# U.S. Customs and Border Protection

**DEPARTMENT OF THE TREASURY**

**19 CFR PART 12**

**CBP DEC. 24–09**

**RIN 1515–AE82**

## IMPOSITION OF IMPORT RESTRICTIONS ON ARCHAEOLOGICAL AND ETHNOLOGICAL MATERIAL OF PAKISTAN

**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 the imposition of import restrictions on archaeological and ethnological materials from the Islamic Republic of Pakistan (Pakistan). These restrictions are imposed pursuant to an agreement between the United States and Pakistan, entered into under the authority of the Convention on Cultural Property Implementation Act. This document amends the CBP regulations, adding Pakistan to the list of countries which have bilateral agreements with the United States imposing cultural property import restrictions, and contains the Designated List, which describes the archaeological and ethnological materials to which the restrictions apply.

**DATES:** Effective on April 10, 2024.

**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

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), allows for the conclusion of an agreement between the United States and another party to the Convention to impose import restrictions on certain archaeological and ethnological material. Pursuant to the CPIA, the United States entered into a bilateral agreement with the Islamic Republic of Pakistan (Pakistan) to impose import restrictions on certain archaeological and ethnological material of Pakistan. This rule announces that the United States is now imposing import restrictions on certain archaeological and ethnological material of Pakistan through January 30, 2029. This period may be extended for additional periods, each extension not to exceed 5 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); § 12.104g(a) of title 19 of the Code of Federal Regulations (19 CFR 12.104g(a))).

### Determinations

Under 19 U.S.C. 2602(a)(1), the United States must make certain determinations before entering into an agreement to impose import restrictions under 19 U.S.C. 2602(a)(2). On August 29, 2022, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, after consultation with and recommendation by the Cultural Property Advisory Committee, made the determinations required under the statute with respect to certain archaeological and ethnological material originating in Pakistan that is described in the Designated List set forth below in this document.

These determinations include the following: (1) that the cultural patrimony of Pakistan is in jeopardy from the pillage of archaeological material representing Pakistan's cultural heritage dating from approximately 2,000,000 Years Before Present[1] to A.D. 1750, and ethnological material representing Pakistan's diverse history, ranging in date from approximately A.D. 800 to 1849 (19 U.S.C. 2602(a)(1)(A)); (2) that the Pakistani government has taken measures consistent with the Convention to protect its cultural patrimony (19

[1] "Years Before Present" is commonly used instead of "B.C." or "A.D." within archaeology when radiocarbon dating or other similar dating techniques are utilized.

U.S.C. 2602(a)(1)(B)); (3) that import restrictions imposed by the United States would be of substantial benefit in deterring a serious situation of pillage and remedies less drastic are not available (19 U.S.C. 2602(a)(1)(C)); and (4) that the application of import restrictions as set forth in this final rule is consistent with the general interests of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes (19 U.S.C. 2602(a)(1)(D)). The Assistant Secretary also found that the material described in the determinations meets the statutory definition of "archaeological or ethnological material of the State Party" (19 U.S.C. 2601(2)).

## The Agreement

On January 30, 2024, the Governments of the United States and Pakistan signed a bilateral agreement, "Agreement Between the Government of the United States of America and the Government of the Islamic Republic of Pakistan Concerning the Imposition of Import Restrictions on Categories of Archaeological and Ethnological Materials of Pakistan" ("the Agreement"), pursuant to the provisions of 19 U.S.C. 2602(a)(2). The Agreement entered into force on January 30, 2024, following the exchange of diplomatic notes, and enables the promulgation of import restrictions on certain categories of archaeological material ranging in date from the Lower Paleolithic Period (approximately 2,000,000 Years Before Present) through A.D. 1750, as well as certain categories of ethnological material associated with Pakistan's diverse history from A.D. 800 through 1849. A list of the categories of archaeological and ethnological material subject to the import restrictions is set forth later in this document.

## Restrictions and Amendment to the Regulations

In accordance with the Agreement, importation of material designated below is subject to the restrictions of 19 U.S.C. 2606 and 19 CFR 12.104g(a) and will be restricted from entry into the United States unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met. CBP is amending 19 CFR 12.104g(a) to indicate that these import restrictions have been imposed.

Import restrictions listed at 19 CFR 12.104g(a) are effective for no more than 5 years beginning on the date on which an agreement enters into force with respect to the United States. This period may be extended for additional periods of not more than 5 years if it is determined that the factors which justified the agreement still pertain and no cause for suspension of the agreement exists. Therefore, the import restrictions will expire on January 30, 2029, unless extended.

## Designated List of Archaeological and Ethnological Material of Pakistan

The Agreement between the United States and Pakistan includes, but is not limited to, the categories of objects described in the Designated List set forth below. Importation of material on this list is restricted unless the material is accompanied by documentation certifying that the material left Pakistan legally and not in violation of the export laws of Pakistan.

The Designated List includes archaeological and ethnological material from Pakistan. The archaeological material in the Designated List includes, but is not limited to, objects made of stone, ceramic, faience, clay, metal, plaster, stucco, painting, ivory, bone, glass, leather, bark, vellum, parchment, paper, textiles, wood, shell, and/or other organic materials, as well as human remains ranging in date from the Lower Paleolithic Period through A.D. 1750. The ethnological material in the Designated List includes, but is not limited to, architectural materials and manuscripts ranging in date from A.D. 800 through 1849.

## Categories of Archaeological and Ethnological Material

(I) Archaeological Material

- (A) Stone
- (B) Ceramic, Faience, and Fired Clay
- (C) Metal
- (D) Plaster, Stucco, and Unfired Clay
- (E) Paintings
- (F) Ivory and Bone
- (G) Glass
- (H) Leather, Birch Bark, Vellum, Parchment, and Paper
- (I) Textiles
- (J) Wood, Shell, and other Organic Material
- (K) Human Remains

(II) Ethnological Material

- (A) Architectural Materials
- (B) Manuscripts

Approximate Simplified Chronology of Well-Known Periods:

(a) *Paleolithic, Neolithic, and Chalcolithic:* c. 2,000,000 Years Before Present–3500 B.C.

(b) *Bronze Age (Pre-Indus, Indus, and Post-Indus Periods):* c. 3500–1500 B.C.

(c) *Iron Age:* c. 1500–600 B.C.

(d) *Early Historic Period (Achaemenid, Macedonian, and Mauryan Empires; Greco-Bactrian, Indo-Greek, Indo-Scythian, and Indo-Parthian Kingdoms; Gandharan Culture; Kushan Empire; Kushano-Sasanian Period; Gupta Empire; and Turk Shahi Dynasty):* c. 600 B.C.–A.D. 712.

(e) *Middle Historic Period (Umayyad Caliphate, Hindu Shahi, Habbari, Ghaznavid, and Ghurid Dynasties):* c. A.D. 712–1206.

(f) *Late Historic Period (Delhi Sultanate; Mughal Empire; Sikh Empire):* c. A.D. 1206–1849

*(I) Archaeological Material*

(A) *Stone*

(1) Architectural Elements—Primarily in limestone, marble, sandstone, and steatite schist, but includes other types of stone. Category includes, but is not limited to, arches, balustrades, benches, brackets, bricks and blocks from walls, ceilings, and floors; columns, including capitals and bases; dentils; domes; door frames; false gables; friezes; lintels; merlons; mihrabs; minarets; mosaics; niches; pilasters; pillars, including capitals and bases; plinths; railings; ring stones; vaults; window screens (*jalis*). Elements may be plain, carved in relief, incised, inlaid, or inscribed in various languages and scripts; may be painted and/or gilded. Architectural elements may include relief sculptures, mosaics, and inlays that were part of a building, such as friezes, panels, or figures in the round. Includes architectural elements of Hellenistic (Greek) influence, such as Ionic and Corinthian styles, and/or depicting geometric, floral, or vegetal motifs, or figures and scenes from Hellenistic (Greek), Buddhist, Hindu, and Jain religious traditions. For example, Early Historic Period Gandharan architectural reliefs may include images of the Buddha, Bodhisattvas, human devotees, and scenes from the life of the Buddha. Approximate Date: 2600 B.C.–A.D. 1750.

(2) Non-Architectural Monuments—Primarily in limestone, marble, steatite schist, but includes other types of stone. Types include, but are not limited to: altars; bases; basins; cenotaphs; funerary headstones and monuments; fountains; libation platforms; *linga* (m); monoliths; niches; plaques; portable shrines; roundels; sarcophagi; slabs; stands; stelae; stelae bases; and *yoni.* Monuments may be plain, carved in relief, incised, inlaid, or inscribed in various languages and scripts; may be painted and/or gilded. Decorative elements may include geometric, floral, and/or vegetal motifs, as well as animal, mythological, and/or human figures, such as images from

Hellenistic (Greek), Buddhist, Hindu, and Jain religious traditions. Includes rock edicts and pillars with incised inscriptions. Approximate Date: 800 B.C.–A.D. 1750.

(3) Large Statuary—Primarily in steatite schist but includes other types of stone. Statuary includes seated or standing human and divine figures, such as statues of the Buddha, Bodhisattvas, and devotees, as well as figures from Hindu religious traditions. Large statuary is primarily associated with the Early Historic Period Gandharan tradition. Statues may bear inscriptions in various languages and scripts. Approximate Date: 800 B.C.–A.D. 1200.

(4) Small Statuary—Primarily in agate, alabaster, chlorite, garnet, jade, jasper, limestone, marble, sandstone, and steatite schist, but includes other types of stone. Animal and human forms may be stylized or naturalistic. Includes game pieces. Small statuary is found throughout many periods from the Bronze Age onward; well-known styles date to the Indus and Early to Middle Historic Periods. Approximate Date: 3500 B.C.–A.D. 1750.

(a) Bronze Age Indus Period statuary is often made in alabaster, limestone, sandstone, or steatite. It includes human figures, such as bearded, seated males that may be schematic or more detailed and may have inlaid eyes, and female dancers, as well as animal figures such as bulls, rams, or composite mythological creatures that may be either schematic or naturalistic. Approximate Date: 3500–1800 B.C.

(b) Early Historic through Middle Historic period statuary made in alabaster, garnet, steatite schist, and other stones. Includes figures from Hellenistic (Greek), Buddhist, and Hindu religious traditions. Approximate Date: 800 B.C.–A.D. 1000.

(5) Vessels and Containers—Primarily in alabaster, chlorite, jade, rock crystal, and steatite, but includes other types of stone. Vessel types may be conventional shapes such as bowls, boxes, canisters, cups, cylindrical vessels, goblets, flasks, jars, jugs, lamps, platters, stands, and trays, and may also include caskets, cosmetic containers or palettes, inkpots, pen boxes, spittoons, reliquaries (and their contents), and incense burners. Includes vessel lids. Some reliquaries may take the shape of a Buddhist stupa. Surfaces may be plain, polished, and/or incised or carved in relief with geometric, floral, or vegetal decoration, elaborate figural scenes, and/or inscriptions in various languages. Vessels may be inlaid with stones or gilded. Includes round trays or cosmetic palettes carved in relief, often with Hellenistic (Greek) mythological or banquet scenes. Approximate Date: 6000 B.C.–A.D. 1750.

(6) Tools, Instruments, and Weights—Includes ground stone and flaked stone tools.

(a) Ground stone tools, instruments, and weights are mainly made from chert, diorite, gneiss, granite, jade, marble, limestone, quartz, sandstone, or steatite, but other types of stone are included. Types include adzes, anvils, axes, balls, celts, grinding stones, hammerstones, maces, mills, molds, mortars, palettes, pestles, querns, rods, rubbers, scepters, whetstones, and others. Also included are counters, dice, finials, fly whisk handles, game pieces, hilts, mirror frames and handles, spindle whorls, trays, and weights. Stone weights are found in various shapes, such as cubes, rectangular prisms, rings, spheres, and truncated spheres, and may be decorated with incisions or relief carving and/or inscribed in various languages and scripts. Mirror handles of the Early Historic Period may be carved in human and animal forms, and dagger and sword hilts of the Mughal period may be carved in zoomorphic shapes and inlaid with precious or semiprecious stones, glass and/or precious metals. Approximate Date: 8000 B.C.–A.D. 1750.

(b) Flaked stone tools are primarily made of chalcedony, chert or other cryptocrystalline silicates, flint, jasper, obsidian, or quartzite, but other types of stone are included. Types include axes, bifaces, blades, burins, borers, choppers, cleavers, cores, hammers, microliths, points, projectiles, scrapers, sickles, unifaces, and others. Approximate Date: 2,000,000 Years Before Present—600 B.C.

(7) Beads and Jewelry—Primarily in alabaster, agate, amethyst, carnelian, chalcedony, coral, cryptocrystalline silicates, emerald, garnet, jade, jasper, lapis lazuli, onyx, quartz, rock crystal, ruby, steatite, and turquoise, but also includes other types of stone. Steatite beads may be fired and glazed. Carnelian beads bleached (etched) in white with geometric designs are particularly representative of the Bronze Age Indus period. Beads were made in animal, biconical, conical, cylindrical, disc, dumbbell, eye, faceted, scaraboid, spherical, teardrop, and other shapes. May bear geometric designs, images, and/or inscriptions in various languages and scripts. Jewelry includes amulets, bracelets, pendants, rings, and other types. Approximate Date: 7000 B.C.–A.D. 1750.

(8) Stamps, Seals, and Gems—Primarily in agate, amethyst, carnelian, chalcedony, hematite, jasper, rock crystal, steatite, but also includes other types of stone. Stamps, seals, and gems may have engravings that include animals, human figures, geometric, floral, or vegetal designs, and/or inscriptions in various languages and scripts. Includes cameos and intaglios. Well-known styles are from the Neolithic, Chalcolithic, Bronze Age, Iron Age, Early Historic Period, and Middle to Late Historic Periods. Approximate Date: 7000 B.C.–A.D. 1750.

(a) Chalcolithic and Bronze Age seals are usually square or rectangular stamp seals, but may also be circular, cylindrical, oval, or triangular, and may have a pierced knob handle. They may be made of steatite (usually fired and glazed) or other stones. Incised designs often feature inscriptions in the Indus script, either alone or together with animals such as bulls, elephants, and unicorns, as well as human, divine, and mythological figures, plants, and symbols. Designs may also be geometric. Approximate Date: 2800–1800 B.C.

(b) Stamps and intaglio seals of the Iron Age and Early Historic Period are usually made of stones such as agate, carnelian, chalcedony, garnet, hematite, jasper, lapis lazuli, onyx, quartz, and steatite. They are usually oval, rectangular, button-shaped or hemispherical. Stamps and seals may be incised, drilled, cut, or relief-carved with animals, human, divine, and/or mythological figures, and/or symbols of Hellenistic (Greek), Achaemenid/ Persian, Buddhist, Zoroastrian, or Hindu traditions; may be carved with a portrait bust; may be perforated for suspension or set into a ring; may be inscribed in various languages and scripts. Approximate Date: 1500 B.C.–A.D. 712.

(c) Stamps and seals of the Middle and Late Historic Periods are usually made in carnelian, chalcedony, hematite, or other stones and are circular, oval, octagonal, teardrop-shaped, rectangular, or square. They are usually carved with inscriptions in Arabic or Persian script, sometimes with floral embellishments. Approximate Date: A.D. 712–1750.

(B) *Ceramic, Faience, and Fired Clay*

(1) Statuary—Includes small and large-scale statuary in ceramic, faience, and terracotta. May take the form of an animal, deity, human, hybrid animal/human or other mythological creature, cart frame or wheel, model mask, model boat, model house, or model stupa. May be associated with religious activity, games, or toys. May be painted or have traces of paint or pigment. Forms may be stylized or naturalized. Well-known styles date to the Chalcolithic, Bronze Age, Iron Age, Early Historic, and Middle Historic Periods. Approximate Date: 5500 B.C.–A.D. 1750.

(a) Chalcolithic and Bronze Age (Pre-Indus and Indus Period) male and female terracotta figurines are stylized with applied or incised eyes, hair, headdresses, or necklaces and tapered legs. Animal figurines in terracotta and faience may be stylized, with applied and incised details, or naturalistic and sometimes partly formed in a mold. Approximate Date: 5500–1800 B.C.

(b) Late Bronze Age (Post-Indus) and Iron Age terracotta human figurines may have pinched faces, incised details, and/ or flat bases. Approximate Date: 1800–600 B.C.

(c) Early Historic Period terracotta figurines may be mold-made in Indo-Greek or local style or handmade with incised and applied details. They include female figurines (in the round and as plaques), horse-and-rider figurines, and animals. Approximate Date: 600 B.C.–A.D. 500.

(d) Early Historic Period large-scale terracotta statuary in the Gandharan tradition can be hand-formed or mold-made in the image of animals, humans, and mythological figures. May be painted, plastered, and/or inlaid with stones. Includes statues of the Buddha, Bodhisattvas, and devotees. Approximate Date: 1st–9th Centuries A.D.

(e) Middle Historic, Hindu Shahi Period terracotta figurines of male and female human figures and animals are handmade and schematic with pinched faces and applied and incised details. They can be slipped and painted. Approximate Date: 9th–10th Centuries A.D.

(2) Architectural Elements—Includes terracotta bricks, niches, panels, pipes, tiles, window screens (*jalis*), and other elements used as functional or decorative elements in buildings and mosaics. Bricks may be cut or molded to form decorative patterns on building exteriors. Mosaic designs include animals, humans, and geometric, floral, and/or vegetal motifs. Panels and tiles may be painted, plastered, or have traces of paint or plaster. Tiles may bear carved, incised, or impressed or molded decoration in the form of animals, humans, geometric, floral, and/or vegetal motifs. Glazed tiles and bricks are well-known from the Middle and Late Historic Periods, used to decorate civic and religious architecture. Tiles may be square or polygonal. They may have been molded, incised, and/or painted with animal, geometric, floral, and/or vegetal motifs, arabesque (intertwining) motifs, and or calligraphic writing in various scripts and languages before glazing. Glaze may be clear, monochrome, or polychrome. Polychrome glaze may be applied in the *cuerda seca* technique. Approximate Date: 3500 B.C.–A.D. 1750.

(3) Vessels—Includes utilitarian vessels, fine tableware, lamps, special-purpose vessels, and other ceramic objects of everyday use produced in many periods of Pakistan's history. Approximate Date: 6000 B.C.–A.D. 1750.

(a) Neolithic—Includes handmade earthenware vessels. Vessel types include bowls, jars, pots, and other forms. They may be made of

coarse chaff- or sand-tempered clay, sometimes with red-slipped surface, often with basket or mat impressions. Approximate Date: 6000–5500 B.C.

(b) Chalcolithic—Includes handmade and wheel-made earthenware vessels. Vessel types include bowls, jars, flat dishes, pots, and other forms. Surface can be reddish-yellow, yellowish, buff, gray, brown, or red-brown, and burnished or red-slipped. Sometimes painted in black, brown, and/or red with simple geometric and animal motifs. Approximate Date: 5500–3500 B.C.

