makes the following findings of fact based on a review of the documents admitted into evidence and the credible testimony of the witnesses during the bench trial:

1. SGS is and has always been an importer and distributor of swimwear, sports apparel, and related merchandise. Schedule C ¶ 7; Trial Tr., Day 1, at 63, 117.

2. SGS is a Canadian corporation that was incorporated under the Canada Business Corporations Act on January 19, 1988 by Mr. Gellis. Schedule C ¶ 5; Pl.'s Ex. 1; Def.'s Ex. 1; Trial Tr., Day 1, at 63–64, 116.

3. From incorporation of SGS in 1988 until 2007, Mr. Gellis was the sole owner and sole officer of SGS. Schedule C ¶¶ 8–9; Trial Tr., Day 1, at 117.

4. Mr. Gellis is and has always been the President of SGS. Schedule C ¶¶ 9, 101; Trial Tr., Day 1, at 102, 272, 287–88.

5. SGS modified its ownership structure and reorganized the shares of the company in 2007 and 2013, both of which occurred subsequent to the execution of the Warehousing Agreement. Schedule C ¶ 91; Trial Tr., Day 1, at 201–03.

6. Canada 147483 is a Canadian corporation that was incorporated under the Canada Business Corporations Act on October 22, 1985 at the direction of Mr. Gellis. Schedule C ¶¶ 1–2; Pl.'s Ex. 2; Def.'s Ex. 2; Trial Tr., Day 1, at 72, 114.

7. From incorporation of Canada 147483 in 1985, Mr. Gellis is and has always been the sole owner and officer of Canada 147483. Schedule C ¶¶ 3, 101; Trial Tr., Day 1, at 115.

8. Beginning in 2001, SGS leased real property located at 6400 Cote de Liesse Road, St-Laurent, Quebec, which has continuously been the address of SGS' office. Schedule C ¶ 25; Pl.'s Ex. 10; Def.'s Ex. 14; Trial Tr., Day 1, at 69, 118–20.

9. In 2005, SGS leased additional real property adjacent to 6400 Cote de Liesse Road, with an address of 6450 Cote de Liesse Road, St-Laurent, Quebec, which has continuously been the location of the warehouse since 2005. Schedule C ¶ 26; Pl.'s Ex. 10; Def.'s Exs. 14, 16; Trial Tr., Day 1, at 69–70, 98, 118–20.

10. Canada 147483 does not pay any rent to SGS or any other entity for use of the warehouse. Schedule C ¶ 67; Trial Tr., Day 1, at 175.

11. All of the property, inventory, and equipment in the warehouse are owned by SGS and were identified as assets of SGS on its financial statements. Schedule C ¶ 68; Trial Tr., Day 1, at 176; *see* Def.'s Exs. 6–10.

12. The utility bill for the real property located at 6450 Cote de Liesse Road, which is separate from the utility bill for the real property located at 6400 Cote de Liesse Road, is paid by SGS. Schedule C ¶ 70; Trial Tr., Day 1, at 177.

13. The insurance policy on all of the merchandise and equipment in the entirety of the real property located at 6400 and 6450 Cote de Liesse Road is held by SGS. Schedule C ¶ 71; Trial Tr., Day 1, at 176–77.

14. On September 1, 2005, Mr. Gellis reviewed, approved, and executed a document entitled "Warehousing Agreement" by signing on behalf of both SGS and Canada 147483 in his capacity as President and sole officer of both companies. Schedule C ¶¶ 40, 45, 57; Pl.'s Ex. 8 ("Warehousing Agreement"); Def.'s Ex. 12 ("Warehousing Agreement"); Trial Tr., Day 1, at 160, 295–96.

15. Mr. Gellis was not required, according to the bylaws of either company, to obtain approval from any other person in order to execute the Warehousing Agreement. Schedule C ¶ 44.