(c) Bronze Age (Pre-Indus, Indus, and Post-Indus Periods)—Includes handmade and wheel-made earthenware vessels. Vessel types include bowls, canisters, cooking pots, goblets, jars, lids, plates, pedestalled stands, perforated strainers, and other forms. Can also take the form of birdcages, feeder bottles, and mousetraps. Surface can be buff, greenish-gray, gray, red, red-buff, or white, sometimes with basket impressions or applied snake motifs. Sometimes slipped in black, gray, or red clay, occasionally combed to reveal the clay color beneath. Sometimes painted (monochrome, bichrome, or polychrome) in black, blue, brown, green, red, white, and yellow with simple or complex geometric motifs, animals such as birds, cattle, deer, dogs, gazelle, fish, and others, and/or vegetal motifs such as pipal leaves. Can be incised with characters in the Indus script. Approximate Date: 3500–1500 B.C.

(d) Iron Age—Includes handmade and wheel-made earthenware vessels. Vessel types include bottles, bowls, cooking pots, goblets, lids, jars, jugs, juglets, lids, plates, saucers, tubs, urns, and other forms. Vessel forms may have a pedestalled foot or stand, handles, and/or spouts. Surfaces can be red, gray, gray-black, brown, or brown-gray and may be slipped, grooved, and/or burnished. Painted decoration in monochrome or bichrome colors includes animal, human, plant, and/or geometric motifs. "Visage" jars or urns characteristic of this period depict a human face through modeling and incision or perforation. Approximate Date: 1500–600 B.C.

(e) Early Historic Period—Includes handmade, mold-made, or wheel-made earthenware vessels. Vessel types include conventional shapes such as basins, beakers, bottles, bowls, cooking pots, cups, dishes (*thalis*), jars, pitchers, plates, storage vessels, trays, and vases (kraters), as well as other forms such as incense burners, lamps, rhyta (drinking horns), and stands. Vessel forms may have pedestal bases, handles, and/or spouts. Some vessels may have been formed into elaborate shapes using molds. "Tulip bowls" with a rounded base, flaring rim, and carinated or kinked body are typical of the early part of this period. Includes round trays or cosmetic palettes decorated in

relief with Hellenistic (Greek) mythological scenes or banquet scenes. Vessels may have a brown, buff, gray, red, dark purplish-red, yellow, or black surface. Surface treatments may include slip, burnishing, polishing, incising, impressing (including grooving, rouletting, and stamping), appliqué, painting, and/or glazing. Stamp impressions include simple geometric motifs; leaves, lotuses, and rosettes; and elaborate scenes combining animal, human, geometric, floral, and/or vegetal motifs. Molded animal heads, human figures, or rosettes in clay may be applied to the exterior surface of a vessel or attached as a handle. Painted designs include geometric, floral, and vegetal motifs, as well as friezes of humans, animals, and plants. Some vessels may be covered with green, blue-green, brown, or yellow glaze. Vessels may be incised or painted with inscriptions in various languages and scripts. Approximate Date: 6th Century B.C.–9th Century A.D.

(f) Middle and Late Historic Periods— Includes handmade, molded, and wheel-made earthenware vessels, as well as porcelain. Vessel types include conventional shapes such as bowls, cooking pots, cups, ewers, flasks, jars, jugs, lamps, lids, pans, platters, trays, water vessels (lota), and other types such as hookah pots, incense burners, vessels with a pedestalled foot, kneading troughs, model stupas, pipes, and vessels in the shape of animals. Clay is often red or buff. Surface treatments may include slip, polishing, burnishing, incising, impressing, appliqué, painting, and/or glazing. Stamps and impressions include motifs such as circles, bars and dots, rosettes, eyes, and human faces. Molded designs can include inscriptions and/or geometric, floral, and/or vegetal motifs on unglazed or glazed vessels. Spouts and handles may be formed in the shape of animals. Painted decoration includes animal, geometric, floral, and vegetal motifs, as well as inscriptions in various languages and scripts, variously applied on a slipped surface, under a colorless glaze, or over a colored glaze. Designs may be scratched (*sgraffiato*) through the slip to reveal the clay color beneath before glazing. Glazes may be colorless, monochrome, or polychrome. Common colors include green, yellow, blue, black, brown, turquoise, and white. Imported types include celadon (green ware) and blue-and-white porcelain from China. Approximate Date: 9th Century A.D.–A.D. 1750.

(4) Beads, Jewelry, and Ornaments—Includes bangles, beads, bracelets, buttons, ear spools, inlays, and rings made of faience and terracotta. Beads include barrel, biconical, cylindrical, segmented, and other shapes. Faience may be colored with blue, blue-green, red, and white glaze. Approximate Date: 5500 B.C.–A.D. 1750.

(5) Tools and Instruments—Includes terracotta balls, buttons, “cakes,” coin molds, statuary molds, vessel molds, cones, cubes, dab-

bers, dice, discs, flutes, loom weights, net-sinkers, stamps, rattles, rubbers, spindle whorls, scoops, spoons, stoppers, tri-armed kiln setters, whistles, and other objects. Bronze Age "cakes" may be circular, square, or triangular, and whistles may take the shape of animals such as birds. May be incised or stamped with characters in various scripts. Approximate Date: 6000 B.C.–A.D. 1750.

(6) Stamps and Seals—Terracotta faience stamp seals were produced in the Bronze Age, Early Historic Period, and Middle Historic Hindu Shahi Period. Bronze Age Indus Period stamp seals can be square or circular in shape and compartmented with geometric and animal motifs and/or inscribed with Indus script. Approximate Date: 3500 B.C.–A.D. 1000.

(7) Tablets and Sealings—Terracotta and faience tablets and sealings of the Bronze Age Indus period may be cylindrical, rectangular, or prismatic and molded in relief with images of animals, humans, and other motifs, and/ or inscriptions in Indus script. Approximate Date: 2600–1800 B.C.

(C) *Metal*—Includes copper, gold, silver, iron, lead, tin, electrum, and alloys such as bronze, brass, pewter, and steel. Metal objects were produced in many periods of Pakistan's history, beginning in the Chalcolithic Period. Approximate Date: 5500 B.C.–A.D. 1750.

(1) Containers and Vessels—Vessel types include conventional shapes such as basins, bottles, bowls, boxes, canisters, cauldrons, chalices, cups, dishes, ewers, flasks, jars, jugs, lamps, pans, plates, platters, pots, stands, utensils, and vases, but also include forms such as caskets, hookah pots, incense burners, reliquaries (and their contents), and spittoons. Some reliquaries may take the form of a Buddhist stupa. One end of some drinking vessels (*rhyta*) may take the form of an animal or mythical creature. They may include lids, spouts, and handles of vessels. Metal containers may have been decorated by chasing (embossing), engraving, gilding, inlaying, punching, and/or repoussé (relief hammering). Designs include, but are not limited to, inscriptions in various languages and scripts, arabesque (intertwining) motifs, geometric, floral, and vegetal motifs, animal motifs, and portrait busts or scenes of human figures, such as ceremonial, banquet, or hunting scenes. Some containers and vessels, such as reliquaries, may be inlaid with precious or semi-precious stones, as well as precious metals such as gold and silver. Approximate Date: 5500 B.C.–A.D. 1750.

(2) Jewelry and Personal Adornments—Types include, but are not limited to, amulets, amulet holders, bangles, beads, bracelets, belts, bracteates, brooches, buckles, buttons, charms, clasps, crowns, earrings, ear spools, hair ornaments, hairpins, headdress or hat orna-

ments, lockets, necklaces, pectoral ornaments, pendants, pins, rings, rosettes, and staffs. Includes metal ornaments, appliqués, and clasps once attached to textiles or leather objects. Includes also metal scrolls inscribed in various languages and scripts. May have been decorated by chasing (embossing), cloisonné, enameling, engraving, filigree, gilding, granulation, inlaying, and/or repoussé (relief hammering). Decoration may include animal, human, geometric, floral, or vegetal motifs. May include inlays of ivory, bone, animal teeth, enamel, other metals, precious stones, and/or semi-precious stones. Approximate Date: 5500 B.C.–A.D. 1750.

(3) Tools and Instruments—Types include, but are not limited to, axes, backscratchers, bells, blades, chisels, drills, goads, hinges, hooks, keys, knives, measuring rods, mirrors, mirror handles, nails, pickaxes, pins, rakes, rods, saws, scale weights, shears, sickles, spades, spoons, staffs, trowels, weights, and tools of craftspeople such as carpenters, masons, and metalsmiths. Approximate Date: 5500 B.C.–A.D. 1750.

(4) Weapons and Armor—Includes body armor, such as chain mail, helmets, plate armor, scale armor, shin guards, shields, shield bosses, horse armor, and horse bits and bridle elements. Also includes launching weapons (arrowheads, spearheads, and javelin heads); hand-to-hand combat weapons (axes, swords, including sabers and scimitars, daggers, including khajars and katars, and maces); and sheaths. Some weapons may be highly decorative and incorporate inlays of other types of metal, precious stones, or semi-precious stones in the sheaths and hilts. Some weapons, hilts, and sheaths may be engraved or chased (embossed) with inscriptions in various languages and scripts, arabesque (intertwining), geometric, floral, and/or vegetal motifs, and/or human or animal scenes, such as hunting scenes. Approximate Date: 3500 B.C.–A.D. 1750.

(5) Coins—Ancient coins include gold, silver, copper, and copper alloy coins in a variety of denominations. Includes gold and silver ingots, which may be plain and/or inscribed. Some of the most well-known types are described below:

(a) Early coins in Pakistan include silver sigloi of the Achaemenid Empire. Gold staters and silver tetradrachms and drachms of Alexander the Great and Philip III Arrhidaeus are also found. Regionally minted Achaemenid-period coins include silver bent bars (*shatamana*) with punched symbols such as wheels or suns. Local Hellenistic (Greek)-period and Mauryan imperial punch-marked silver coins (*karshapana*) are covered with various symbols such as suns, crescents, six-arm designs, hills, peacocks, and others. Circular or square,

die-struck cast copper alloy coins with relief symbols and/or animals on one or both sides also date to this period. Approximate Date: 6th–2nd Centuries B.C.

(b) Greco-Bactrian, Indo-Greek, Indo-Scythian, and Indo-Parthian coins include gold staters, silver tetradrachms, drachms, and obols, and copper alloy denominations. Copper alloy coins are often square. The bust of the king, the king on horseback, Greek and Hindu deities, the Buddha, elephants, bulls, and other animals are common designs. The name of the king is often written in Greek, Kharosthi or Brahmi script. Approximate Date: 2nd Century B.C.– 1st Century A.D.

(c) Roman Imperial coins struck in silver and bronze are sometimes found in archaeological contexts in Pakistan. Approximate Date: 1st Century B.C.–4th Century A.D.

(d) Kushan coins include gold dinars, silver tetradrachms, and copper alloy denominations. Imagery includes the king as a portrait bust ("Augustus type"), standing figure with a fire altar, or equestrian figure; emblems (*tamgha*); and figures from Greek, Zoroastrian, Buddhist, and Hindu religious traditions. Inscriptions are written in Greek, Bactrian, and/or Brahmi scripts. Approximate Date: A.D. 30–350.

(e) Sasanian coins include gold dinars, silver drachms, obols (*dang*), and copper alloy denominations. Imagery includes the bust of the king wearing a large crown and Zoroastrian fire altars and deities. Inscriptions are usually written in Pahlavi, but gold dinars minted in Sindh with Brahmi inscriptions are included. Approximate Date: A.D. 240–651.

(f) Kushano-Sasanian or Kushanshah coins include gold dinars, silver tetradrachms, and copper alloy denominations. Some Kushano-Sasanian coins followed the Kushan style of imagery, while others resemble Sasanian coins. Inscriptions are written in Greek, Bactrian, Brahmi, or Pahlavi scripts. Approximate Date: A.D. 225–365.

(g) Gupta coins include gold dinars and silver and copper alloy denominations. Imagery includes the king in various postures and activities, the queen, Hindu deities, altars, and animals. Inscriptions are usually written in pseudo-Greek or Brahmi script. Approximate Date: A.D. 345–455.

(h) Coins of the Hephthalite, Kidarite, Alchon and Nezak Hun, Rai, Brahmin Chacha, and Turk Shahi Dynasties include silver and copper alloy denominations. Designs resemble Sasanian coins with a portrait bust of the ruler wearing a distinctive crown on the obverse and a fire altar or other Zoroastrian imagery on the reverse. Coins

sometimes bear emblems (*tamgha*s) and/or inscriptions in Bactrian, Pahlavi, Brahmi, or Nagari script. Designs are sometimes highly schematized. Approximate Date: 5th–9th Centuries A.D.

(i) Hindu Shahi silver coins often bear inscriptions in Nagari or Sharada script and depict a horseman and a bull, or an elephant and a lion. Approximate Date: A.D. 822–1026.

(j) The Umayyad and Abbasid Caliphates and the Ghaznavid and Ghurid Empires issued gold dinars, silver dirhams, and copper alloy *fulus* (singular *fals*) bearing Arabic inscriptions on both faces. Inscriptions are often enclosed in circles, squares, rings of dots, or an inscription band. Silver and copper alloy denominations of local governors, the Habbari Dynasty of Sindh, and the Emirate of Multan are similar, but some coins of Multan carry inscriptions in Nagari or Sharada. Some Ghaznavid coins carry bilingual inscriptions in Arabic and Sharada scripts, and some bear images of a bull and horseman. Some Ghurid coins bear inscriptions in Devanagari and/or stylized images of a flower, bull, horseman, and/or goddess. Approximate Date: A.D. 712–1206.

(k) The Delhi Sultanate issued gold *tankas,* silver *tankas* and *jitals,* and copper alloy denominations bearing Arabic inscriptions, either enclosed in a circle, scalloped circle, octofoil, flower, square, or inscription band, or covering the full face of the coins. Some bear inscriptions in Devanagari and/or stylized images of a bull, horseman, lion, or goddess. Some coins are square. Approximate Date: A.D. 1206–1526.

(l) The Mughal Empire issued coins such as gold *mohurs;* silver *shahrukhis,* rupees, and tankas; copper and copper alloy dams, and other denominations. Coins bear Arabic inscriptions enclosed in a circle, ring of dots, square, or inscription band, or covering the entire face. Some coins are square. Some coins bear an image of the seated emperor, a portrait bust of the emperor, a sun, and/or Zodiac symbols. Approximate Date: A.D. 1526–1749.

(6) Statuary, Ornaments, and other Decorated Objects—Primarily in copper, gold, silver, or alloys such as bronze and brass. Includes free-standing and supported statuary; relief or incised plaques or roundels; finials; votive ornaments; stands; and other ornaments. Statuary may be fashioned as humans, animals, deities, or mythological figures; miniature chariots; wheeled carts; or other objects. Statuary may take naturalized or stylized forms. Decorative techniques for statuary, ornaments, and other decorated objects include chasing (embossing), gilding, engraving, repoussé (relief hammering), and/or inlaying with other materials. Decorative elements may include humans, deities, animals, mythological figures, scenes of activity, floral, geometric, and/or vegetal motifs, and/or inscriptions in

various languages and scripts. Imagery representative of the Early Historic and Middle Historic Periods includes figures from Hellenistic (Greek), Buddhist, and Hindu religious traditions. Approximate Date: 3500 B.C.–A.D. 1750.

(7) Stamps, Seals, and Tablets— Primarily cast in copper and alloys such as bronze and brass; also includes stamps and seals in gold or silver. Types include amulets, flat tablets, rings, small devices with engraving on one side, and others. Stamps and seals may have engravings that include animals, humans, deities, mythological figures, geometric, floral, and vegetal motifs, symbols, and/or inscriptions in various languages and scripts. May be inlaid with other types of material. Approximate Date: 3500 B.C.–A.D. 1750.

(D) *Plaster, Stucco, and Unfired Clay*—Includes ceiling decoration or tracery, columns, corbels, cornices, large- and small-scale figures of animals, humans, and deities, friezes, medallions, mihrabs, ornaments, niches, panels, plaques, reliefs, roundels, stupas, vaults, window screens, and other architectural and non-architectural decoration or sculpture. May be painted or bear traces of paint; gilded; inlaid with stones or other materials; and/or inscribed in various languages and scripts. Stucco panels may depict elaborate scenes of animals and human activity (such as hunting or elite activity) and/or arabesque (intertwining), geometric, floral, and/or vegetal patterns. Stucco panels may have been made with molds. Stucco sculpture and decorated objects of the Early Historic Period may resemble Hellenistic (Greek) styles and figures; they may depict individuals such as the Buddha, Bodhisattvas, or devotees. Unfired clay bullae and roundels with stamped or rolled impressions used as sealing material are included. Approximate Date: 5500 B.C.–A.D. 1750.

(E) *Paintings*—Includes paintings, frescoes, and fragments on natural stones and cave walls, building walls and ceilings, and portable media. Rock paintings of the Paleolithic through Bronze Age are usually executed in red or black pigments and depict stylized animals and humans or symbols. Patterns in red, black, and white pigments are typical for wall paintings of the Neolithic period. Rock and wall frescoes of the Early Historic Period depict humans, animals, and geometric symbols, sometimes with imagery from Buddhist and Hindu religious traditions, in various colors and styles. Wall and ceiling frescoes with polychrome arabesque, floral, vegetal, and geometric patterns and inscriptions are typical of the Mughal Period. Mughal Period paintings also include miniature portraits set in rings or pendants and larger paintings on cotton. Approximate Date: 30,000 B.C.–A.D. 1750.

(F) *Ivory and Bone*

(1) Non-Architectural Relief Panels and Plaques—Decorated and engraved panels and plaques featuring low-and high-relief carvings. May include imagery of humans, deities, animals, mythological creatures, and human activity, as well as floral, geometric, and/or vegetal motifs. May be gilded and/or painted or bear traces of paint or pigment. Approximate Date: 1st Century A.D.–A.D. 1750.

(2) Statuary—Includes carved animal, human, and deity figures. Geometric, floral, and/or vegetal decorative elements may be part of the carved design. Approximate Date: 1st Century A.D.–A.D. 1750.

(3) Containers, Tools, Handles, and other Instruments—Includes awls, boxes, buckles, buttons, caskets, combs, flasks, game dice, game pieces, dagger or sword handles or hilts, mirrors and mirror handles, points, polishers, reliquaries, rods, rulers, spatulas, spindles, stoppers, and other personal objects made of ivory and bone. May be incised and/or painted with decorative motifs, inlaid with other materials, carved in relief, carved in zoomorphic shapes, and/or inscribed in various languages and scripts. Approximate Date: 45,000 B.C.–A.D. 1750.

(4) Furniture and Furniture Elements—Includes bone or ivory brackets, handles, finials, and elements of chairs, couches, beds, footstools, chests, trunks and other types of furniture such as arms, legs, feet, inlays, and panels. Approximate Date: 1st Century A.D.–A.D. 1750.

(5) Jewelry and Ornaments—Types include, but are not limited to, beads, pendants, hairpins, pins, and rings. Approximate Date: 5500 B.C.–A.D. 1750.