16. In the Warehousing Agreement, SGS and Canada 147483 mutually agreed that:

> (1) "[SGS] may, from time to time request that [Canada 147483] take delivery of merchandise on behalf of [SGS] and to hold said merchandise pending the instructions of [SGS] regarding the disposition of the merchandise."
> (2) "[Canada 147483] agrees that in taking delivery of said merchandise it will perform the following functions:
>
> > (a) provide all necessary labor for the handling, storage and safe keeping of the property deposited for storage;
> >
> > (b) assist [SGS] and its agents in the transportation of the merchandise both to and from the warehouse;
> >
> > (c) create and maintain inventory records of all merchandise delivered to [Canada 147483];
> >
> > (d) maintain perpetual inventory records;

> (e) assist [SGS] in the issuance of samples from the inventory on deposit;
>
> (f) take periodic inventory of the merchandise deposited;
>
> (g) provide, at [SGS'] request, all of the services typically provided by a Warehouseman in the ordinary course of business, including, but not limited to, 'pick & pack' services."

Warehousing Agreement at 1–2; *see* Schedule C ¶ 41; Trial Tr., Day 1, at 254.

17. SGS does not manufacture the merchandise it sells; the merchandise is imported from foreign suppliers, who are primarily located in China. Schedule C ¶ 27; Trial Tr., Day 1, at 66.

18. Beginning in 2005, SGS' foreign suppliers shipped SGS' merchandise, by sea or by air, to Canada. When sent by combined transport utilizing sea and rail, the goods were transported "through Montreal," and when sent by air, the airport of destination was Montreal. From Montreal, the merchandise was then transported by truck, in bond, to Champlain, New York. Order (Feb. 2, 2021) at 1, ECF No. 80 (granting the Parties' joint motion to amend Schedule C ¶ 33); Trial Tr., Day 1, at 67, 127, 130–36.

19. When the in-bond merchandise was brought into New York, SGS would file a consumption entry in the United States and duties were assessed on the price "paid or payable" to the foreign supplier. Order (Feb. 2, 2021) at 1; Trial Tr., Day 1, at 67–68, 128, 136–37.

20. Beginning in 2005 and up until at least the date the subject merchandise entered the United States, containers that were imported into the United States by SGS from its foreign suppliers were immediately exported, unaltered, from the United States to SGS' warehouse at 6450 Cote de Liesse Road in Canada by truck. Schedule C ¶¶ 26, 34; Trial Tr., Day 1, at 63, 67, 128.

21. As to the transactions from the United States to Canada, SGS acts as both the exporter (from the United States) and importer (into Canada). Schedule C ¶ 34; Trial Tr., Day 1, at 137, 139.

22. The physical handling of the merchandise by Canada 147483 began when the merchandise arrived at the loading dock for the SGS warehouse. Legal title to that merchandise did not pass from SGS to Canada 147483. Order (Feb. 2, 2021) at 2 (granting the Parties' joint motion to amend Schedule C ¶ 62); Trial Tr., Day 1, at 63, 67, 140, 163–64, 252.

23. When merchandise reached the SGS warehouse, Canada 147483 employees confirmed the number of cartons in the shipment; documented any open or broken boxes and notified SGS; segregated the merchandise by style, color, and size; and placed the merchandise in appropriate areas. Trial Tr., Day 1, at 67, 74, 217, 252, 254–57.

24. When a customer placed an order, SGS entered the order into its system. The allocation system compared the order to the inventory on hand and automatically allocated inventory to the orders. The SGS allocation manager reviewed the allocation and an SGS employee printed a picking ticket and placed it in a basket in the SGS front office. Schedule C ¶¶ 64–65; Trial Tr., Day 1, at 91–92; *see* Pl.'s Ex. 14.

25. Two or three times per day, a Canada 147483 employee entered the SGS front office, retrieved the accumulated pick tickets, and took the pick tickets to Mr. Couchman. Schedule C ¶¶ 65–66; Trial Tr., Day 1, at 92–94, 235, 258–59; *see* Pl.'s Ex. 14; Def.'s Ex. 32.

26. Mr. Couchman placed the pick tickets in order of priority. Trial Tr., Day 1, at 258–60.

27. A Canada 147483 employee retrieved the inventory by style and color as indicated on the pick ticket, packed the merchandise, and arranged for the carrier to ship the merchandise to the customer. Schedule C ¶¶ 65–66; Trial Tr., Day 1, at 92–94, 235, 258–59; *see* Pl.'s Ex. 14; Def.'s Ex. 32.

28. The Warehouse Manager for Canada 147483, Mr. Couchman, interacted with SGS' suppliers—both warehouse supply companies and transport companies, such as FedEx and UPS—on behalf of SGS, identifying himself as Warehouse Manager for SGS. Mr. Couchman was an au-

thorized user on the SGS purchasing accounts for many such vendors. Schedule C ¶ 75; Trial Tr., Day 1, at 180–82, 246–48.

29. A Canada 147483 employee indicated by circling that all the inventory on a pick ticket had been picked and returned the fulfilled pick tickets back to the SGS front office. The fulfilled pick tickets were used to invoice SGS for Canada 147483's services. Schedule C ¶ 66; Trial Tr., Day 1, at 94–99, 109–10; *see* Pl.'s Ex. 12; Def.'s Exs. 16, 18, 39.

30. Canada 147483 on its own could not decide to direct any merchandise to leave the SGS warehouse. No merchandise left the SGS warehouse except according to a pick ticket from SGS. Trial Tr., Day 1, at 263.

31. Canada 147483 employees did not "use" merchandise for any purpose other than to provide "pick and pack" services. Trial Tr., Day 1, at 264–65.

32. In 2013 and 2014, SGS imported the subject merchandise into the United States under various consumption entries and paid duties on the price paid or payable to the foreign supplier. *See* Compl. ¶ 8; Order (Feb. 2, 2021) at 1; Trial Tr., Day 1, at 67–68, 128, 136–37.

33. SGS exported the subject merchandise immediately to Canada. *See* Compl. ¶ 9; Schedule C ¶¶ 34–35; Trial Tr., Day 1, at 63, 67, 128.

34. SGS and Canada 147483 understood the terms of the Warehousing Agreement to apply to Canada 147483's handling of the subject merchandise. *See* Trial Tr., Day 1, at 79, 241.

35. Canada 147483 handled the subject merchandise at the warehouse in the same manner in which it generally handled all of SGS' merchandise. *See* Order (Feb. 2, 2021) at 2; Schedule C ¶¶ 64–66, 75; Trial Tr., Day 1, at 67, 74, 91–94, 217, 235, 252–60, 264–65; *see* Pl.'s Ex. 14; Def.'s Ex. 32.

36. SGS imported the subject merchandise into the United States, asserting that the merchandise was properly classified under HTSUS subheading 9801.00.20. Schedule C ¶ 59.

37. Customs denied SGS' claim for duty-free treatment under HTSUS subheading 9801.00.20, liquidated the subject entries, reclassified the merchandise under HTSUS Chapters 61 through 63, and assessed duties. Compl. ¶ 24; Trial Tr., Day 1, at 100; *see* Pl.'s Ex. 16.

CONCLUSIONS OF LAW

I. HTSUS Subheading 9801.00.20

The Court conducts de novo review of whether the subject merchandise qualifies for duty-free treatment under HTSUS subheading 9801.00.20. The Court specifically addresses only the Phase One bifurcated trial issue of whether the Warehouse Agreement is a lease or similar use agreement.

A. Legal Framework

In construing the terms of the HTSUS headings, "[a] court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337–38 (Fed. Cir. 1999)). Ordinarily, the Court may also consult the Harmonized Commodity Description and Coding System's Explanatory Notes ("Explanatory Notes"), which "are not legally binding or dispositive," *Kahrs Int'l, Inc. v. United States*, 713 F.3d 640, 645 (Fed. Cir. 2013), but here the tool is unavailable because Chapter 98 does not have Explanatory Notes. Tariff terms are defined according to the language of the headings, the relevant section and chapter notes, the Explanatory Notes, available lexicographic sources, and other reliable sources of information.

B. Analysis of the Terms of HTSUS Subheading 9801.00.20

The Court first ascertains the proper meaning and scope of HTSUS subheading 9801.00.20. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998).

HTSUS subheading 9801.00.20 covers reimported merchandise: (1) upon which duty was paid at the time of previous importation; (2) that has not been advanced in value or improved in condition by any process of manufacture or other means while abroad; (3) that was exported under a lease or similar use agreement; and (4) that is reimported by or for the account of the person who imported the merchandise into, and exported it from, the United States. *See* HT-

SUS subheading 9801.00.20; *Skaraborg Invest USA, Inc. v. United States*, 22 CIT 413, 417, 9 F. Supp. 2d 706, 709 (1998).