(6) Stamps and Seals—Bone and ivory seals include button-shaped and square stamps, among other shapes. May be engraved with animals, humans, deities, geometric, floral, and/or vegetal designs, symbols, and/or inscriptions in various languages and scripts, including the Indus script. Approximate Date: 4000 B.C.–A.D. 712.

(G) *Glass*

(1) Architectural Elements—Includes glass pieces or tiles arranged in mosaic fashion to create geometric, floral, and/ or vegetal designs on architectural surfaces or in windows. Glass may be mirrored or stained. Approximate Date: 1st Century A.D.–A.D. 1750.

(2) Beads and Jewelry—Includes beads in the form of animals, cylinders, cones, discs, spheres, or other shapes, as well as bangles. Decoration may include bevels, incisions, and/or raised decoration. Includes glass inlay used in other types of jewelry and decorated items. Includes stamp seals or gems incised with decorative and figural designs. Approximate Date: 1100 B.C.–A.D. 1750.

(3) Vessels—Vessel types include conventional shapes such as beakers, bottles, bowls, cups, dishes, flasks, goblets, jars, mugs, plates, and vases, and other forms such as cosmetic containers, lamps, medicine droppers, and animal-shaped vessels. Some vessels may have been formed in molds or using mosaic techniques. May be monochrome or polychrome. Some polychrome glass vessels may have been painted with arabesque (intertwining), floral and/or vegetal designs or bear traces of paint. Approximate Date: 1st Century A.D.–A.D. 1750.

(4) Ornaments—Includes glass medallions. May have molded decorations including, but not limited to, animals, humans, geometric, floral, and vegetal motifs. Typically associated with the Ghaznavid and Ghurid periods. Approximate Date: A.D. 1000–1200.

(H) *Leather, Birch Bark, Vellum, Parchment, and Paper*

(1) Books and Manuscripts—Includes scrolls, sheets, and bound volumes. Texts may be written in ink on birch bark, vellum, parchment, or paper, and may be gathered into leather or wooden bindings, albums, or folios. Includes secular and religious texts. Texts of the Early Historic Period written on birchbark, vellum, and parchment include sacred texts of Buddhism and other religions of ancient Pakistan, as well as texts on secular topics such as mathematics, and are written in various languages and scripts, such as Brahmi, Gandhari, Kharosthi, and Sharada. Books and manuscripts of the Middle and Late Historic Periods were written primarily on paper in various languages in scripts such as Arabic, Persian, Devanagari, and Sharada. Topics of this period include, but are not limited to, religion, religious epics, science, mathematics, medicine, literature, poetry, history, and biography. Books and manuscripts of this period may be embellished or decorated with monochrome or polychrome paintings or illuminations of arabesque (intertwining), geometric, floral, or vegetal motifs; images of animals, plants, and humans, including individual portraits; landscapes; and/or scenes of human activities, such as courtly gatherings and ceremonies, hunting, falconry, battles, and historical, mythological, or legendary events. May be in miniature form with decorated borders. Paper may be marbleized and/or embellished with gold. Approximate Date: 1st Century A.D.–A.D. 1750.

(2) Items of Personal Adornment—Primarily in leather, including bracelets and other types of jewelry, belts, necklaces, sandals, and shoes. May be embroidered or embellished with other materials. Leather goods may have also been used in conjunction with textiles. Approximate Date: 7000 B.C.–1750 A.D.

(I) *Textiles*—Includes silk, linen, cotton, hemp, wool, and other woven materials used in basketry and other household goods. In-

cludes clothing, shoes, jewelry, and items of personal adornment; sheaths; burial shrouds; tent coverings, tent hangings, and other domestic textiles; carpets; baskets; and others. Textiles may be plain, or patterns may have been woven into the body of the textile. Other decorative techniques include embroidery, application of gold leaf, or painting with various motifs, such as animals, geometric, floral, and vegetal motifs, and other designs. Gold or silver threads may be woven into the textile. Approximate Date: 7000 B.C.–A.D. 1750.

(J) *Wood, Shell, and other Organic Material*—Wooden objects include architectural elements, such as arches, balconies, bases, benches, capitals, columns, doors, door frames, friezes, lintels, mihrabs, minbars, jambs, panels, posts, screens, shutters, window frames and fittings, and window screens, or pieces of any of these objects; boxes; coffins; finials; furniture; jewelry and other items of personal adornment; musical instruments; statuary and figurines; stamps and seals with engraved designs and/or inscriptions in various languages and scripts; vessels and containers; weapons such as bows; and other objects. Jewelry and ornaments made of shell, mother-of-pearl, and pearl include bangles, beads, bracelets, cones, inlays, necklaces, pendants, rings, studs, and other types. Vessels made of shell or set with mother-of-pearl panels include ewers, ladles, libation vessels, plates, and spoons. Wooden, shell, mother-of-pearl, and pearl objects may be carved, incised, inlaid with other materials, lacquered, and/or painted. Approximate Date: 7000 B.C.–1750 A.D.

(K) *Human Remains*—Human remains and fragments of human remains, including skeletal remains, soft tissue, and ash from the human body that may be preserved in burials, reliquaries, and other contexts.

**(II) Ethnological Material**

Ethnological material in the Designated List includes manuscripts and architectural materials from civic and religious buildings associated with Pakistan's diverse history from A.D. 800 through 1849.

(A) *Architectural Materials*—Architectural materials include non-industrial and/or handmade elements used to decorate civic and religious architecture. They may be made of stone, ceramic or terracotta, plaster and stucco, glass, and/or wood, and painted media.

(1) Stone—Primarily in limestone, marble, sandstone, and steatite schist. Includes arches; balustrades; benches; brackets; bricks and blocks from walls, ceilings, and floors; columns, including capitals and bases; corbels; cornices; dentils; domes; door frames; false gables; friezes; lintels; merlons; mihrabs; minarets; mosaics; niches; panels; pilasters; pillars, including capitals and bases; plinths; railings; ring-

stones; vaults; window screens (*jali*s); and others. May be plain, carved in relief, incised, inlaid, or inscribed in various languages and scripts. May be painted and/or gilded. May include relief sculptures, mosaics, and inlays that were part of a civic or religious building, such as friezes, panels, or figures in the round. Imagery may be civic or religious. Mosaic designs include animals, humans, and geometric, floral, and/or vegetal motifs. Approximate Date: A.D. 800–1849.

(2) Ceramic and Fired Clay—Includes terracotta (fired clay) bricks, mosaics, niches, panels, pipes, tiles, window screens (*jali* s), and other elements used as decorative elements in civic and religious buildings. Bricks may be cut or molded to form decorative patterns on building exteriors. Mosaic designs include animals, humans, and geometric, floral, and/or vegetal motifs. Panels and tiles may be painted, plastered, or have traces of paint or plaster. Tiles may be square or polygonal and may be carved, incised, impressed, or molded with decorations in the form of animals, humans, geometric, arabesque (intertwining), floral, and/or vegetal motifs, and/or calligraphic writing in various scripts and languages, and/or then glazed. Glaze may be clear, monochrome, and/or polychrome. Polychrome glaze may be applied in the *cuerda seca* technique. Approximate Date: A.D. 800–1849.

(3) Plaster and Stucco—Includes ceiling decoration or tracery, columns, corbels, cornices, friezes, medallions, mihrabs, niches, panels, plaques, reliefs, roundels, vaults, window screens, and other types. May be painted or bear traces of paint; gilded; inlaid with stones or other materials; and/or inscribed in various languages and scripts. Designs may include arabesque (intertwining), geometric, floral, and/or vegetal patterns. May have been made using molds. Approximate Date: A.D. 800–1849.

(4) Paintings and Frescos—Includes paintings and frescoes on civic and religious building walls and ceilings, and fragments thereof. Frescoes with polychrome arabesque (intertwining), floral, vegetal, and/or geometric patterns and inscriptions are typical of the Mughal Period. Jain and Hindu temples and Sikh *gurdwaras* are sometimes adorned with frescoes depicting human and animal figures and scenes, as well as floral, vegetal, and geometric motifs. Approximate Date: A.D. 800–1849.

(5) Glass—Includes glass pieces or tiles arranged in mosaic fashion to create geometric, floral, and/or vegetal designs on architectural surfaces or in windows. Glass may be mirrored or stained. Often found in mosques and Sikh gurdwaras. Approximate Date: A.D. 1000–1849.

(6) Wood—Includes hand-carved arches, balconies, bases, benches, capitals, columns, doors, door frames, friezes, lintels, mihrabs, minbars, jambs, panels, posts, screens, shutters, window frames and fittings, and window screens, or parts thereof, used as structural elements in and/or to decorate civic or religious architecture. These architectural elements may have been reused for new purposes, such as a wood panel used as a table, or a door jamb used as a bench. May be carved, incised, inlaid with other materials, and/or painted. Approximate Date: A.D. 800–1849.

(B) *Manuscripts*—Manuscripts, portions of manuscripts, and works on paper include non-industrial, handmade, handwritten, hand-illustrated and/or illuminated scrolls, sheets, and bound volumes. They may be made of various media, from writing, illustrations, and/or illuminations on parchment, vellum, birchbark, cotton, or paper to binding in leather or wood. Texts may be written in various languages and scripts, such as Arabic, Balochi, Brahmi, Gandhari, Kharoshti, Nagari, Pashto, Persian, Sharada, Sindhi, and/or Urdu. They may include sacred texts of Buddhism and/or other religious traditions. Other topics include, but are not limited to, astronomy, botany, history, literature, mathematics, medicine, poetry, religion, and/or sciences. May be embellished or decorated with monochrome, bichrome, or polychrome handmade illustrations and/or illuminations. These may include arabesque (intertwining), geometric, floral, or vegetal motifs; images of animals, plants, and humans, including portraiture; landscapes; and/ or scenes of human activities, such as courtly gatherings and ceremonies, hunting, falconry, battles, and historical, mythological, or legendary events. May be in miniature form with decorated borders. Approximate Date: A.D. 800–1849.

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**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 (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).

**Executive Orders 12866 and 13563**

Executive Orders 12866 (as amended by Executive Order 14094) and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Orders 12866 and 13563 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 and, by extension, Executive Order 13563.

**Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since a general notice of proposed rulemaking is not necessary for this rule, CBP is not required to prepare a regulatory flexibility analysis for this rule.

## 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 the Secretary's delegate) to approve regulations related to customs revenue functions.

Troy A. Miller, the Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign this document to the Director (or Acting Director, if applicable) of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

## List of Subjects in 19 CFR Part 12

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

## Amendment to 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, the table in paragraph (a) is amended by adding Pakistan to the list in alphabetical order to read as follows:

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

(a) * * *

| State party | Cultural property | Decision No. |
|---|---|---|
| | * * * * * * * | |
| Pakistan ..... | Archaeological material of Pakistan ranging from the Lower Paleolithic Period (approximately 2,000,000 Years Before Present) through A.D. 1750, and ethnological material of Pakistan ranging in date from approximately A.D. 800 through 1849. | CBP Dec. 24–09. |
| | * * * * * * * | |

* * * * *

Emily K. Rick,
*Acting Director,*
*Regulations & Disclosure Law Division,*
*Regulations & Rulings, Office of Trade,*
*U.S. Customs and Border Protection.*

Aviva R. Aron-Dine,
*Acting Assistant*
*Secretary of the Treasury for Tax Policy.*

## REPUBLIC OF KOREA STEEL IMPORTS APPROVED FOR THE ELECTRONIC CERTIFICATION SYSTEM (ECERT)

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

**ACTION:** General notice.

**SUMMARY:** This document announces that the export certification requirement for imports of steel products of the Republic of Korea that are subject to an absolute quota will be collected through the Electronic Certification System (eCERT). As a result, all imports of steel of the Republic of Korea that are subject to an absolute quota must have a valid export certificate with a corresponding eCERT transmission at the time of entry for consumption or withdrawal from warehouse for consumption. The transition to eCERT will not change the quota filing process or requirements.

**DATES:** The use of the eCERT process for Korean steel importations that are subject to an absolute quota will be required for steel entered, or withdrawn from a warehouse, for consumption on or after April 22, 2024. CBP will automatically reject filings without correct eCERT information starting May 20, 2024.

**FOR FURTHER INFORMATION CONTACT:** Julia Peterson, Chief, Quota and Agriculture Branch, Trade Policy and Programs, Office of Trade, (202) 384–8905, or *HQQUOTA@cbp.dhs.gov*.

**SUPPLEMENTARY INFORMATION:**

### Background

Absolute quotas are established by Presidential proclamations, Executive orders, and legislation. *See* section 132.2(a) of title 19 of the Code of Federal Regulations (19 CFR 132.2(a)). On April 30, 2018, President Donald J. Trump signed Proclamation 9740 (83 FR 20683) imposing, among other things, absolute quota limits[1] on certain steel products of the Republic of Korea, pursuant to U.S. Note 16(e), subchapter III, chapter 99, Harmonized Tariff Schedule of the United States (HTSUS), and subheadings 9903.80.05 through 9903.80.58, HTSUS. Subsequently, on August 29, 2018, President Trump signed Proclamation 9777 (83 FR 45025), wherein clause 7 provides that where a government of a country identified in the superior text to subheadings 9903.80.05 through 9903.80.58, HTSUS, notifies the United States that it has established a mechanism for the certification of exports to the United States of the products covered by the

[1] Absolute quotas strictly limit the quantity of goods that may enter the commerce of the United States for a specific period.

quantitative limitations applicable to those subheadings, U.S. Customs and Border Protection (CBP) may require that importers of these products furnish relevant certification of export information in order to qualify for the treatment set forth in those subheadings. Where CBP adopts such a requirement, it must publish notice of the requirement in the **Federal Register**, along with procedures for the submission of the relevant export certification information. No article that is subject to an export certification requirement may be entered for consumption, or withdrawn from warehouse for consumption, except upon presentation of a valid and properly executed export certification.

The Republic of Korea is a country identified in the superior text to subheadings 9903.80.05 through 9903.80.58, HTSUS. The government of the Republic of Korea has notified the United States that it has established a mechanism for the certification of exports to the United States. On September 18, 2019, CBP published a notice in the **Federal Register** (84 FR 49115), announcing that, on October 18, 2019, CBP would begin requiring official export certificates issued by the Republic of Korea for importation of certain steel products into the United States.[2] Following publication of the **Federal Register** notice, CBP issued a message through the Cargo Systems Messaging Service (CSMS) announcing that filers failing to provide the correct export certificate number would receive a warning message from the Automated Commercial Environment (ACE) until January 1, 2020, at which time ACE would begin to reject entries lacking the correct export certificate number. Subsequent CSMS messages delayed the implementation of ACE rejection until further notice, such that steel imports of the Republic of Korea without an export certificate received warning messages, but were not rejected.[3]

The Electronic Certification System (eCERT) is a system developed by CBP that uses electronic data transmissions of information normally associated with a required export document, such as a license or certificate, to facilitate the administration of quotas and ensure that the proper restraint levels are charged without being exceeded. The Republic of Korea currently submits export certificates to CBP via email, and in the administration of the quota, CBP validates the certificate numbers provided by importers on their entry summaries with the information provided by the Republic of Korea. The Republic

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[2] Only exporters may obtain valid and properly executed certificates of exportation, which exporters may apply for online via the Korea Iron and Steel Association (KOSA) website at *http://sq.kosa.or.kr/*. The Republic of Korea has authorized KOSA to issue export certificates. Importers should obtain these certificates of exportation from exporters.

[3] *See* CSMS #40196360 (October 10, 2019) (initial announcement of the testing period), followed by CSMS #41021976 (December 17, 2019) and CSMS #42445519 (April 21, 2020). Full implementation of the certificate requirement was put on hold, while the United States and the Republic of Korea addressed issues related to the management of the certificates.

of Korea requested to participate in the eCERT process to comply with the United States' absolute quota limits for steel exported from the Republic of Korea for importation into the United States. CBP has coordinated with the Republic of Korea to implement the eCERT process, and now the Republic of Korea is ready to participate in this process by transmitting its export certificates to CBP via eCERT.[4]

Foreign countries participating in eCERT transmit information via a global network service provider, which allows connectivity to CBP's automated electronic system for commercial trade processing, ACE. Specific data elements are transmitted to CBP by the importer of record (IOR), or an authorized customs broker, when filing an entry summary with CBP, and those data elements must match eCERT data from the participating country before the subject importations will be entered or withdrawn for consumption. Importers must provide the participating country with their IOR number in advance of filing an entry, and, in turn, the participating country must submit the IOR number as an additional data element of information within the transmission for eCERT.[5] For entries filed through ACE, additional guidance on the submission of the export certificate information is available in the CBP and Trade Automated Interface Requirements (CATAIR), specifically in the chapter entitled Entry Summary Create/Update, regarding the record entitled Importer's Additional Declaration Detail (*https://www.cbp.gov/document/guidance/ace-catair-entry-summary-createupdate-v88*). If a certificate number is not translated properly, the entry will be rejected.

This document announces that the Republic of Korea will be implementing the eCERT process for transmitting export certificates for steel product entries subject to the absolute quota limitation. The entry summary data elements transmitted to CBP for merchandise that is entered, or withdrawn from warehouse, for consumption on or after April 22, 2024 must match the eCERT transmission of an export certificate from the Republic of Korea for the merchandise to be entered or withdrawn for consumption. CBP will automatically reject filings without correct eCERT information starting May 20, 2024. The transition to eCERT will not change the absolute quota filing process or requirements. Importers will continue to provide the export certificate numbers from the Republic of Korea in the same manner as when currently filing entry summaries with CBP. The format of the export certificate numbers will not change as a result of the transition

[4] An exporter's KOSA number functions as the eCERT number.

[5] 87 FR 52015.

to eCERT. CBP will reject entry summaries that otherwise comply with the absolute quota limitations when filed without a valid export certificate in eCERT.

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

# PROPOSED REVOCATION OF NINE RULING LETTERS AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF WIRELESS HEADPHONE SETS FROM CHINA, MEXICO AND AN UNDISCLOSED COUNTRY OF ORIGIN

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

**ACTION:** Notice of proposed revocation of nine ruling letters, and proposed revocation of treatment relating to the tariff classification of wireless headphone sets.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke nine ruling letters concerning tariff classification of wireless headphones sets under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

**DATE:** Comments must be received on or before May 24, 2024. .

**ADDRESS:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Shannon Stillwell, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Shannon Stillwell at (202) 325–0739.

**FOR FURTHER INFORMATION CONTACT:** Dwayne Rawlings, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at dwayne.rawlings@cbp.dhs.gov

**SUPPLEMENTARY INFORMATION:**

## BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke nine ruling letters pertaining to the tariff classification of wireless headphone sets. In this notice, CBP is specifically referring to New York Ruling Letters ("NY") N012174 (June 12, 2007) ("Attachment A"); NY N012171 (June 12, 2007) ("Attachment B"); NY N022197 (February 19, 2008) ("Attachment C"); NY N022195 (February 20, 2008) ("Attachment D"); NY N022204 (February 20, 2008) ("Attachment E"); NY N170023 (July 8, 2011) ("Attachment F"); NY N220756 (June 28, 2012) ("Attachment G"); NY N240329 (April 22, 2013) ("Attachment H"); NY N269695 (October 30, 2015) ("Attachment I"). This notice also covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the nine identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N012174, NY N012171, NY N022197, NY N022195, NY N022204, NY N170023, NY N220756, NY N240329 and NY N269695, CBP classified wireless headphone sets in heading 8517, HTSUS, specifically in subheading 8517.62.00, HTSUS, which provides for "Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus." CBP has reviewed those ruling letters and has determined the ruling letters to be in error. It is now CBP's position that the wireless headphone sets are properly classified in heading 8518, HTSUS, specifically in subheading 8518.30.20, HTSUS, which provides for "Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof: Headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N012174, NY N012171, NY N022197, NY N022195, NY N022204, NY N170023, NY N220756, NY N240329 and NY N269695, and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H317791, set forth as Attachment J to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

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

GREGORY CONNOR
*for*
YULIYA A. GULIS,
*Director*
*Commercial and Trade Facilitation Division*

Attachments

ATTACHMENT A

N012174

June 12, 2007
CLA-2–85:RR:E:NC:N1:109
CATEGORY: Classification
TARIFF NO.: 8517.62.0050

MR. STEVE BONAR
GLOBAL CUSTOMS COMPLIANCE MANAGER
PLANTRONICS INC.
*345 ENCINAL STREET*
*SANTA CRUZ, CA 95060*

RE: The tariff classification of a CS70N wireless headset system from Mexico

DEAR MR. BONAR:

In your letter dated June 1, 2007 you requested a tariff classification ruling.

The merchandise subject to this ruling is a CS70N wireless headset system. The CS70N is Plantronic's new office headset system, which allows the user to wear it over the ear. It incorporates a noise canceling microphone for clarity and clear speech in noisy environments. This wireless headset system is put up for retail sale as a product comprised of a base unit that connects to a lined telephone, a wireless headset that transmits and receive radio frequency at 1.9 GHz, a power cord for the base unit, ear-tips of different sizes for the user's comfort, and a handset lifter.

The base unit plugs into the headset jack on the telephone to receive and transmit sound waves into a modulated current to feedback to the telephone. Once the modulated current is received by the base unit, it encrypts the current and sends it to the wireless headset via a radio frequency at 1.9 GHz. Once the headset receives the signal from the base unit, it decodes the transmission and regenerates the signal into voice. When the user speaks into the headset the process is reversed. The voice from the user is encrypted and is transmitted back to the base unit. The base unit then decodes the signal and converts it to a modulated current, which is then sent to the telephone. The CS70N features a control button to answer/end/make calls and a volume control including mute. The base unit can fully recharge the headset.

The applicable subheading for the CS70N wireless headset system will be 8517.62.0050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other. The general rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Linda M. Hackett at 646–733–3015.

*Sincerely,*

ROBERT B. SWIERUPSKI
*Director,*
*National Commodity Specialist Division*

ATTACHMENT B

N012171

June 12, 2007
CLA-2–85:RR:E:NC:N1:109
CATEGORY: Classification
TARIFF NO.: 8517.62.0050

Mr. Steve Bonar
Global Customs Compliance Manager
Plantronics Inc.
*345 Encinal Street*
*Santa Cruz, CA 95060*

RE: The tariff classification of a Discovery 655 Bluetooth headset from China

Dear Mr. Bonar:

In your letter dated June 1, 2007 you requested a tariff classification ruling.

The merchandise subject to this ruling is a Discovery 655 Bluetooth headset. The Discovery 655 is Plantronic's mobile headset which allows the user to wear it over the ear. It incorporates digital signal processing (DSP), the latest audio technology for enhanced sound for clear conversations. The Discovery 655 is put up for retail sale as a product comprised of a Bluetooth wireless headset that transmits and receives with a cellular phone, a AAA battery charger, an AC charger, a mini USB to USB charging cable used for charging by a computer, ear-tips of different sizes for the users comfort, and an ear stabilizer for secure positioning on the ear.

The Bluetooth headset is built with a transceiver microchip which receives and transmits using radio frequency (RF) signals, 2.4 GHz ISM, with a cellular phone within 33 feet. The cellular phone transmits a Bluetooth signal to the headset. The headset receives the RF, coverts the signal to sound waves for the user to hear. When the user speaks into the headset the sound waves are converted to a signal and sent back to the corresponding cellular phone. The Discovery 655 features a control button to answer/end/make calls and volume control including mute. The headset can utilize voice dialing when the cellular phone has enabled the voice dialing.

The applicable subheading for the Discovery 655 Bluetooth headset will be 8517.62.0050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other. The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Linda M. Hackett at 646–733–3015.

*Sincerely,*

ROBERT B. SWIERUPSKI
*Director,*
*National Commodity Specialist Division*

ATTACHMENT C

N022197
February 19, 2008
CLA-2–85:OT:RR:E:NC:N1:109
CATEGORY: Classification
TARIFF NO.: 8517.62.0050

Mr. Troy D. Crago
Import Specialist
Atico International USA, Inc.
*501 South Andrews Ave.*
*Fort Lauderdale, FL 33301*

RE: The tariff classification of a Slim Size Bluetooth Wireless Headset from China

Dear Mr. Crago:

In your letter dated January 19, 2008, you requested a tariff classification ruling.

The merchandise is identified in your letter as a Slim Size Bluetooth Wireless headset, which weighs only 9 grams, has Bluetooth V2.0 + EDR (Enhanced Data Rate). The Bluetooth Wireless headset is identified within your letter as Item # A015DA00070. It is built with a transceiver microchip that receives and transmits using radio frequency (RF) signals with a cellular phone within a 30 feet operating range. The cellular phone transmits a Bluetooth signal to the headset. The headset receives the RF signals and converts the signal to sound waves for the user to hear. When the user speaks into the headset the sound waves are converted to a signal and sent back to the corresponding cellular phone. Among its many features are 6 hours of talk time, 100 hours standby time, easy switching between headset and hands free, volume control, support voice dial, and last number redial. An alternating current (AC) adapter for recharging the battery and three different size earpieces are included with the headset.

The applicable subheading for the Slim Size Bluetooth Wireless Headset (Item # A015DA00070) will be 8517.62.0050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other." The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Linda M. Hackett at 646–733–3015.

*Sincerely,*

Robert B. Swierupski
*Director,*
*National Commodity Specialist Division*

ATTACHMENT D

N022195
February 20, 2008
CLA-2–85:OT:RR:E:NC:N1:109
CATEGORY: Classification
TARIFF NO.: 8517.62.0050

MR. TROY D. CRAGO
IMPORT SPECIALIST
ATICO INTERNATIONAL USA, INC.
*501 SOUTH ANDREWS AVENUE*
*FORT LAUDERDALE, FL 33301*

RE: The tariff classification of a Bluetooth wireless stereo headphone from China

DEAR MR. CRAGO:

In your letter dated January 19, 2008 you requested a tariff classification ruling.

The merchandise subject to this ruling is a Bluetooth wireless stereo headphone. It is identified within your submission as Model # A015DA00031. This Bluetooth wireless stereo headphone features Bluetooth V2.0 + EDR (Enhanced Data Rate), support profiles of hands-free headset A2DP & AVRCP, a LI-ION rechargeable battery, which provides 12 hours of talk time, 10 hours of music time, and 260 hours of standby time, and has an operating range up to 30 feet. It has a built-in microphone, volume control with up/down/mute modes, a music control that enables the user to play music backward and forward, supports voice dial, last number redial, an LED for line-in-use & battery level check indication, and auto-switching between listening to music and making phone calls. A foldable headband and USB charger is included.

The applicable subheading for the Bluetooth wireless stereo headphone (Model # A015DA00031) will be 8517.62.0050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other." The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Linda M. Hackett at 646–733–3015.

*Sincerely,*

ROBERT B. SWIERUPSKI
*Director,*
*National Commodity Specialist Division*

ATTACHMENT E

N022204
February 20, 2008
CLA-2–85:OT:RR:E:NC:N1:109
CATEGORY: Classification
TARIFF NO.: 8517.62.0050

MR. TROY D. CRAGO
IMPORT SPECIALIST
ATICO INTERNATIONAL USA, INC.
*501 SOUTH ANDREWS AVENUE*
*FORT LAUDERDALE, FL 33301*

RE: The tariff classification of a Bluetooth wireless stereo headphone from China

DEAR MR. CRAGO:

In your letter dated January 19, 2008 you requested a tariff classification ruling.

The merchandise subject to this ruling is a Bluetooth wireless stereo headphone. It is identified within your submission as Model # A015DA00067. The Bluetooth wireless stereo headphone features Bluetooth V2.0 + EDR (Enhanced Data Rate), supports HS, HF, A2DP, & QVRCP profile, 8 hours of talk time, 170 hours of standby time, and has an operating range up to 30 feet. It has a music control that enables the user to play music backward and forward, supports voice dial, and last number redial. An AC adapter and detachable earpiece are included.

The applicable subheading for the Bluetooth wireless stereo headphone (Model # A015DA00067) will be 8517.62.0050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other." The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Linda M. Hackett at 646–733–3015.

*Sincerely,*

ROBERT B. SWIERUPSKI
*Director,*
*National Commodity Specialist Division*

ATTACHMENT F

N170023

July 8, 2011
CLA-2–85:OT:RR:NC:N1:109
CATEGORY: Classification
TARIFF NO.: 8517.62.0050

MR. ERIC S. C. WANG
DYNASTY CUSTOMS BROKER, INC.
*DYNASTY U.S.A. GROUP*
*1409 SAN MATEO AVENUE*
*SOUTH SAN FRANCISCO, CA 94080*

RE: The tariff classification of Gioteck Bluetooth headsets from China

DEAR MR. WANG:

In your letter dated June 3, 2011 you requested a tariff classification ruling on behalf of your client, Goodbetterbest, Ltd., dba Video Games Accessories Manufacturer.

In your submission you requested the classification of three Bluetooth headsets. They were identified within your letter as Model EX-01, Model EX-02s, and Model TX-1. Samples of each were submitted for classification purposes. At this time, the classification of Model TX-1 cannot be rendered because additional information about this merchandise is necessary in order to determine if it communicates wirelessly via Bluetooth technology. Therefore, this ruling will only provide the classification of Model EX-01 and Model EX-02s. As such, the classification of Model EX-01 and Model EX-02s follows. You will find questions pertaining to Model TX-1 at the end of this ruling letter.

Model EX-01 is referred to as a Bluetooth headset. Model EX-02s is referred to as a next generation Bluetooth headset. Both models contain a transceiver microchip which provides two-way communication. They receive and transmit using a 2.4 GHz radio frequency (RF) signal from and to a video game console. The headsets receive an RF signal and convert it to sound waves for a player to hear. When a player speaks, the sound waves are converted to RF signals and sent back to the video game console, enabling all players on a PlayStation network to hear the audio and to speak to one another. Although your submission states that the Gioteck Bluetooth headsets are designed for home video game consoles, such as PS3, XBOX360, they are not exclusively for use with a gaming console. There is nothing about these products that prevent them from being used with other devices, such as a cellular telephone for 2-way communication, so long as the headsets are "paired" with the other devices.

Model EX-01 is a Bluetooth headset. It is an over-the-ear earphone (speaker) combined in the same housing with a microphone and radio reception/transmission apparatus (transceiver microchip), enabling the headset to communicate wirelessly with other apparatus. It contains an ear hook, an LED feedback indicator, buttons for volume increase/decrease and power/mute, and a rechargeable Lithium-ion polymer battery. It is imported with two spare over-the-ear hooks and a USB cable to recharge the battery. The headset utilizes Bluetooth (an open wireless protocol for exchanging data over short distances using radio waves), which enables the headset to communicate wirelessly with other devices that it is "paired" up with.

Model EX-02s is a next generation Bluetooth headset is an over-the-ear earphone (speaker) combined in the same housing with a microphone and radio reception/transmission apparatus (transceiver microchip), enabling the headset to communicate wirelessly with other apparatus. It contains an ear hook, an LED feedback indicator, buttons for volume increase/decrease and power/mute, and a rechargeable Lithium-ion polymer battery. It is imported with a spare over-the-ear hook and a USB cable to recharge the battery. The headset utilizes Bluetooth (an open wireless protocol for exchanging data over short distances using radio waves), which enables the headset to communicate wirelessly with other devices that it is "paired" up with.

The applicable subheading for the Gioteck Bluetooth headsets (Model EX-01 and Model EX-02s) will be 8517.62.0050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other." The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported.

In order to provide the classification of headset Model TX-1 a response to the following questions is needed.

1 – A physical examination of headset Model TX-1, which you submitted a sample of, reveals that it is a throat mic consisting of a microphone, earphone bud, adjustable neck band and an attached mini jack. The product literature states that the mini jack can be "plugged" into the bottom of an XBOX360. What is the purpose of headset Model TX-1 being "wired" into a device such as an XBOX 360 device (or any other device, for that matter)?

2 – Can headset Model TX-1 transmit and receive "wireless" **without** being wired into a device such as the XBOX360 via the 2.5mm mini jack? If so, what is the purpose of the 2.5mm mini jack and what is it that enables headset Model TX-1 to transmit and receive wirelessly? If not, please explain why headset Model TX-1 cannot transmit and receive wirelessly.

3 – Does headset Model TX-1 contain a transceiver microchip? If so, what is the purpose of the transceiver microchip specifically within headset Model TX-1?

4 – Does headset Model TX-1 transmit and receive via an open wireless protocol for exchanging voice and/or data over short distances using radio waves known as Bluetooth technology? If so, please explain this process.

5 – Does headset Model TX-1 contain a rechargeable battery? If so, what type of battery is it? If not, how does headset Model TX-1 obtain its power?

6 –What are all of the functions that headset Model TX-1 executes? In layman's terms, please explain how headset Model TX-1 executes those functions.

7 – Is headset Model TX-1 an electroacoustic receiver used to produce low-intensity sound signals?

8 – Does headset Model TX-1 transform an electrical effect into an acoustic effect? If so, what other functions does headset Model TX-1 execute that distinguishes it from a headset that is provided for in heading 8518, whose function is to transform an electrical effect into an acoustic effect?

If you decide to resubmit your request, please refer to our file number N170023 and include all of the material that we have returned to you and mail your request to U.S. Customs and Border Protection, Customs Information Exchange, 10th Floor, One Penn Plaza, New York, NY 10119, attn: Binding Rulings Section. If you have any questions regarding the ruling or the questions listed above, contact National Import Specialist Linda M. Hackett at (646) 733–3015.

*Sincerely,*

ROBERT B. SWIERUPSKI
*Director*
*National Commodity Specialist Division*

ATTACHMENT G

N220756

June 28, 2012
CLA-2–85:OT:RR:NC:N1:109
CATEGORY: Classification
TARIFF NO.: 8517.62.0050

Ms. Antionette McKnight
American Shipping Company, Incorporated
*250 Moonachie Rd., 5th Floor*
*Moonachie, NJ 07074*

RE: The tariff classification of Bluetooth headsets from China

Dear Ms. Antionette McKnight:

In your letter dated June 5, 2012 you requested a tariff classification ruling on behalf of your client, Voyetra Turtle Beach, Incorporated

The merchandise subject to this ruling is five Bluetooth headsets. They are identified within your ruling letter as Model Numbers XP500, PX5, Delta, XP300, and XP400. Your letter states that the headsets are primarily designed for gaming purposes for utilization with such electronic games as the Sony PlayStation 3 and the Microsoft Xbox 360. Within your submission you also state that the headsets can also transmit radio frequency (RF) not only from a game console, but also to the game console enabling the user to speak with others within a local or wide area network. Additionally, these headsets can communicate with any other device capable of receiving RF signals using Bluetooth technology, such as phones, computers, and other consumer electronic devices. As such, although they are designed for gaming purposes, it is not solely or principally used with a gaming system. Samples of each of the five Bluetooth headsets were furnished for classification purposes and are being returned to you as per your request.

Each of the headsets has a transceiver microchip which provides 2-way communication that allows the user to communicate with other online video game players. The headsets receive and transmit RF signals from and to a video game console. The headsets receive an RF signal and convert it to sound waves for a player to hear. When a player speaks, the sound waves are converted to RF signals and sent back to the video game console, enabling all players on the a PlayStation network to hear the audio and to speak to one another. The headsets utilize Bluetooth, which is an open wireless protocol for exchanging data over short distances using radio waves, which enables the headsets to communicate wirelessly with other devices that they are "paired" up with, such as a cell phone and other Bluetooth devices. The XP500, PX5, and Delta headsets use wireless CD-quality game sound via digital 2.404–2.475 GHz RF that communicates with a transmitter that is included in each headset. The XP300 and XP400 use wireless CD-quality game sound via digital 5.160–5.280 GHz RF that communicates with a transmitter that is included with each headset.

The applicable subheading for the Bluetooth headsets (Model Numbers XP500, PX5, Delta, XP300, and XP400) will be 8517.62.0050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network): Machines for the reception, conversion and

transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other." The rate of duty will be free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Linda M. Hackett at (646) 733–3015.

*Sincerely,*

THOMAS J. RUSSO
*Director*
*National Commodity Specialist Division*

ATTACHMENT H

N240329

April 22, 2013
CLA-2–85:OT:RR:NC:N1:109
CATEGORY: Classification
TARIFF NO.: 8517.62.0050

William Viriya Netramai
Global Trade Compliance
Beats Electronics LLC
*1601 Cloverfield Blvd., Suite 5000N*
*Santa Monica, CA 90404*

RE: The tariff classification of Bluetooth enabled wireless headphones from an undisclosed country of origin

Dear Mr. Netramai:

In your letter dated March 27, 2013, you requested a tariff classification ruling.

The merchandise in question is referred to as the “Beats Wireless Over Ear Headphone” set (Model # 810–00012–00). The retail package includes the “Beats Wireless Over Ear Headphones,” a USB charging cable, a remote microphone cable, an audio cable, an audio plug adapter, and a uniquely shaped fitted case. The ear cups are cushioned; one ear cup incorporates a microphone, a power/answer/hang-up button, a power LED indicator, a play/pause button, back and next buttons, and volume control buttons. There is a jack located at the base of this ear cup for the audio or microphone cable. The other ear cup incorporates a mini USB jack at the base which is used to charge the item. It is retail packaged upon importation.

The headphones incorporate the “BlueCore5 Multimedia Bluetooth Chip.” This chip allows for wireless two-way communication between the headset and any Bluetooth enabled device. The user can access Bluetooth enabled cellular telephones for wireless two-way communications and/or wirelessly receive streaming audio from an iPod, iPhone, iPad, laptop, or any other Bluetooth enabled device. The buttons on the ear cup let you manage the volume, skip tracks, and answer telephone calls with a single touch.

The applicable subheading for the “Beats Wireless Over Ear Headphone” set (Model # 810–00012–00) will be 8517.62.0050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Machines for the reception, conversion, and transmission or regeneration of voice, images or other data, including switching and routing apparatus: Other”. The general rate of duty will be Free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Steven Pollichino at (646) 733–3008.