Generally, an importer must pay a duty on previously imported merchandise that was exported and then reimported into the United States. 19 C.F.R. § 141.2. HTSUS subheading 9801.00.20 provides an exception to this general rule by allowing duty-free treatment if the subject merchandise was originally imported into the United States and duties were paid, the merchandise was exported outside the United States under a lease or similar use agreement, and then reimported back into the United States. The purpose of this provision is to prevent the imposition of double duties for merchandise that meets the specific requirements of HTSUS subheading 9801.00.20. Customs determines whether to allow for duty-free treatment under HTSUS subheading 9801.00.20, as set forth in the relevant implementing regulation as follows:

> **Entry of reimported articles exported under lease.** Free entry shall be accorded under subheading 9801.00.20, Harmonized Tariff Schedule of the United States (HTSUS), whenever it is established to the satisfaction of the Center director that the article for which free entry is claimed was duty paid on a previous importation . . . , is being reimported without having been advanced in value or improved in condition by any process of manufacture or other means, was exported from the United States under a lease or similar use agreement, and is being reimported by or for the account of the person who imported it into, and exported it from, the United States.

19 C.F.R. § 10.108.

C. Lease or Similar Use Agreement

Phase One of this bifurcated trial involves only the third element, whether the Warehousing Agreement constitutes a lease or similar use agreement. Am. Bifurcation Order at 1; *see* HTSUS subheading 9801.00.20. Plaintiff argues that its Warehousing Agreement is a bailment agreement, which Customs has previously recognized as a "lease or similar use agreement[]." *See* Pl.'s Pretrial Br. at 3; Trial Tr., Day 2, at 330, 338–39. The Court notes at the outset that Plaintiff's characterization of its arrangement with Canada 147483 as a "bailment agreement" presupposes a legal conclusion, and the Court does not entertain an analysis of whether there is a bailment agreement in this case. The Court confines its analysis to whether the facts ascertained at trial establish a lease or similar use agreement under a statutory analysis of HTSUS subheading 9801.00.20.

The Court looks to dictionary definitions to construe the tariff terms "lease or similar use agreement[]." "Lease" is defined as "[a] contract by which a rightful possessor of personal property conveys the right to use that property in exchange for consideration." *Lease* (5), *Black's Law Dictionary* (11th ed. 2019). "Similar" is defined as "alike in substance or essentials." *Similar*, *Merriam-Webster's Collegiate Dictionary* at 1161 (11th ed. 2020). "Use" as a noun is defined as "[t]he application or employment of something." *Use* (noun) (1), *Black's Law Dictionary* (11th ed. 2019). "Use" as a verb is defined as "[t]o employ for the accomplishment of a purpose." *Use* (verb) (1), *Black's Law Dictionary* (11th ed. 2019). "Use" is also defined as "to carry out a purpose or action." *Use*, *MerriamWebster's Collegiate Dictionary* at 1378. "Agreement" is defined as "[a] mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons." *Agreement* (1), *Black's Law Dictionary* (11th ed. 2019).

Accordingly, the Court construes the terms "lease or similar use agreement[]" under HTSUS subheading 9801.00.20 in light of these relevant dictionary definitions as follows:

The Court construes the term "lease" to mean a contract by which a rightful possessor of the subject merchandise conveys the right to employ the subject merchandise for the accomplishment of a purpose or action in exchange for consideration.

The Court construes the terms "similar use agreement" and "use agreement similar to a lease" to be synonymous in the context of HTSUS subheading 9801.00.20, because "similar" compares the use agreement to a lease.

The Court construes the synonymous terms "similar use agreement" and "use agreement similar to a lease" to mean a mutual understanding between two or more parties to employ the subject merchandise for the accomplishment of a purpose or action that is alike in substance to a lease. Both a lease and a similar use agreement require that the subject merchandise be employed for the accomplishment of a purpose or action.

Few cases at the U.S. Court of International Trade have opined on a lease or similar use agreement. In *Werner & Pfleiderer Corp. v. United States* ("*Werner*"), 17 CIT 916 (1993), the court held that consideration is not required for a valid similar use agreement. 17 CIT at 918. The Court of International Trade defined a "similar use agreement" under HTSUS subheading 9801.00.20 as a loan for temporary use. *Skaraborg*, 22 CIT at 418; *Werner*, 17 CIT at 918. In

Werner, the subject merchandise machine was reimported to the United States after it was loaned by the plaintiff to Ogilvie Mills Limited and several test runs of the subject merchandise machine were performed at Ogilvie Mills Limited's facilities in Canada. 17 CIT at 916. The *Werner* court determined that the agreement to "loan" the machine "for testing purposes" was "either a lease or a similar use agreement." *Id.* at 918–19. This is consistent with the Court's definition of a similar use agreement because testing requires operating the subject merchandise for the accomplishment of a purpose or action.