*Sincerely,*

THOMAS J. RUSSO
*Director*
*National Commodity Specialist Division*

ATTACHMENT I

N269695
October 30, 2015
CLA-2–85:OT:RR:NC:N4:109
CATEGORY: Classification
TARIFF NO.: 8517.62.0050

ELISABETH FORREST
PLANTRONICS
*345 ENCINAL STREET*
*SANTA CRUZ, CA 95060*

RE: The tariff classification of a communication headset from China

DEAR MS. FORREST:

In your letter dated October 14, 2015, you requested a tariff classification ruling.

The item concerned is referred to as the Blackwire C720. It is described as a versatile Unified Communications (UC) headset. This device is a telecommunication type headset with two speakers (one for each ear) and a microphone within a wraparound style mouth piece. It also incorporates a Bluetooth transceiver and a USB port.

The Bluetooth transceiver enables the Blackwire C720 headset to wirelessly connect to mobile phones and tablets while the USB port allows it to connect, via a USB cable, to a personal computer (PC). This headset uses smart sensor technology that automatically answers a call when the user puts on the headset. The inline controls with Bluetooth functionality are used to answer mobile calls and PC calls, control volume, and mute volume. Inline indicator lights and voice prompts alert the user to connection status, mute, and volume status. Lights on the ear pad let colleagues know when the user is on a call.

The applicable subheading for the Blackwire C720 communication headset will be 8517.62.0050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Telephone sets...: Other apparatus for transmission or reception of voice, images or other data...: Machines for the reception, conversion and transmission or regeneration of voice, images or other data...: Other.” The rate of duty will be Free.

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

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

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Steven Pollichino at Steven.Pollichino@cbp.dhs.gov.

*Sincerely,*

GWENN KLEIN KIRSCHNER
*Director*
*National Commodity Specialist Division*

ATTACHMENT J

H317791
OT:RR:CTF:TCM H317791 DSR
CATEGORY: Classification
TARIFF NO.: 8518.30.20

MR. TROY D. CRAGO
IMPORT SPECIALIST
ATICO INTERNATIONAL USA, INC.
*501 SOUTH ANDREWS AVENUE*
*FORT LAUDERDALE, FL 33301*

WILLIAM VIRIYA NETRAMAI
GLOBAL TRADE COMPLIANCE
BEATS ELECTRONICS LLC
*1601 CLOVERFIELD BLVD., SUITE 5000N*
*SANTA MONICA, CA 90404*

ELISABETH FORREST
PLANTRONICS
*345 ENCINAL STREET*
*SANTA CRUZ, CA 95060*

MS. ANTOINETTE MCKNIGHT
AMERICAN SHIPPING COMPANY, INCORPORATED
*250 MOONACHIE RD., 5TH FLOOR*
*MOONACHIE, NJ 07074*

MR. ERIC S. C. WANG
DYNASTY CUSTOMS BROKER, INC.
DYNASTY U.S.A. GROUP
*1409 SAN MATEO AVENUE*
*SOUTH SAN FRANCISCO, CA 94080*

MR. STEVE BONAR
GLOBAL CUSTOMS COMPLIANCE MANAGER
PLANTRONICS INC.
*345 ENCINAL STREET*
*SANTA CRUZ, CA 95060*

RE: Tariff classification of Bluetooth enabled wireless headphone sets from China, Mexico and an undisclosed country of origin; Revocation of NY N012174 (June 12, 2007), NY N012171 (June 12, 2007), NY N022197 (February 19, 2008), NY N022195 (February 20, 2008), NY N022204 (February 20, 2008), NY N170023 (July 8, 2011), NY N220756 (June 28, 2012), NY N240329 (April 22, 2013), and NY N269695 (October 30, 2015)

DEAR MSES. MCKNIGHT AND FORREST, AND MESSRS. BANAR, WANG, NETRAMAI, AND CRAGO,

This letter is in reference to the tariff classification of retail sets containing certain wireless headphones. We have identified nine published rulings that need to be reconsidered so that we do not have in force rulings that may be inconsistent with our current views.

Each of the rulings classified the subject merchandise in subheading 8517.62.00, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Other apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or

wireless network (such as a local or wide area network): Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus." After reviewing the rulings, CBP has determined that the classifications of the subject articles are incorrect and CBP is therefore revoking them for the reasons set forth herein.

**FACTS:**

The subject of NY N269695 is described as follows:

> The item concerned is referred to as the Blackwire C720. It is described as a versatile Unified Communications (UC) headset. This device is a telecommunication type headset with two speakers (one for each ear) and a microphone within a wraparound style mouthpiece. It also incorporates a Bluetooth transceiver and a USB port.
>
> The Bluetooth transceiver enables the Blackwire C720 headset to wirelessly connect to mobile phones and tablets while the USB port allows it to alternatively connect, via a USB cable, to a personal computer (PC). This headset uses smart sensor technology that automatically answers a call when the user puts on the headset. The inline controls with Bluetooth functionality are used to answer mobile calls and PC calls, control volume, and mute volume. Inline indicator lights and voice prompts alert the user to connection status, mute, and volume status. Lights on the ear pad let colleagues know when the user is on a call.

The subjects of NY N220756 are described as follows:

> The merchandise subject to this ruling is five Bluetooth headsets. They are identified within your ruling letter as Model Numbers XP500, PX5, Delta, XP300, and XP400. Your letter states that the headsets are primarily designed for gaming purposes for utilization with such electronic games as the Sony PlayStation 3 and the Microsoft Xbox 360. Within your submission you also state that the headsets can also transmit radio frequency (RF) not only from a game console, but also to the game console enabling the user to speak with others within a local or wide area network. Additionally, these headsets can communicate with any other device capable of receiving RF signals using Bluetooth technology, such as phones, computers, and other consumer electronic devices. As such, although they are designed for gaming purposes, it is not solely or principally used with a gaming system. Samples of each of the five Bluetooth headsets were furnished for classification purposes and are being returned to you as per your request.
>
> Each of the headsets has a transceiver microchip which provides 2-way communication that allows the user to communicate with other online video game players. The headsets receive and transmit RF signals from and to a video game console. The headsets receive an RF signal and convert it to sound waves for a player to hear. When a player speaks, the sound waves are converted to RF signals and sent back to the video game console, enabling all players on the PlayStation network to hear the audio and to speak to one another. The headsets utilize Bluetooth, which is an open wireless protocol for exchanging data over short distances using radio waves, which enables the headsets to communicate wirelessly with other devices that they are "paired" up with, such as a cell phone and

> other Bluetooth devices. The XP500, PX5, and Delta headsets use wireless CD-quality game sound via digital 2.404–2.475 GHz RF that communicates with a transmitter that is included in each headset. The XP300 and XP400 use wireless CD-quality game sound via digital 5.160–5.280 GHz RF that communicates with a transmitter that is included with each headset.

The subjects of NY N170023 are described as follows:

> ... Model EX-01 is referred to as a Bluetooth headset. Model EX-02s is referred to as a next generation Bluetooth headset. Both models contain a transceiver microchip which provides two-way communication. They receive and transmit using a 2.4 GHz radio frequency (RF) signal from and to a video game console. The headsets receive an RF signal and convert it to sound waves for a player to hear. When a player speaks, the sound waves are converted to RF signals and sent back to the video game console, enabling all players on a PlayStation network to hear the audio and to speak to one another. Although your submission states that the Gioteck Bluetooth headsets are designed for home video game consoles, such as PS3, XBOX360, they are not exclusively for use with a gaming console. There is nothing about these products that prevent them from being used with other devices, such as a cellular telephone for 2-way communication, so long as the headsets are "paired" with the other devices.
>
> Model EX-01 is a Bluetooth headset. It is an over-the-ear earphone (speaker) combined in the same housing with a microphone and radio reception/transmission apparatus (transceiver microchip), enabling the headset to communicate wirelessly with other apparatus. It contains an ear hook, an LED feedback indicator, buttons for volume increase/decrease and power/mute, and a rechargeable Lithium-ion polymer battery. It is imported with two spare over-the-ear hooks and a USB cable to recharge the battery. The headset utilizes Bluetooth (an open wireless protocol for exchanging data over short distances using radio waves), which enables the headset to communicate wirelessly with other devices that it is "paired" up with.
>
> Model EX-02s is a next generation Bluetooth headset is an over-the-ear earphone (speaker) combined in the same housing with a microphone and radio reception/transmission apparatus (transceiver microchip), enabling the headset to communicate wirelessly with other apparatus. It contains an ear hook, an LED feedback indicator, buttons for volume increase/decrease and power/mute, and a rechargeable Lithium-ion polymer battery. It is imported with a spare over-the-ear hook and a USB cable to recharge the battery. The headset utilizes Bluetooth (an open wireless protocol for exchanging data over short distances using radio waves), which enables the headset to communicate wirelessly with other devices that it is "paired" up with.

The subject of NY N022197 is described as follows:

> The merchandise is identified in your letter as a Slim Size Bluetooth Wireless headset, which weighs only 9 grams, has Bluetooth V2.0 + EDR (Enhanced Data Rate). The Bluetooth Wireless headset is identified within your letter as Item # A015DA00070. It is built with a transceiver microchip that receives and transmits using radio frequency (RF) signals

> with a cellular phone within a 30 feet operating range. The cellular phone transmits a Bluetooth signal to the headset. The headset receives the RF signals and converts the signal to sound waves for the user to hear. When the user speaks into the headset the sound waves are converted to a signal and sent back to the corresponding cellular phone. Among its many features are 6 hours of talk time, 100 hours standby time, easy switching between headset and hands free, volume control, support voice dial, and last number redial. An alternating current (AC) adapter for recharging the battery and three different size earpieces are included with the headset.

The subject of NY N012174 is described as follows:

> The merchandise subject to this ruling is a CS70N wireless headset system. The CS70N is Plantronic's new office headset system, which allows the user to wear it over the ear. It incorporates a noise canceling microphone for clarity and clear speech in noisy environments. This wireless headset system is put up for retail sale as a product comprised of a base unit that connects to a lined telephone, a wireless headset that transmits and receive radio frequency at 1.9 GHz, a power cord for the base unit, ear-tips of different sizes for the user's comfort, and a handset lifter.
>
> The base unit plugs into the headset jack on the telephone to receive and transmit sound waves into a modulated current to feedback to the telephone. Once the modulated current is received by the base unit, it encrypts the current and sends it to the wireless headset via a radio frequency at 1.9 GHz. Once the headset receives the signal from the base unit, it decodes the transmission and regenerates the signal into voice. When the user speaks into the headset the process is reversed. The voice from the user is encrypted and is transmitted back to the base unit. The base unit then decodes the signal and converts it to a modulated current, which is then sent to the telephone. The CS70N features a control button to answer/end/make calls and a volume control including mute. The base unit can fully recharge the headset.

The subject of NY N012171 is described as follows:

> The merchandise subject to this ruling is a Discovery 655 Bluetooth headset. The Discovery 655 is Plantronic's mobile headset which allows the user to wear it over the ear. It incorporates digital signal processing (DSP), the latest audio technology for enhanced sound for clear conversations. The Discovery 655 is put up for retail sale as a product comprised of a Bluetooth wireless headset that transmits and receives with a cellular phone, a AAA battery charger, an AC charger, a mini-USB to USB charging cable used for charging by a computer, ear-tips of different sizes for the user's comfort, and an ear stabilizer for secure positioning on the ear.
>
> The Bluetooth headset is built with a transceiver microchip which receives and transmits using radio frequency (RF) signals, 2.4 GHz ISM, with a cellular phone within 33 feet. The cellular phone transmits a Bluetooth signal to the headset. The headset receives the RF, coverts the signal to sound waves for the user to hear. When the user speaks into the headset the sound waves are converted to a signal and sent back to the corresponding cellular phone. The Discovery 655 features a control button

> to answer/end/make calls and volume control including mute. The headset can utilize voice dialing when the cellular phone has enabled the voice dialing.

The subject of NY N022195 is described as follows:

> This Bluetooth wireless stereo headphone features Bluetooth V2.0 + EDR (Enhanced Data Rate), support profiles of hands-free headset A2DP & AVRCP, a LI-ION rechargeable battery, which provides 12 hours of talk time, 10 hours of music time, and 260 hours of standby time, and has an operating range up to 30 feet. It has a built-in microphone, volume control with up/down/mute modes, a music control that enables the user to play music backward and forward, supports voice dial, last number redial, an LED for line-in-use & battery level check indication, and auto-switching between listening to music and making phone calls. A foldable headband and USB charger is included.

The subject of NY N022204 is described as follows:

> The Bluetooth wireless stereo headphone features Bluetooth V2.0 + EDR (Enhanced Data Rate), supports HS, HF, A2DP, & QVRCP profile, 8 hours of talk time, 170 hours of standby time, and has an operating range up to 30 feet. It has a music control that enables the user to play music backward and forward, supports voice dial, and last number redial. An AC adapter and detachable earpiece are included.

The subject of NY N240329 is described as follows:

> The merchandise in question is referred to as the “Beats Wireless Over Ear Headphone” set (Model # 810–00012–00) The retail package includes a pair of Beats wireless headphones, a USB charging cable, a remote microphone cable, an audio cable, an audio plug adapter, and a uniquely shaped fitted case. The ear cups are cushioned, and one ear cup incorporates a microphone, a power/answer/hang-up button, a power LED indicator, a play/pause button, back and next buttons, and volume control buttons. There is a jack located at the base of this ear cup for the audio or microphone cable. The other ear cup incorporates a mini-USB jack at the base which is used to charge the item. It is retail packaged upon importation.
>
> The headphones incorporate the “BlueCore5 Multimedia Bluetooth Chip.” This chip allows for wireless two-way communication between the headset and any Bluetooth enabled device. The user can access Bluetooth enabled cellular telephones for wireless two-way communications and wirelessly receive streaming audio from an iPod, iPhone, iPad, laptop, or any other Bluetooth enabled device. The buttons on the ear cup let you manage the volume, skip tracks, and answer telephone calls with a single touch.

**ISSUE:**

Whether the headphone sets are classified under heading 8517, HTSUS, which provides for, in pertinent part, apparatus for the reception, conversion and transmission or regeneration of voice, images or other data, or under heading 8518, HTSUS, which provides for, in pertinent part, headphones and earphones, whether or not combined with a microphone.

**LAW AND ANALYSIS:**

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. If the goods cannot be classified solely based on GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.[1]

The HTSUS provisions under consideration in this ruling are as follows:

8517 Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof:

* * *

8518 Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof:

In addition, in interpreting the HTSUS, the Explanatory Notes ("ENs") of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. Likewise, decisions in the Compendium of Classification Opinions should be treated in the same manner as the ENs. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The EN to heading 85.17 states, in pertinent part, the following:

> This heading covers apparatus for the transmission or reception of speech or other sounds, images or other data between two points by variation of an electric current or optical wave flowing in a wired network or by electromagnetic waves in a wireless network. The signal may be analogue or digital. The networks, which may be interconnected, include telephony, telegraphy, radio-telephony, radio-telegraphy, local and wide area networks.
>
> ...
>
> (II) OTHER APPARATUS FOR TRANSMISSION OR RECEPTION OF VOICE, IMAGES OR OTHER DATA, INCLUDING APPARATUS FOR COMMUNICATION IN A WIRED OR WIRELESS NETWORK (SUCH AS A LOCAL OR WIDE AREA NETWORK)
>
> ...
>
> (F) Transmitting and receiving apparatus for radio-telephony and radio-telegraphy.

[1] At the time of importation, all the components contained in the packages of the subject articles are packaged together for retail sale and can be classifiable as sets per GRI 3(b). As such, the products are classifiable in the heading that provides for the component which imparts the essential character of the set, which would be the headphones.

This group includes:

(1) Fixed apparatus for radio-telephony and radio-telegraphy (transmitters, receivers and transmitter-receivers) . . ..

Classification Opinion 8517.62/20 describes the following:

**Wireless headset** with an AC charger and two ear-hooks of different sizes (headset dimensions : 41.5 mm (L) x 18.9 mm (W) x 25.9 mm (H); weight : 8 grams), consisting of a single (monaural) over-the-ear earphone combined in the same housing with a microphone, a radio transceiver, a rechargeable lithium polymer battery, a power input, a LED (light emitting diode) indicator light and controls.

The radio transceiver utilizes an open wireless technology standard (wireless protocol for exchanging data within a Personal Area Network (PAN) using short length radio waves over short distances (up to 10 meters)) with Enhanced Data Rate (EDR) technology, which enables the headset to communicate wirelessly with fixed and mobile devices, such as a mobile telephone for cellular networks.

The indicator light provides information on transmission/reception status and state of the battery charge. The power input is designed to accept a 5-pin, B-type plug, permitting recharging from a charger, a USB port on an automatic data processing machine or a motor vehicle accessory plug charger. The controls are used for powering the apparatus on and off, voice dialing, answering and ending incoming calls, rejecting calls, placing calls on hold, call waiting, redial of the last number, if supported by the apparatus with which it is "paired" (transmitting to and receiving from).

The product is put up in a set for retail sale in a box with a quick start manual.

**Application of GIRs 1 (Note 3 to Section XVI), 3 (b) and 6.**

*Adoption: 2011*

The EN to heading 85.18 provides, in pertinent part, the following:

This heading covers microphones, loudspeakers, headphones, earphones and audio-frequency electric amplifiers of all kinds presented separately, regardless of the particular purpose for which such apparatus may be designed (e.g., telephone microphones, headphones and earphones, and radio receiver loudspeakers).

The heading also covers electric sound amplifier sets.

. . .

> (C) HEADPHONES AND EARPHONES, WHETHER OR NOT COMBINED WITH A MICROPHONE, AND SETS CONSISTING OF A MICROPHONE AND ONE OR MORE LOUDSPEAKERS
>
> Headphones and earphones are electroacoustic receivers used to produce low-intensity sound signals. Like loudspeakers, described above, they transform an electrical effect into an acoustic effect; the means used are the same in both cases, the only difference being in the powers involved.
>
> The heading covers headphones and earphones, whether or not combined with a microphone, for telephony or telegraphy; headsets consisting of a special throat microphone and permanently-fixed earphones (used, for example, in aviation); line telephone handsets which are combined microphone/speaker sets for telephony and which are generally used by telephone operators; headphones and earphones for plugging into radio or television receivers, sound reproducing apparatus or automatic data processing machines....

We find that the instant headphones are composite machines described in Note 3 to Section XVI, HTSUS, and therefore classified as consisting only of the component that performs their principal function. Specifically, Note 3 states the following:

> Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

The General ENs to Section XVI, provide, in relevant part, as follows:

> (VI) MULTI-FUNCTION MACHINES AND COMPOSITE MACHINES
>
> (Section Note 3)
>
> In general, multi-function machines are classified according to the principal function of the machine.
>
> ...
>
> Composite machines consisting of two or more machines or appliances of different kinds, fitted together to form a whole, consecutively or simultaneously performing separate functions which are generally complementary and are described in different headings of Section XVI, are also classified according to the principal function of the composite machine.
>
> ...
>
> For the purposes of the above provisions, machines of different kinds are taken to be fitted together to form a whole when incorporated one in the other or mounted one on the other, or mounted on a common base or frame or in a common housing.

Here, each of the subject headphones incorporate a Bluetooth transceiver that allows for wireless two-way communication between the headphones and other Bluetooth-enabled devices. For instance, the headphones' users can access Bluetooth-enabled cellular telephones for wireless two-way communications or also wirelessly receive streaming audio from another Bluetooth-enabled device. Also, in the cases of the Beats headphones of NY N240329

and the Blackwire C720 of NY N269695, a user can choose to connect the devices directly to an audio source via an audio cable, or USB connection, respectively. Each device under consideration also possesses buttons that allow a user to manage functions such as incoming audio volume, audio track control and answering telephone calls.

Similar to the ENs, T.D. 89–80, *supra*, indicates that a classification opinion in the Compendium of Classification Opinions constitutes the official interpretation of the Harmonized System. Although generally indicative of the proper interpretation of the various provisions in the HS, classification opinions are not legally binding on the contracting parties. They should be consulted for guidance but should not be treated as dispositive.

In this case, we have consulted Classification Opinion 8517.62/20, but find that is not dispositive. In applying the legal text of Note 3 to Section XVI, we note that the transmission and reception functions of the Bluetooth transceivers in the subject headphones are not indicative of a principal function based on the reception or transmission of voice, images, or other data. Rather, in the case of the subject headphones, the wireless connectivity facilitated by the Bluetooth transceivers is analogous to the connectivity found in wired headphones. *See* NY N302512, dated February 9, 2019 (where CBP classified wired headphones with similar control functionality under heading 8518, HTSUS). In other words, the transmission and reception functions inherent to the subject devices are intermediate steps or ancillary features that complement the devices' ultimate principal function, which is to convert incoming and outgoing signals into sound – that is, to function as headphones combined with microphones. Therefore, we find that the subject headphone sets of NY N012174, NY N012171, NY N022197, NY N022195, NY N022204, NY N170023, NY N220756, NY N240329 and NY N269695 are properly classified as headphones of heading 8518, HTSUS.[2]

**HOLDING:**

By application of GRIs 1 (Note 3 to Section XVI), 3(b) and 6, the subject headphone sets are classified in heading 8518, HTSUS, specifically in subheading 8518.30.20, HTSUS, which provides for "Microphones and stands therefor; loudspeakers, whether or not mounted in their enclosures; headphones and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers; audio-frequency electric amplifiers; electric sound amplifier sets; parts thereof: Headphones

[2] Presidential Proclamation 8097, 72 Fed. Reg. 453, Volume 72, No. 2 (January 4, 2007), amended heading 8517, HTSUS (and other headings), to reflect changes recommended by the World Customs Organization. Current subheading 8517.62.00 was added to the HTSUS to cover "Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 8443, 8525, 8527 or 8528; parts thereof: Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus:" Prior to that amendment, heading 8517 covered "Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones; parts thereof:" The proclaimed changes became effective for goods entered or withdrawn from warehouse for consumption on or after February 3, 2007. In light of the above, this revocation covers only relevant heading 8517 rulings issued *after* the effective date of the amendment, as those before are revoked by operation of law.

and earphones, whether or not combined with a microphone, and sets consisting of a microphone and one or more loudspeakers: Other." The column one, general rate of duty is free.

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

**EFFECT ON OTHER RULINGS:**

NY N012174, NY N012171, NY N022197, NY N022195, NY N022204, NY N170023, NY N220756, NY N240329 and NY N269695 are revoked in accordance with this decision.

*Sincerely,*

YULIYA A. GULIS,
*Director*
*Commercial and Trade Facilitation Division*

## AGENCY INFORMATION COLLECTION ACTIVITIES

### New Collection; Forced Labor Portal/Forced Labor Case Management System (CMS)

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

**ACTION:** 60-Day notice and request for comments.

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

**DATES:** Comments are encouraged and must be submitted (no later than June 7, 2024) to be assured of consideration.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651–0NEW in the subject line and the agency name. Please submit written comments and/or suggestions in English. Please use the following method to submit comments:

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

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

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the

agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

**Overview of This Information Collection**

**Title:** Forced Labor Portal/Forced Labor Case Management System (CMS).

**OMB Number:** 1651–0NEW.

**Form Number:** N/A.

**Current Actions:** New Collection.

**Type of Review:** New Collection.

**Affected Public:** Businesses, Individuals.

**Abstract:** U.S. Customs and Borders Protection (CBP) has created a new Forced Labor Portal/Forced Labor Case Management System (CMS). Currently, information regarding potential forced labor and trade violations are electronically submitted via the e-Allegations website at: *https://www.cbp.gov/trade/e-allegations/*.

Submissions from petitioners for revocation and modification requests are submitted by email to *ForcedLabor@cbp.dhs.gov* (and through the BOX program and the Case Management System—CMS). Exception review information is sent to *UFLPAInquiry@cbp.dhs.gov* mailbox via email with multiple zip files.

Applicability review information is sent to various ports of entry or any of the ten Centers of Excellence and Expertise via email with multiple zip files or shared secured folders.

The new Forced Labor Portal/Forced Labor CMS will consolidate the various above-mentioned methods of submission into one centralized location, increasing efficiency and reducing the burden of collection to both CBP and the public.

U.S. Customs and Border Protection (CBP) enforces section 307 of the Tariff Act of 1930 (19 U.S.C. 1307), which states that "all goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced

labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited. . .”

In addition, the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) (Pub. L. 114–125), signed into law on February 24, 2016, removed the “consumptive demand clause” for the enforcement of 19 U.S.C. 1307, and mandated CBP to create a division to oversee forced labor enforcement and create a process for the investigation of allegations.

CBP also enforces the Countering America’s Adversaries Through Sanctions Act (CAATSA) (Pub. L. 115–44 (August 2, 2017), (22 U.S.C. 9241a)) where goods produced by North Korean nationals or citizens are presumed to be produced under forced labor and are prohibited from entering the U.S. commerce under 19 U.S.C. 1307.

Recently, the Uyghur Forced Labor Prevention Act (UFLPA) (Pub. L. 117–78 (December 23, 2021)) established that any goods produced wholly or in part in the Xinjiang Uyghur Autonomous Region (XUAR) of China, or by entities on the UFLPA Entity List are presumed to be made with forced labor and thus prohibited from importation into the U.S. under 19 U.S.C. 1307. This law allows for the collection of supply chain documentation to substantiate that forced labor was not used in the production of imported goods under an exception review or UFLPA does not apply to the detained shipment under an applicability review.

Sections 12.42 through 12.45 of title 19 of the Code of Federal Regulations (CFR) contain methods for CBP to collect information on forced labor, conduct investigations, and initiate withhold release orders (WRO) or findings to enforce 19 U.S.C. 1307 as well as allow for the collection of information from importers on detained shipments for admissibility review under a WRO.

Individuals, companies (domestic and international), civil society organizations, and nongovernmental organizations may submit allegations of forced labor, request for admissibility, applicability, and exception reviews with CBP under these laws and regulations.

*Type of Information Collection:* Allegations.

**Estimated Number of Respondents:** 200.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 200.

**Estimated Time per Response:** 10 minutes.

**Estimated Total Annual Burden Hours:** 34.

*Type of Information Collection:* WRO Admissibility Reviews.

**Estimated Number of Respondents:** 1900.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 1900.

**Estimated Time per Response:** 30 minutes.

**Estimated Total Annual Burden Hours:** 950.

*Type of Information Collection:* Modifications/Revocations.

**Estimated Number of Respondents:** 25.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 25.

**Estimated Time per Response:** 10 minutes.

**Estimated Total Annual Burden Hours:** 4.

*Type of Information Collection:* UFLPA Exception Requests.

**Estimated Number of Respondents:** 4.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 4.

**Estimated Time per Response:** 30 minutes.

**Estimated Total Annual Burden Hours:** 2.

*Type of Information Collection:* UFLPA Applicability Reviews.

**Estimated Number of Respondents:** 1500.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 1500.

**Estimated Time per Response:** 30 minutes.

**Estimated Total Annual Burden Hours:** 750.

*Type of Information Collection:* CAATSA Exception Reviews.

**Estimated Number of Respondents:** 2.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 2.

**Estimated Time per Response:** 10 minutes.

**Estimated Total Annual Burden Hours:** 0.33.

Dated: April 3, 2024.

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

# U.S. Court of Appeals for the Federal Circuit

RIMCO INC., Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee

Appeal No. 2022–2079

Appeal from the United States Court of International Trade in No. 1:21-cv-00537-MAB, Chief Judge Mark A. Barnett.

Decided: April 8, 2024

JOHN M. PETERSON, Neville Peterson LLP, New York, NY, argued for plaintiff-appellant. Also represented by PATRICK KLEIN; RICHARD F. O'NEILL, Seattle, WA.

BEVERLY A. FARRELL, Commercial Litigation Branch, Civil Division, United States Department of Justice, New York, NY, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, CLAUDIA BURKE, PATRICIA M. MCCARTHY, JUSTIN REINHART MILLER; FARIHA KABIR, YELENA SLEPAK, Office of Assistant Chief Counsel, Bureau of Customs and Border Protection, United States Department of Homeland Security, New York, NY; IAN ANDREW MCINERNEY, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, Washington, DC.

Before PROST, TARANTO, and HUGHES, *Circuit Judges*.

HUGHES, *Circuit Judge*.

Importer Rimco Inc., appeals the United States Court of International Trade's dismissal for lack of subject matter jurisdiction over an action seeking judicial review of a denied protest. Rimco asserts the Court of International Trade's exclusive subject-matter jurisdiction to review denial of protests pursuant to 28 U.S.C. § 1581(a), or alternatively, residual jurisdiction pursuant to 28 U.S.C. § 1581(i). Because Customs and Border Protection's assessment of countervailing and antidumping duties is not a protestable decision, and because jurisdiction under 28 U.S.C. § 1581(c) would have been available if Rimco had not failed to exhaust the appropriate administrative remedies, we affirm the CIT's dismissal for lack of subject matter jurisdiction.

## I

### A

Antidumping duties (AD) and countervailing duties (CVD) work to remedy domestic injuries caused by goods imported at unfair prices or receiving countervailable subsidies from foreign governments. *Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194, 1196 (Fed. Cir. 2014). The U.S. Department of Com-

merce and the U.S. International Trade Commission are the agencies charged with conducting CVD and AD investigations. 19 U.S.C. §§ 1671, 1673. During these investigations, Commerce determines whether, and to what extent, merchandise imported into the United States is being sold at prices below fair value, or benefits from countervailable foreign subsidiaries. 19 U.S.C. §§ 1671d, 1673d.

After concluding an investigation, Commerce determines the appropriate AD and CVD rates required to address any domestic injuries or unfair practices related to certain foreign exporters, producers, or governments. 19 U.S.C. §§ 1671d(c)(1), 1673d(c)(1). These rates can be established for specific entities or on a country-wide basis depending on the source and extent of the harm. 19 U.S.C. §§ 1671d(c)(1)(B), 1673d(c)(1)(B). Congress has supplied Commerce with a statutory scheme that provides methods for establishing AD and CVD rates for individually and non-individually investigated entities, as well as an "all-others" rate based on multiple considerations, including facts available. *See* 19 U.S.C. §§ 1671d(c)(5), 1673d(c)(5), 1677e.

This court has recognized that Commerce has "broad authority to interpret . . . and carry out th[is] statutory mandate." *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). However, its methodology must nevertheless be reasonable. *See Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1373 (Fed. Cir. 2013) (quoting "reasonable method" requirement contained in 19 U.S.C. § 1673d(c)(5)(B)).

After Commerce makes final AD and CVD determinations, it publishes the rates in a final order. In accordance with rulemaking under the Administrative Procedure Act (APA) § 3, 5 U.S.C. § 553, Commerce then provides notice of opportunity for interested parties, such as importers, to request and/or participate in administrative review of the final orders. At the close of the notice of opportunity period, Commerce issues liquidation instructions, directing the U.S. Customs and Border Protection (Customs) to assess entries subject to the orders at the final published respective rates.

B

On March 28, 2019, after completing CVD and AD investigations, Commerce published final CVD and AD determinations on certain steel wheels from China. *See generally Certain Steel Wheels From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 84 Fed. Reg. 11,744 (Dep't Commerce Mar. 28, 2019) (Final CVD Determination); *Certain Steel Wheels From the People's Republic of China: Final Determination of Sales At Less-Than-Fair-*

*Value*, 84 Fed. Reg. 11,746 (Dep't Commerce Mar. 28, 2019) (Final AD Determination). In its Final CVD Determination, Commerce established an entity rate of 457.10 % for two mandatory respondents based on total adverse facts available, as authorized under 19 U.S.C. § 1677e(b), and an all-others rate of 457.10 %, as authorized under 19 U.S.C. § 1673d(c)(5)(A). *See Certain Steel Wheels From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 84 Fed. Reg. at 11,745. Because no companies participated in the AD investigation, Commerce established a China-wide entity rate of 231.08 % for the Final AD Determination. *See Certain Steel Wheels From the People's Republic of China: Final Determination of Sales At Less-Than-Fair-Value*, 84 Fed. Reg. at 11,747.

On May 24, 2019, Commerce issued the AD and CVD orders in a single publication. *Certain Steel Wheels From the People's Republic of China; Antidumping and Countervailing Duty Orders*, 84 Fed. Reg. 24,098–24,100 (Dep't Commerce May 24, 2019).

On May 1, 2020, Commerce published a notice of opportunity to allow requests for administrative review of the AD order and CVD order for the periods August 31, 2018, through December 31, 2019, and October 30, 2018, through April 30, 2020, respectively. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 85 Fed. Reg. 25,394, 25,396 (Dep't of Commerce May 1, 2020). This notice provided interested parties, with an opportunity to participate in the administrative review process to ensure that their entries from the reviewable time periods were assessed at the proper rates during liquidation. As is relevant to this appeal, Rimco, a North Dakota-based importer and reseller of wheels subject to the orders, is an interested party to which the notice applied. *See* 19 U.S.C. 1677(9)(A) (defining "interested party" to include "the United States importer[] of subject merchandise"). Yet, neither Rimco, nor any other interested party, requested administrative review of any transactions covered by the respective periods of review.

Because no interested party requested administrative review of the AD or CVD orders, Commerce issued liquidation instructions directing Customs to assess entries subject to the orders at the final published rates. During liquidation, Customs then applied the instructed rates when assessing goods subject to the respective orders. Rimco made various consumption entries of goods subject to liquidation in accordance with the AD and CVD orders.

On March 16, 2021, Rimco filed a protest challenging Customs' assessment of AD and CVD on its imported goods as "'excessive fines' in contravention of the Eighth Amendment." Appellant's Br. at 5. On

March 30, 2021, Customs denied the protest on the basis that "19 U.S.C. [§] 1514 does not authorize protests or petitions against Commerce calculations or findings." Appellee's Br. at 8. Rimco then filed an action before the U.S. Court of International Trade (CIT), seeking judicial review of Customs' denial of protest. Rimco asserted the CIT's exclusive jurisdiction under 28 U.S.C. § 1581(a), or alternatively, 28 U.S.C. § 1581(i).

The Government moved to dismiss Rimco's action for lack of subject matter jurisdiction and failure to state a claim. On July 8, 2022, the CIT granted the Government's motion on jurisdictional grounds and dismissed the action with prejudice.[1] J.A. 1. The CIT held that it lacked jurisdiction under § 1581(a) because Customs' ministerial application of AD and CVD rates, pursuant to Commerce's liquidation instructions, was not a protestable decision. J.A. 10–12. Instead, the CIT found that the true nature of Rimco's action was "a challenge to the countervailing and antidumping duty rates set by Commerce in the respective orders . . . ." J.A. 19. Therefore, the CIT concluded that it lacked jurisdiction under § 1581(i) "because jurisdiction pursuant to section 1581(c) was available and would not have been manifestly inadequate" had Rimco sought administrative review of Commerce's AD and CVD determinations. J.A. 13.

Rimco appeals the CIT's dismissal. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

## II

We review a dismissal granted by the CIT for lack of subject-matter jurisdiction de novo as a question of law. *Hutchinson Quality Furniture, Inc. v. United States*, 827 F.3d 1355, 1359 (Fed. Cir. 2016).

The burden of establishing jurisdiction is on the party invoking it. *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). The well-pleaded factual allegations of the complaint are accepted as true, and all reasonable inferences are drawn in favor of the claimant. *Hutchinson*, 827 F.3d at 1359.

## III

The CIT's general jurisdiction is statutorily defined under 28 U.S.C. § 1581. *Norcal / Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 358 (Fed. Cir. 1992). The "particular laws over which the Court of International Trade may assert jurisdiction" are further specified in each

[1] Because the CIT dismissed the action for lack of subject-matter jurisdiction, it did not reach the motion to dismiss for failure to state a claim. J.A. 3 n.1.

subsection of § 1581. *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1555 (Fed. Cir. 1988). Relevant to this appeal are subsections (a), (c), and (i).

Section 1581(a) of title 28 grants the CIT "exclusive jurisdiction [over] any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515]." Section 1515 of title 19 governs Customs' review of "a protest . . . filed in accordance with section 1514 of this title." Importantly, § 1514 provides a limited list of seven circumstances in which a party may file a "protest against decisions of Customs." 19 U.S.C. § 1514(a)(1)–(7). Because "[s]ection 1514(a) applies exclusively to *Customs* decisions . . . [it] does not embrace decisions by other agencies." *See Mitsubishi Elec. Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994) (emphasis added and internal quotations omitted).

Section 1581(c) provides the CIT with "exclusive jurisdiction [over] civil actions commenced under [19 U.S.C. § 1516a]." Section 1516a specifically governs judicial review of Commerce's determinations in antidumping and countervailing duty proceedings.

Section 1581(i), commonly referred to as the CIT's "residual" grant of jurisdiction, "may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1191 (Fed. Cir. 2018) (citing *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1371 (Fed. Cir. 2002)). The party asserting § 1581(i) jurisdiction has the burden to show that such alternative remedy would be manifestly inadequate. *Id*.

Claimants seeking judicial review by the CIT may not "ignore the precepts of subsection 1581 and attempt[] to circumvent" Congress' clear statutory procedures and safeguards. *Nat'l Corn Growers*, 840 F.2d at 1556. Similarly, claimants are prohibited from using creative pleading to expand the CIT's statutory jurisdiction. *Norsk Hydro Can.*, 472 F.3d at 1355. Thus, when asserting § 1581 jurisdiction, "mere recitation of a basis for jurisdiction, by either a party or a court, cannot be controlling." *Id*. Instead, we must look at the facts asserted in the pleadings and determine the true nature of the action. *See Hutchinson*, 827 F.3d at 1360. This factual inquiry requires our court to identify the particular agency action underlying the claimed harm, so that we may determine which subsection of § 1581 provides the CIT with proper jurisdiction. *Id*.

A

Rimco asserts that the CIT has exclusive jurisdiction under § 1581(a), and argues the CIT erred in finding "that there was no 'decision' by [Customs] against which a protest would lie." Appellant's Br. at 29. In support of its position, Rimco alleges that Customs' "liquidation decision is protestable, even if it [is] . . . carried out ministerially." Appellant's Br. at 29. We disagree.