Legislative history also supports the Court's statutory interpretation. In the 1963 version of the Tariff Schedule of the United States ("TSUS"), which followed the enactment of the Tariff Classification Act of 1962, Pub. L. No. 87–456, Item 801.00 of the TSUS appeared as follows:

> Articles, previously imported, with respect to which the duty was paid upon such previous importation, if (1) reimported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad, after having been exported under *lease to a foreign manufacturer*, and (2) reimported by or for the account of the person who imported it into, and exported it from, the United States.

Tariff Classification Act of 1962, Pub. L. No. 87–456, Schedule 8, Item 801.00, 77A Stat. 403, 406 (1962) (emphasis added). Item 801.00 of the TSUS was amended by the Trade and Tariff Act of 1984, Pub. L. No. 98–573, to language identical to the language of HTSUS subheading 9801.00.20, as follows:

> **SEC. 118. REIMPORTATION OF CERTAIN ARTICLES ORIGINALLY IMPORTED DUTY FREE.**
>
> Item 801.00 is amended—
>
> . . .
>
> (2) by striking out "lease to a foreign manufacturer" in clause (1) and inserting in lieu thereof "*lease or similar use agreements*."

Trade and Tariff Act of 1984, Pub. L. 98–573, § 118, 98 Stat. 2948, 2953–54 (1984) (emphasis added). The legislative intent is recorded in a Ways and Means Committee Report of stand-alone bill H.R. 5448, as the amendment was originally introduced, and later a House of Representatives Report of the amendment as combined with other bills in omnibus bill H.R. 6064:

> Section 1 of H.R. 5448, if enacted, would extend the duty-free treatment of item 801.00 of the Tariff Schedules of the United States (TSUS) to the reimportation of articles which were imported into the United States and then exported *under lease or similar use agreement* to an entity other than a foreign manufacturer. . . . The intent of this legislation is to extend the coverage of that provision to the reimportation of goods which were exported *under lease* to someone other than a foreign manufacturer; of particular concern are exportations *under lease* to a government or service industry. . . .
>
> Item 801.00 may be applied to any type of article. However, it appears to be primarily applied to the reimportation of injection molds for plastic or rubber products, such as combs, plastic houseware items, toys, or tires. The molds are manufactured of steel and generally range in price from $8,000 to $80,000. Other reimported articles entered under item 801.00 include dies of all kinds and general tooling equipment such as jigs, fixtures, and CNC machine lathes. . . .

Report on Miscellaneous Tariff and Customs Bills Before the Subcomm. on Trade of the H. Comm. on Ways and Means, 98th Cong. 34, 157–59 (1984) (emphasis added); *see also* H.R. Rep. No. 98–1015, at 1, 24 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4960, 4983. The word "lease" in Item 801.00 was replaced with the phrase "lease or similar use agreement," but the legislative history reflects a focus on lease with references to "goods which were exported under lease" and "exportations under lease." A reading of the entire report supports a conclusion that the expansion of the provision intended by the 1984 amendment does not apply to all goods that were imported and duty-paid, then exported and reimported, under any type of agreement that might be described as a use agreement, but rather a use agreement that is similar to a lease.

Based on credible testimony presented during a bench trial, the Court finds that under the Warehousing Agreement in this case, SGS and Canada 147483 expressed a mutual understanding for Canada 147483 to "take delivery of merchandise on behalf of [SGS] and to hold said merchandise pending the instructions of [SGS] regarding the disposition of the merchandise;" "provide all necessary labor for the handling, storage and safe keeping of the property deposited for storage;" "assist [SGS] and its agents in the transportation of the merchandise both to and from the warehouse;" "create and maintain inventory records of all merchandise delivered to [Canada 147483]; "maintain perpetual inventory records;" "assist [SGS] in the issuance