Contrary to Rimco's assertion, when Customs' role is purely ministerial, liquidation of entries subject to AD and CVD orders is "not a 'decision' under § 1514(a)." *Thyssenkrupp Steel N. Am., Inc. v. United States*, 886 F.3d 1215, 1224 (Fed. Cir. 2018) (internal citation omitted). A protestable decision under § 1514(a) requires Customs to have "engage[d] in some sort of decision-making process." *Indus. Chems., Inc. v. United States*, 941 F.3d 1368, 1371 (Fed. Cir. 2019) (quoting *U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360 (1998)). Conversely, this court has consistently held that "'merely ministerial' actions are not protestable under [§] 1514." *Id*. (quoting *Mitsubishi*, 44 F.3d at 977). This is because unlike typical § 1514(a) decisions that involve substantive determinations, Customs lacks discretion when "merely follow[ing] Commerce's [liquidation] instructions." *Mitsubishi*, 44 F.3d at 977; *see also ARP Materials, Inc. v. United States*, 520 F. Supp. 3d 1341, 1358 (Ct. Int'l Trade 2021), *aff'd*, 47 F.4th 1370 (Fed. Cir. 2022) ("Customs' role in collecting those duties was ministerial rather than a decision under section 1514(a)." (internal quotations omitted)). Because Customs cannot "modify . . . [Commerce's] determinations, their underlying facts, or their enforcement," its liquidation of entries subject to AD and CVD orders cannot be protested. *Mitsubishi*, 44 F.3d at 977 (cleaned up).

While this court has recognized a limited range of circumstances in which Customs' underlying liquidation pursuant to AD or CVD orders may be subject to protest, we find no such circumstance here. *See, e.g., Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231, 1239 (Fed. Cir. 2007) (holding that deemed liquidation under 19 U.S.C. § 1504(d) is subject to protest when Customs fails to execute liquidation instructions); *Cemex, S.A. v. United States*, 384 F.3d 1314, 1324 (Fed. Cir. 2004) (concluding that Customs made a particular "decision" when it erroneously recognized a deemed liquidation at an "as entered" rate instead of applying the final rate). Rimco has not alleged that Customs made any substantive determinations or undertook any discretionary actions that would constitute § 1514(a) decisions. Instead, Rimco asserts that Customs was "required by law to go through the

liquidation process" and simply acted on Commerce's liquidation instructions that it was "bound by statute to carry out." Appellant's Br. at 29.

Accordingly, because Customs' role in liquidating entries subject to the AD and CVD orders was merely ministerial and required no substantive determinations, the CIT properly determined that there was no protestable decision under § 1514(a). Therefore, the CIT lacks § 1581(a) jurisdiction over Rimco's action.

B

Rimco alternatively argues that the CIT erred in finding that it lacked residual jurisdiction under § 1581(i). Whether a party may properly invoke § 1581(i) is a two-step inquiry. *See Erwin Hymer Grp. N. Am., Inc. v. United States*, 930 F.3d 1370, 1375 (Fed. Cir. 2019). First, we determine whether jurisdiction under a different subsection of § 1581 could have been available, and second, if such jurisdiction was available, we ask whether the provided remedy would have been manifestly inadequate. *Id.*

Because the availability of jurisdiction under other subsections of § 1581 depends on the particular type of agency action challenged, we must first determine the true nature of an action. *See Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1293 (Fed. Cir. 2008) (affirming the trial court's decision to look to the true nature of the action in determining jurisdiction). The CIT concluded that the true nature of Rimco's action was to challenge Commerce's AD and CVD rate determinations. We agree.

Although Rimco contends that this suit "is not a challenge to . . . any Commerce determination," Appellant's Br. at 30, this conclusory statement directly contradicts Rimco's own argument. Rimco's opening brief explicitly states that "[its] claims that the CVD and AD[] rates assessed against it are unconstitutional 'excessive fines' *results from Commerce's decision* to base the rates on [adverse facts available]." Appellant's Br. at 10–11 (emphasis added). Rimco also posits that some of Commerce's final determinations were not based on "lawful calculated rate[s]." *Id.* at 14. Further, most of Rimco's factual allegations relate to Commerce's AD and CVD investigations and subsequent final rate determinations. Thus, in view of the totality of Rimco's allegations, the true nature of its action is to challenge Commerce's AD and CVD rate determinations.

Interested parties are directed to raise challenges to Commerce's AD and CVD determinations via administrative review proceedings governed by § 1516a of title 19. Subsequent judicial review of such proceedings is available under the CIT's § 1581(c) exclusive jurisdic-

tion. Rimco alleges that it would have lacked standing to pursue § 1581(c) jurisdiction because it was not a party to Commerce's earlier AD and CVD investigations. Appellant's Br. at 14–15. But this argument provides no explanation as to why, in light of Commerce's notice of opportunity, Rimco failed to seek administrative review of the orders. Because Rimco, as an interested party, had the opportunity to seek administrative review of Commerce's AD and CVD determinations, jurisdiction under § 1581(c) would have been available but for Rimco's own failure to pursue the proper administrative remedy.

C

Because jurisdiction was available under § 1581(c), the CIT's residual jurisdiction under § 1581(i) is unavailable unless Rimco can show that the remedy afforded by subsection (c) would be manifestly inadequate. A remedy is not inadequate simply because a party believes such remedy is unavailable. *Hartford Fire Ins. Co*. 544 F.3d at 1294. Rather, a manifestly inadequate remedy requires "an exercise in futility, or 'incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain.'" *Id*. (quoting Oxford English Dictionary (2d ed. 1989).

Rimco contends that the CIT's proposed administrative pathway is not a workable option for importers to raise constitutional claims. Appellant's Br. at 10. In an attempt to frame the § 1581(c) remedy as inadequate, Rimco alleges that Commerce "lacks institutional competence to judge the constitutionality of its own determinations" and therefore argues that it was not required to exhaust its administrative remedies. Appellant's Br. at 16. We disagree with this argument for two reasons.

First, Commerce is required to review the statutory appropriateness of its AD and CVD rates, including those based on adverse facts available. During the administrative review process, Commerce would have considered facts to determine whether its rates were proportional to the harm they were intended to address and "necessary to serve the purpose of deterrence." *See BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1300 (Fed. Cir. 2019) (noting that because rates based on adverse facts available (AFA) work to incentivize cooperation, "an unusually high rate is permissible when it is 'necessary to serve the purpose of deterrence"). Furthermore, because the test for excessiveness turns on a proportionality determination, *see United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality"), Commerce could typically dispose of the constitutional issue by reviewing the rates for statutory

compliance (i.e., finding the rates not excessive). *See KYD, Inc. v. United States*, 607 F.3d 760, 768 (Fed. Cir. 2010) ("[A]n AFA [anti-]dumping margin determined in accordance with the statutory requirements is not a punitive measure, and the limitations applicable to punitive damages assessments therefore have no pertinence to duties imposed based on lawfully derived margins such as the margin at issue in this case."). Rimco itself concedes "that a correctly calculated CVD or AD[] rate would not be susceptible to constitutional challenges under the Eighth Amendment." Appellant's Br. at 14 n.10. And when "an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued." *Pub. Utils. Comm'n of State of Cal. v. United States*, 355 U.S. 534, 539–40 (1958). Therefore, because Commerce could have removed the constitutional issue by addressing the statutory appropriateness of its rate determinations, administrative review was the proper remedy.

Second, this court has rejected the argument that it would necessarily be futile to seek administrative remedies when an agency is unable to make constitutional findings. *See Bowling v. McDonough*, 38 F.4th 1051, 1057–59 (Fed. Cir. 2022) (holding that it would not have been futile to raise constitutional challenges before an agency, even if the agency could not address the constitutional issue). As we explained in *Bowling*, this is because the agency will nevertheless serve its immensely useful record-development and fact-finding functions. *See Bowling*, 38 F.4th at 1059; *see also Parisi v. Davidson*, 405 U.S. 34, 37 (1972) ("The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies."). So even if there were a scenario, however unlikely, where a calculated rate might comply with statutory reasonableness but nonetheless violate the excessive fines component of the Eighth Amendment, administrative exhaustion would still be required. Because administrative review could have established an invaluable record as to the factual basis for Commerce's AD and CVD determinations, irrespective of the constitutionality issue, it would not have been futile for Rimco to seek such remedy.

Rimco could have sought § 1516a administrative review to sufficiently challenge Commerce's AD and CVD determinations. Had Rimco been dissatisfied with Commerce's administrative review determination, it could have rightfully sought judicial review on the

record under the CIT's exclusive jurisdiction. This is the exact statutory process outlined by Congress in § 1581(c). As discussed above, it is neither unworkable, nor futile.

Because Rimco has failed show that the available remedy provided by § 1581(c) would have been manifestly inadequate, § 1581(i) jurisdiction is improper. As noted by the CIT, "Rimco failed to pursue the administrative avenue available to it and thereby missed its opportunity to challenge the rates set by Commerce. It cannot avoid the consequences of that failure through the exercise of the court's section 1581(i) jurisdiction." J.A. 19.

IV

Because Customs' ministerial assessment of antidumping and countervailing duties is not a protestable decision, and because jurisdiction under 28 U.S.C. § 1581(c) would have been available and not manifestly inadequate if Rimco had not failed to exhaust administrative remedies, we affirm the Court of International Trade's dismissal for lack of subject matter jurisdiction.

**AFFIRMED**

# U.S. Court of International Trade

Slip Op. 24–40

FAR EAST AMERICAN, INC. AND LIBERTY WOODS INTERNATIONAL, INC., Plaintiffs, and AMERICAN PACIFIC PLYWOOD, INC. AND INTERGLOBAL FOREST LLC, Consolidated Plaintiffs, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Chief Judge
Consol. Court No. 22–00213

[Sustaining U.S. Customs and Border Protection's Remand Redetermination.]

Dated: April 8, 2024

*Gregory S. Menegaz*, *J. Kevin Horgan*, *Alexandra H. Salzman*, and *Vivien J. Wang*, deKieffer & Horgan, PLLC, of Washington, DC, for Plaintiffs Far East American, Inc. and Liberty Woods International, Inc.

*Frederic D. Van Arnam, Jr.*, Barnes, Richardson & Colburn, LLP, of New York, NY, for Consolidated Plaintiff American Pacific Plywood, Inc.

*Thomas H. Cadden*, Cadden & Fuller LLP, of Irvine, CA, for Consolidated Plaintiff InterGlobal Forest LLC.

*Elizabeth A. Speck*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief were *Evan Wisser*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, and *Jennifer L. Petelle*, Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection, of Washington, DC.

## *OPINION*

**Barnett, Chief Judge:**

This matter is before the court following U.S. Customs and Border Protection's ("CBP") filing of its redetermination on court-ordered remand. Remand Redetermination, ECF No. 71.[1] On remand, CBP reversed its affirmative determination of evasion pursuant to the Enforce and Protect Act ("EAPA"), 19 U.S.C. § 1517 (2018), after finding that Plaintiffs[2] and Consolidated Plaintiffs[3] (collectively referred to as "Plaintiffs") did not import "covered merchandise" pur-

[1] CBP issued the Remand Redetermination pursuant to *Far East American, Inc. v. United States*, 47 CIT __, 673 F. Supp. 3d 1333 (2023) ("*Far East EAPA*"), in which the court granted Defendant's ("the Government") motion for a voluntary remand. *Far East EAPA* contains additional background information on this case, familiarity with which is presumed.

[2] Plaintiffs consist of importers Far East American, Inc. and Liberty Woods International, Inc.

[3] Consolidated Plaintiffs consist of importers American Pacific Plywood, Inc. and Interglobal Forest LLC.

suant to 19 U.S.C. § 1517(a)(3). *Id.* at 2. Absent the importation of covered merchandise into the United States, CBP had no choice but to issue a negative determination. *See id.* at 2, 6. The court has jurisdiction pursuant to section 517(g) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1517(g), and 28 U.S.C. § 1581(c) (2018). There being no substantive objection to CBP's Remand Redetermination, and for the reasons discussed herein, the court will sustain CBP's Remand Redetermination and enter judgment in this case.

## BACKGROUND

Plaintiffs commenced this case in response to CBP's final affirmative determination of evasion. *See, e.g.*, Compl. ¶ 1, ECF No. 6. Two events that occurred during CBP's investigation are relevant to this opinion.

First, on the eve of CBP's statutory deadline for concluding its investigation, CBP submitted a covered merchandise referral to the U.S. Department of Commerce ("Commerce") pursuant to its authority under 19 U.S.C. § 1517(b)(4)(A). *See* Remand Redetermination at 3. CBP ultimately relied on Commerce's affirmative covered merchandise finding to issue an affirmative final evasion determination. *Id.*

Second, despite the imposition of interim measures requiring the statutory suspension of liquidation through the pendency of the investigation, *see* 19 U.S.C. § 1517(e)(1), CBP liquidated the entries subject to the investigation inclusive of antidumping and countervailing duties, Jt. Status Report at 2–3, ECF No. 72. Plaintiffs protested CBP's liquidations, "and CBP suspended the protests pending a final judgment in this matter." Remand Redetermination at 7 n.37. Various parties, including Plaintiffs here, also commenced actions pursuant to the court's 28 U.S.C. § 1581(i) jurisdiction contesting the actions of Commerce and CBP that led to the liquidations; those cases are currently stayed. *See generally Liberty Woods Int'l v. United States*, Ct. No. 20-cv-00143 (CIT filed Aug. 5, 2020); *Viet. Finewood Co. Ltd. v. United States*, Ct. No. 20-cv-00155 (CIT filed Aug. 14, 2020) (referred to herein as "the Stayed Cases").

Several Plaintiffs challenged Commerce's covered merchandise finding. Following a court-ordered remand to reconsider that finding, Commerce reversed its determination and concluded that the merchandise subject to this EAPA determination is not covered by the scope of the relevant antidumping and countervailing duty orders. *See Far East American, Inc. v. United States*, 47 CIT __, __, 654 F.

Supp. 3d 1308, 1310 (2023) ("*Far East Scope*").[4] The court sustained Commerce's negative determination. *See id* at 1311. "No party appealed that decision, and it is now final." *Far East EAPA*, 673 F. Supp. 3d at 1337.

The finality of the *Far East Scope* litigation prompted the Government's motion for a voluntary remand for CBP to reconsider its affirmative evasion determination. *Far East EAPA*, 673 F. Supp. 3d at 1335.[5] The court granted the Government's motion. *See id.* at 1340. CBP has now issued a negative evasion determination. Remand Redetermination at 6–7. CBP did not address the status of the protests based on its view that "[t]he disposition of such protests is outside the scope of [the Remand Redetermination]." *Id.* at 7 n.37.

Parties filed a joint status report addressing any need for further briefing in this action. Therein, Plaintiffs stated that no further briefing on CBP's evasion determination is required. Jt. Status Report. at 2. Plaintiffs, however, requested a 30-day "pause" on the entry of judgment to allow time for the parties to discuss resolution of the Stayed Cases concomitant with the disposition of this case. *Id.* at 3. Plaintiffs averred that CBP should now grant their protests and refund the duties CBP assessed but that they "cannot speak for or prejudge CBP's position." *Id.* The Government stated that in the absence of any comments in opposition, the court should enter judgment. *Id.*

Thereafter, Plaintiffs requested a status conference to discuss the question of remedy. Letter to Ct. (Mar. 12, 2024), ECF No. 73. On April 3, 2024, the court held a recorded status conference with the Parties. Docket Entry, ECF No. 74.

## DISCUSSION

CBP's Remand Redetermination is uncontested and complies with the court's order for CBP to reconsider its evasion determination in light of the finality of the *Far East Scope* litigation. Entry of judgment is therefore appropriate because there are no further issues for the court to adjudicate, including with respect to remedy. In a recent opinion, the court concluded that relief from the allegedly erroneous liquidation of entries subject to an EAPA investigation inclusive of duties must be pursued through timely protests of the liquidations

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[4] Those orders are: *Certain Hardwood Plywood Prods. From the People's Republic of China*, 83 Fed. Reg. 504 (Dep't Commerce Jan. 4, 2018) (am. final determination of sales at less than fair value, and antidumping duty order); *Certain Hardwood Plywood Prods. From the People's Republic of China*, 83 Fed. Reg. 513 (Dep't Commerce Jan. 4, 2018) (countervailing duty order).

[5] The Government also requested a voluntary remand for CBP to address its treatment of confidential information during the investigation. *See Far East EAPA*, 673 F. Supp. 3d at 1339–40. CBP did not need to reach this issue on remand. Remand Redetermination at 7.

before CBP. *Royal Brush Mfg., Inc. v. United States*, 47 CIT __, __, 675 F. Supp. 3d 1282, 1290–94 (2023). While in that case the plaintiff had failed to protest CBP's liquidation of, and assessment of duties on, entries subject to an EAPA investigation, *see id.* at 1290, the court's reasoning applies equally when, as here, Plaintiffs have lodged such protests, the resolution of which by CBP awaits judgment in this case, *see* Remand Redetermination at 7 n.37.[6] Sustaining CBP's negative evasion determination and entering judgment accordingly constitutes appropriate relief in this case. *Cf. Royal Brush*, 675 F. Supp. 3d at 1294.

## CONCLUSION

Accordingly, there being no substantive challenge to CBP's Remand Redetermination, and that decision being otherwise in compliance with the court's remand order, the court will sustain CBP's Remand Redetermination. Judgment will be entered accordingly.

Dated: April 8, 2024
New York, New York

*/s/ Mark A. Barnett*
MARK A. BARNETT, CHIEF JUDGE

[6] While not directly addressing a negative evasion determination issued on remand, CBP's EAPA regulations indicate that CBP will act consistent with that negative determination. *See* 19 C.F.R. § 165.27(c) (2023) ("If CBP makes a determination under paragraph (a) of this section that covered merchandise was not entered into the customs territory of the United States through evasion, then CBP will cease applying any interim measures taken under [section] 165.24 and liquidate the entries in the normal course."); *id.* § 165.46(b) ("If the final administrative determination reverses the initial determination, then CBP will take appropriate actions consistent with the final administrative determination."). For entries that have already liquidated when CBP issues an affirmative determination, "CBP will initiate or continue any appropriate actions separate from this proceeding." *Id.* § 165.28. Likewise, the court expects that when CBP issues a negative determination, as it did here, and the entries have already liquidated, CBP will take appropriate action in any proceeding before it, which would include ruling on any suspended protests.

## Slip Op. 24–42

BLUE SKY THE COLOR OF IMAGINATION, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Court No. 21–00624

[In a Customs classification matter, judgment issued declaring classification other than as claimed by the parties.]

Dated: April 10, 2024

*Christopher J. Duncan* and *Elon A. Pollack*, Stein Shostak Shostak Pollack & O'Hara, LLP, of Los Angeles, CA, argued for the plaintiff, Blue Sky the Color of Imagination, LLC.