of samples from the inventory on deposit;" "take periodic inventory of the merchandise deposited;" and "provide, at [SGS'] request, all of the services typically provided by a Warehouseman in the ordinary course of business, including, but not limited to, 'pick & pack' services." Warehousing Agreement at 1–2. Evidence elicited at trial established that Canada 147483's handling of the subject merchandise involved confirming the number of cartons in the shipment; notifying SGS of any open or damaged boxes; segregating by style, color, and size; placing the merchandise in appropriate areas; retrieving the inventory by style and color as indicated on the pick ticket; packing the merchandise; and arranging for a carrier to ship the merchandise to the customer. Schedule C ¶¶ 65–66; Trial Tr., Day 1, at 91–94, 217, 235, 252–55, 257–59; *see* Pl.'s Ex. 14. The Court finds that sufficient credible evidence was presented at trial to establish that Canada 147483 employees, pursuant to the Warehousing Agreement, used the subject merchandise for the accomplishment of the purpose or action of providing warehousing and "pick and pack" services that satisfies the meaning of a similar use agreement under HTSUS subheading 9801.00.20.

Defendant argues that by its plain or common meaning, a "use agreement similar to a lease" conveys the right to use and possess the property, and that possession is characterized by dominion and control over the property. Def.'s Pretrial Br. at 21; Trial Tr., Day 2, at 345–47. Defendant contends that because the services covered by the Warehousing Agreement do not involve use of merchandise, and Canada 147483 did not have exclusive possession, control, or dominion over the subject merchandise and could not use the subject merchandise as it wished, the Warehousing Agreement is not a use agreement similar to a lease. Def.'s Pretrial Br. at 21–26; Trial Tr., Day 2, at 347–52.

The Court does not agree with Defendant that the "use" must be for the specific purpose for which the subject merchandise was designed (for example, Canada 147483 employees do not need to wear the bathing suits for swimming under the "use" requirement), but it is sufficient if some purpose or action, such as performing warehousing services or "pick and pack" services, or testing as in *Werner*, is the purpose or action under the agreement.

Defendant proposed including an element of possession by defining "lease" as "a contract by which one owning property grants to another the right to possess, use and enjoy it for a specified period of time in exchange for periodic payments." Def.'s Pretrial Br. at 18–19 (quoting *Black's Law Dictionary* at 800 (5th ed. 1979)) (emphasis and internal punctation omitted). Defendant proposed defining "possession" as:

> 1. The fact of having or holding property in one's power; the exercise of dominion over property. 2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. 3. Civil law. The detention or use of a physical thing with the intent to hold it as one's own. La. Civ. Code art. 3421(a). 4. (usu. pl.) Something that a person owns or controls. . . .

Id. at 10 n.2 & 18–19 (quoting *Black's Law Dictionary* (11th ed. 2019)). The Court rejects Defendant's contention that use under HTSUS subheading 9801.00.20 must involve Canada 147483 possessing or having exclusive control over the subject merchandise, akin to temporary ownership of the goods. The Court declines to read "use" as narrowly as proposed by Defendant.

D. Valid Agreement

The Court amends the previous opinion to address the additional issue of whether a valid agreement exists under applicable Canadian corporate law. Plaintiff argues that the Warehousing Agreement is not a valid agreement because SGS and Canada 147483 are a single entity that operates at the direction and sole discretion of Mr. Gellis for the benefit of SGS. Pl.'s Pre-Trial Br. at 1–2, 22–26. Because SGS and Canada 147483 are corporations, agreement with Plaintiff's argument that SGS and Canada 147483 are a single entity would require the Court to pierce the corporate veils of both SGS and Canada 147483.

The Court cannot "lightly cast aside" the corporate form. *3D Sys. v. Aarotech Labs., Inc.*, 160 F.3d 1373, 1380 (Fed. Cir. 1998). Canadian corporate law applies here because SGS and Canada 147483 were both incorporated in Canada under the Canada Business Corporations Act. Schedule C ¶¶ 1–2, 5; Pl.'s Exs. 1, 2; Def.'s Exs. 1, 2; Trial Tr., Day 1, at 63–64, 72, 114, 116. SGS and Canada 147483 are both located in Quebec. Schedule C ¶¶ 25, 26; Pl.'s Ex. 10; Def.'s Exs. 14, 16; Trial Tr., Day 1, at 69–70, 98, 118–20.

Article 317 of the Civil Code of Quebec provides that "[t]he juridical personality of a legal person may not be invoked against a person in good faith so as to dissemble fraud, abuse of right or contravention of a rule of public order." Civil Code of Quebec, C.Q.L.R. 1991, c 64, art. 317 (Can.); *see also Barer v. Knight Brothers LLC*, 2019 SCC 13, paras. 201, 209, 286 (Can.). "It is trite law that [a] corporation[] ha[s]

a legal personality that is separate from its shareholders." *7914377 Canada Inc. v. Gauvreau*, 2019 QCCS 4344, para. 83 (Can.). To satisfy the fraud requirement of Article 317, "two essential elements of a fraud are dishonesty and loss." *Chisasibi (Cree Nation) v. Servitec Emergency Vehicle Corp.*, 2005 CarswellQue 13008, para. 21 (Can. C. Que.) (WL). Article 317 prohibits a company's shareholders and directors from hiding behind a corporation's juridical personality "to abuse of this right to defraud people doing business with the corporation. . . . [O]ne must prove that said shareholders or directors are the *alter ego* of the corporation; *Alter ego* means a corporation which is an instrument, a puppet in the hands of said shareholders who act through it." *Panorios v. 9200–8143 Quebec Inc.*, 2010 QCCQ 3264, paras. 45, 47–48 (Can. C. Que.).

Defendant argues that because Customs did not seek to impose liability on Canada 147483 or Mr. Gellis, the test for piercing the corporate veil and determining that one entity is an alter ego of another entity need not be applied rigidly. Def.'s Pretrial Br. at 23. Defendant does not cite direct authority supporting its argument and the Court is not persuaded that a less rigid test exists under Quebec law by Defendant's references to the caselaw of various other Canadian and U.S. jurisdictions.

Defendant did not present evidence at trial that SGS committed fraud, abuse of right, or contravention of a rule of public order as required under Canadian law to pierce the corporate veil. The Court agrees with Plaintiff's assertion that Defendant never elicited evidence at trial regarding alleged fraud or wrongdoing by the principals of SGS and Canada 147483, even though Defendant cross-examined multiple witnesses from SGS and Canada 147483 during trial. Because Defendant failed to establish any evidence of fraud, alter ego, or other wrongdoing by SGS and Canada 147483 during trial, the Court views the companies as separate corporate entities and declines to pierce the corporate veils of SGS and Canada 147483. The Court concludes, therefore, that the Warehousing Agreement is a valid agreement between two corporations, SGS and Canada 147483.

In sum, the Court reiterates its conclusion based on the credible evidence presented at trial that the Warehousing Agreement is a lease or similar use agreement, specifically a mutual understanding between two or more parties to employ the subject merchandise for the accomplishment of the purpose or action of providing warehousing and "pick and pack" services that is alike in substance to a lease. Therefore, the Court holds that the Warehousing Agreement is a lease or similar use agreement for purposes of HTSUS subheading 9801.00.20. Because the third requirement of HTSUS subheading

9801.00.20 is satisfied, the Court concludes that a further trial on Phase Two of the Bifurcation Order shall proceed.[2]

CONCLUSION

For the foregoing reasons, the Court holds that the Warehousing Agreement is a lease or similar use agreement and a trial should proceed under Phase Two of the Bifurcation Order to determine whether Plaintiff's subject entries qualify for duty-free treatment under HTSUS subheading 9801.00.20.

It is hereby

ORDERED that Defendant's Motion, ECF No. 100, is granted; and it is further

ORDERED that Slip Opinion 22–26, ECF No. 95, is set aside; and it is further

ORDERED that following a bench trial, the Court concludes that the Warehousing Agreement is a lease or similar use agreement under Phase One of the Bifurcation Order; and it is further

ORDERED that a trial should proceed under Phase Two of the Bifurcation Order to determine whether Plaintiff's subject entries qualify for duty-free treatment under HTSUS subheading 9801.00.20; and it is further

ORDERED that a status conference will be scheduled accordingly to discuss trial under Phase Two of the Bifurcation Order.

Dated: February 17, 2023
New York, New York

/s/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

[2] The Court considered supplemental briefing and held oral argument on the issue of whether 19 U.S.C. § 1625(c) applies in this case. In light of the Court's holding that the Warehousing Agreement is a lease or similar use agreement for purposes of HTSUS subheading 9801.00.20, the Court need not address the 19 U.S.C. § 1625(c) arguments presented by the Parties.

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