*Monica P. Triana*, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY argued for the defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney-In-Charge, and *Aimee Lee*, Assistant Director. Of counsel on the brief was *Fariha B. Kabir*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection of New York, NY.

## *OPINION*

**Restani, Judge:**

Before the court are cross-motions for summary judgment. Pl.'s Mot. for Summ. J., ECF No. 20 (Aug. 23, 2023) ("Blue Sky MSJ"); Def.'s Mem. in Supp. of Cross-Mot. for Summ. J. and Opp'n to Pl.'s Mot. for Summ. J., ECF No. 25 (Nov. 17, 2023) ("Gov. MSJ"). Plaintiff Blue Sky the Color of Imagination, LLC ("Blue Sky") challenges the United States Customs and Border Protection's ("Customs") classification of certain paper products under subheading 4820.10.40.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"). At issue, as framed by the parties, is whether certain notebooks containing calendars are classified instead as calendars of any kind or "[o]ther" paper products for tariff purposes. *See* Blue Sky MSJ at 3. The United States ("Government") asks that the court sustain Customs' classification. Gov. MSJ at 15. For the reasons laid out below, the court concludes that neither classification is correct, and the paper products are diaries classified in subheading 4820.10.20.10, HTSUS.

### I. *Background*

#### A. *Procedural Background*

There are no material factual disputes in this case. Gov. MSJ at 15; Blue Sky MSJ at 22. On December 2, 2021, Blue Sky imported ten

models of desk calendars and planners and, upon import, classified all ten models of desk calendars and planners as "[c]alendars of any kind" under heading 4910, HTSUS. Blue Sky MSJ at 6. At liquidation, Customs reclassified all ten models of desk calendars and planners as "[o]ther" under subheading 4820.10.40.00, HTSUS. Blue Sky MSJ at Ex. 4. Blue Sky timely protested Customs' reclassification. *Id.* Customs denied Blue Sky's protest, and Blue Sky brought this case before the court. Blue Sky MSJ at 7, Ex. 4. Since this case was initiated, Customs has settled with Blue Sky as to several models of the subject merchandise; the sole remaining issue before this court is the classification of four models of Blue Sky weekly/monthly planners. Blue Sky MSJ at 4.

B. *Description of Subject Merchandise*

The subject merchandise consists of four paper products that have variously been called "planners" and "planning calendars" by the parties. Gov. MSJ at 3; Blue Sky MSJ at 3. The subject merchandise consists of four different "weekly/monthly" models. Gov. MSJ at 3; Blue Sky MSJ at 3. Although the sizes vary among the models, all four models include full page month calendars followed by weekly sections that include space to write notes. Gov. MSJ at Ex. A; Blue Sky Reply to Gov. Mot. for Summ. J. at 8–9, ECF No. 26 (Dec. 22, 2023). The subject merchandise has the term "planner" on the front. Gov. MSJ at Ex. F; Blue Sky MSJ at Ex. 8.2. The subject merchandise is "used to note future appointments." Blue Sky MSJ at 13; *see* Gov. MSJ at 27. They are spiral bound as notebooks are and contain a few additional pages for addresses and phone numbers. Gov. MSJ at Ex. A; Blue Sky MSJ at Ex. 13.

## II. *Jurisdiction and Standard of Review*

The court has jurisdiction under 28 U.S.C. § 1581(a). The court will grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). Summary judgment is appropriate in tariff classification cases where "there is no genuine dispute as to the nature of the merchandise and the classification turns on the proper meaning and scope of the relevant tariff provisions." *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1371 (Fed. Cir. 2013) (citation omitted). The court decides classification *de novo*. *See* 28 U.S.C. § 2640(a)(1) (2018); *Telebrands Corp. v. United States*, 36 CIT 1231, 1234, 865 F. Supp. 2d 1277, 1279–80 (2012).

## III. *Discussion*

### A. *Legal Framework*

The meaning of a tariff term is a question of law, and whether subject merchandise falls under any given tariff term is a question of fact. *See Wilton Indus. v. United States*, 741 F.3d 1263, 1265–66 (Fed. Cir. 2013) (citations omitted). The plaintiff has the burden of establishing that the government's classification of the subject merchandise was incorrect but does not bear the burden of establishing the correct classification; instead, it is the court's independent duty to arrive at "the correct result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). In making this determination, the court "must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Id.*

In order to determine the meaning of and apply a tariff term to the facts at hand, the court relies on the General Rules of Interpretation ("GRIs") and, if applicable, the Additional U.S. Rules of Interpretation. *Wilton*, 741 F.3d at 1266. The court applies the GRIs in numerical order, and only proceeds to each subsequent GRI if a previous GRI alone cannot classify the goods. *Id.* The first GRI, GRI 1, requires classification to "be determined according to the terms of the headings and any relative section or chapter notes . . . ." GRI 1, HTSUS. HTSUS chapter and section notes are considered binding statutory law. *See BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011).

Tariff terms are generally adopted from the Harmonized System ("HS"), an international product nomenclature that the U.S. implements as the HTSUS. *See Marubeni Am. Corp. v. United States*, 35 F.3d 530, 532–33 (Fed. Cir. 1994) (describing the adoption of the HTSUS system). The HS is the product of a treaty, the International Convention on the Harmonized Commodity Description and Coding System ("the Convention"), which the U.S. acceded to in 1989.[1] When adopting the HS, the United States agreed to adopt the same tariff language as the other negotiating parties up to the six-digit coding level. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 n.1 (Fed. Cir. 1999). The Convention is not a self-executing treaty; this agree-

[1] *See* U.S. Dep't of State, Treaties in Force, A List of Treaties and Other International Agreements of the United States in Force on January 1, 2020, https://www.state.gov/wp-content/uploads/2020/08/TIF-2020-Full-website-view.pdf (last visited Mar. 21, 2024); International Convention on the Harmonized Commodity Description and Coding System, signed June 14, 1983, amended June 24, 1986, https://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/instruments-and-tools/hs-convention/hs-convention_en.pdf?la=en (last visited Apr. 4, 2024).

ment is implemented into U.S. law by Congressional statute.[2] *See* 19 U.S.C. § 3004 (1988) (implementing the HS into U.S. law).

The United States adopted the HS and implemented it as the HTSUS to achieve "harmonization" of the tariff schedule; the intent was "to implement in United States law the nomenclature established internationally by the Convention." 19 U.S.C. § 3001 (1988); *see also Value Vinyls, Inc. v. United States*, 568 F.3d 1374, 1378–1379 (Fed. Cir. 2009) (quoting H. R. Rep. No. 100–576, at 548 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1581); *Marubeni Am. Corp.*, 35 F.3d at 532. The HTSUS "provides a common core language for trade." *Marubeni Am. Corp.*, 35 F.3d at 533. In implementing the HS into U.S. law, Congress expressly stated that its purpose was "to implement in United States law the nomenclature established internationally by the Convention." 19 U.S.C. § 3001. Thus, wherever no evidence exists to suggest a Congressional intent to alter the meaning of the HS terms when issuing the HTSUS, courts will presume that Congress intended to implement the unchanged international nomenclature utilized by the HS into U.S. law.[3]

When "a tariff term is not defined in either the HTSUS or its legislative history, the term's correct meaning is its common or dictionary meaning in the absence of evidence to the contrary." *Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1048 (Fed. Cir. 2001) (citations omitted). In construing tariff terms, the court may "consult lexicographic and scientific authorities, dictionaries, and other reliable information" or may rely on its "own understanding of the terms used." *Baxter Healthcare Corp. v. United States*, 182 F.3d 1333, 1337–38 (Fed. Cir. 1999) (citation omitted). Courts will also look to the Explanatory Notes ("ENs") to the Harmonized Commodity Description and Coding System for guidance in interpreting the HT-

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[2] Self-executing treaties become part of the law of the land through U.S. ratification; non self-executing treaties are implemented by the legislature. *See Foster v. Neilson*, 27 U.S. 253, 254, 314 (1829), *overruled on other grounds by United States v. Percheman*, 32 U.S. 51 (1833) ("Our constitution declares a treaty to be the law of the land. . . . But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.").

[3] Congress can and has varied from the language of the HS when it deems it necessary to do so; in the absence of evidence of an intent to vary from the HS language, it is reasonable to infer that the stated Congressional intent to implement the "nomenclature of the Convention" governs the meaning of the HTSUS. For an example of language that could have been varied from but clearly was not, see heading 8204, HTSUS ("Hand-operated spanners and wrenches") implementing HS 82.04 ("Hand-operated spanners and wrenches"). HTSUS 8204 (2024); HS 82.04 (2022). In contrast, see HS 87.05 where "breakdown lorries, crane lorries, fire fighting vehicles, concrete mixer lorries, road sweeper lorries, spraying lorries" became "wreckers, mobile cranes, fire fighting vehicles, concrete mixers, road sweepers, spraying vehicles," in heading 8705, HTSUS. *See* HS 87.05 (2022); HTSUS 8705 (2024).

SUS terms. *Carl Zeiss, Inc.*, 195 F.3d at 1378 n.1. The ENs are not dispositive evidence of the meaning of the tariff terms,[4] but the ENs are "generally indicative of [the] proper interpretation of the various provisions" and so are persuasive evidence of the international meaning of the tariff terms.[5] *Carl Zeiss, Inc*., 195 F.3d at 1378 n.1; see also BenQ Am. Corp., 646 F.3d at 1376; H.R. Rep. No. 100576, 549, reprinted in 1988 U.S.C.C.A.N. 1547, 1582.

English is spoken in both the United Kingdom and in the United States of America, but there are some linguistic distinctions among the dialects spoken by the two countries. *See, e.g., Victoria's Secret Direct, LLC v. United States*, 37 CIT 573, 585–86, 908 F. Supp. 2d 1332, 1345 (2013); *Jing Mei Auto. (USA) v. United States*, Slip Op. 23–180, 2023 WL 9792953, at *12 (CIT Dec. 18, 2023). Because the court aims to understand what a tariff term would mean within context of its origin as part of the "international nomenclature" for trade, the court presumes that HS terms that are implemented into the HTSUS without any alteration may encompass both the British and American definitions of the term. *See, e.g., Victoria's Secret*, 37 CIT at 585–86, 908 F. Supp. 2d at 1345; *Jing Mei Auto*., 2023 WL 9792953, at *12. When Congress wishes to exclude a British definition or otherwise alter the HTSUS, it can change the HS language or otherwise adopt an Additional U.S. Rule of Interpretation ("ARI"). *Lerner New York, Inc. v. United States*, 37 CIT 604, 617, 908 F. Supp. 2d 1313, 1326 (2013) (noting availability of Additional U.S. Rules of

[4] When it implemented the HS into U.S. law, Congress was mindful that the ENs, unlike the HS, were not part of the terms of the Convention's agreement and thus the ENs were not binding on the United States in the same way that the agreement to adopt the HS nomenclature was. *See* H. R. Rep. No. 100–576, at 549 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582 ("Although generally indicative of proper interpretation of the various provisions of the Convention, the Explanatory Notes, like other similar publications of the Council, are not legally binding on contracting parties to the Convention. Thus, while they should be consulted for guidance, the Explanatory Notes should not be treated as dispositive."). Nonetheless, Congress was also mindful that the ENs represent useful elaboration on the international meaning of the tariff terms, which the United States had agreed to adopt and which Congress has explicitly stated that it was its intent to implement into U.S. law. *See id.*; *see also* 19 U.S.C. § 3001. Thus, absent evidence of a specific Congressional intent to adopt a meaning contrary to the ENs, the ENs are persuasive evidence of what the tariff terms may mean on an international level, and are persuasive evidence of the meaning of the language adopted by Congress.

[5] Congress may diverge from the international meaning; regardless of U.S. treaty obligations, Congress always retains the right to adopt whatever laws it thinks are "necessary and proper." U.S. Const. art. I, § 8, cl. 18; *see also Medellin v. Texas*, 552 U.S. 491, 509 n.5 (2008) ("Whether or not the United States 'undertakes' to comply with a treaty says nothing about what laws it may enact. The United States is *always* 'at liberty to make . . . such laws as [it] think[s] proper.'"). In this case, evidence before the court indicates that, with this particular treaty, the overall Congressional intent was to adhere to the meaning of the international nomenclature in U.S. law. This may not be the case in all instances of U.S. implementation of self-executing treaties, and when interpreting a statute that implements a treaty the court must always examine Congressional guidance prior to looking to the international document for the meaning of a U.S. statute.

Interpretation and assessing an instance in which Congress had replaced the British "vest" with the American "tank top"). In the absence of a specific, American change, the court aims to identify what the tariff term would mean if used as part of the "common core language for trade" and where appropriate consider the British definition of the term.[6]

In addition to its English version, the Convention was also drafted in French; the French and English texts are considered equally authoritative treaty texts.[7] In both treaty versions, parties agree to adopt the international nomenclature of the Convention; where the English text indicates that the parties undertake to adopt the language of the HS, the French text indicates that the parties will adopt the language of the "Système harmonisé" or "SH."[8] Accordingly, the

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[6] The HS was developed through the Customs Co-Operation Council ("the Council"). *See Marubeni Am. Corp.*, 35 F.3d at 533. The Council was established by treaty in 1952. *See* Convention Establishing a Customs Co-Operation Council, signed Dec. 15, 1950, https://www.wcoomd.org/-/media/wco/public/global/pdf/about-us/legal-instruments/conventions-and-agreements/ccc/convccc.pdf?la=en (last visited Mar. 29, 2024) (entered into force Nov. 4, 1952). The United Kingdom was a contracting party at the time of the Council's origin; the United States did not ratify or accede to the Council until 1970. *See* World Customs Org., Position as Regards Ratifications and Accessions, https://www.wcoomd.org/-/media/wco/public/global/pdf/about-us/legal-instruments/conventions-and-agreements/conventions/sg0228ea.pdf?la=en (last updated June 30, 2023). The original Convention on Nomenclature signed in 1950 was issued in English and French, with both texts equally authoritative, and the English version contains British spellings. *See* Convention on Nomenclature for the Classification of Goods in Customs Tariffs, signed Dec. 15, 1950, https://www.wcoomd.org/-/media/wco/public/global/pdf/about-us/legal-instruments/conventions-and-agreements/conventions/nom_conv_bil.pdf?la=en (last visited Mar. 29, 2024); Appendix to the Convention on Nomenclature for the Classification of Goods in Customs Tariffs § VI, signed Dec. 15, 1950, https://www.wcoomd.org/-/media/wco/public/global/pdf/about-us/legal-instruments/conventions-and-agreements/conventions/nom_conv_bil.pdf?la=en (last visited Mar. 29, 2024) ("colour"). British spelling persists in the 2022 HS Nomenclature. *See generally* HS Nomenclature 2022 edition, Chapter 32, https://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs-nomenclature-2022-edition/hs-nomenclature-2022-edition.aspx (last visited Mar. 29, 2024) ("colouring"). The court therefore presumes that these terms are authored in British English at the international level and, if unchanged from that original language, the British English terms are adopted by Congress.

[7] *See* the Convention, Art. 20, ("Done at Brussels on the 14th day of June 1983 in the English and French languages, both texts being equally authentic . . . ."); *see also* Convention Internationale sur le Système Harmonisé de Désignation et de Codification des Marchandises, Art. 20, signed June 14, 1983; amended June 24, 1986, ("the Convention (French Edition)"), https://www.wcoomd.org/-/media/wco/public/fr/pdf/topics/nomenclature/instruments-and-tools/hs-convention/hs-convention_fr.pdf?la=fr (last visited Mar. 27, 2024) ("Fait à Bruxelles, le 14 juin 1983 en langues française et anglaise, les deux textes faisant également foi . . . .").

[8] *See* the Convention (French Edition), Art. 3 ("[S]es nomenclatures tarifaire et statistiques soient conformes au *Système harmonisé* . . . .") (emphasis added); *see also* the Convention, Art. 3 ("Each Contracting Party undertakes . . . [that] its Customs tariff and statistical nomenclatures shall be in conformity with the Harmonized System. . . . [I]t shall use all the headings and subheadings of the Harmonized System without addition or modification . . . .").

HS is also issued in French,[9] and the French SH, like the English HS, implements the nomenclature of the Convention that the parties have agreed to adopt.[10] Where treaty provisions are drafted in two different languages, if the two drafts can be read to agree, "that construction which establishes this conformity ought to prevail." *United States v. Percheman*, 32 U.S. 51, 52 (1833).

B. *Competing Tariff Provisions*

Customs classified the paper items at issue here under subheading 4820.10.40.00, HTSUS, which reads:

| | |
|---|---|
| Heading 4820 | Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles, exercise books, blotting pads, binders (loose-leaf or other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationery, of paper or paperboard; albums for samples or for collections and book covers (including cover boards and book jackets) of paper or paperboard: |
| 4820.10 | Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles:[11] |
| 4820.10.20 | Diaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles |
| 4820.10.20.10 | Diaries and address books |
| 4820.10.40.00 | Other |

Blue Sky argues that the paper merchandise is better classified under subheading 4910.00.20.00, HTSUS, which reads:

| | |
|---|---|
| Heading 4910 | Calendars of any kind, printed, including calendar blocks:[12] |
| | Printed on paper or paperboard in whole or in part by a lithographic process: |

[9] *See, e.g.*, Organisation Mondiale des Douanes, Nomenclature du SH Édition 2022, https://www.wcoomd.org/fr/topics/nomenclature/instrument-and-tools/hs-nomenclature-2022-edition.aspx (last visited Mar. 22, 2024).

[10] *See* the Convention (French Edition), Art. 3 ("[S]es nomenclatures tarifaire et statistiques soient conformes au *Système harmonisé* . . . .") (emphasis added); *see also* the Convention, Art. 3 ("Each Contracting Party undertakes . . . [that] its Customs tariff and statistical nomenclatures shall be in conformity with the *Harmonized System* . . . .") (emphasis added).

[11] In French, this section reads "Registres, livres comptables, carnets (de notes, de commandes, de quittances), blocs-mémorandums, blocs de papier à lettres, agendas et ouvrages similaires." *See* Organisation Mondiale des Douanes, Nomenclature du SH Édition 2017, 48.20, https://www.wcoomd.org/-/media/wco/public/fr/pdf/topics/nomenclature/instruments-and-tools/hs-nomenclature-2017/2017/1048_2017f.pdf?la=fr (last visited Apr. 4, 2024).

[12] In French, this section reads "Calendriers de tous genres, imprimés, y compris les blocs de calendriers à effeuiller." *See* Organisation Mondiale des Douanes, Nomenclature du SH Édition 2017, 49.10, https://www.wcoomd.org/-/media/wco/public/fr/pdf/topics/nomenclature/instruments-and-tools/hs-nomenclature-2017/2017/1049_2017f.pdf?la=fr (last visited Apr. 4, 2024).

| | |
|---|---|
| 4910.00.20.00 | Not over 0.51 mm in thickness |
| 4910.00.40.00 | Over 0.51 mm in thickness |
| 4910.00.60.00 | Other |

Both of these provisions classify items which are normally imported duty free, but Customs' classification falls under 9903.88.03, HTSUS which provides a duty rate of 25 percent *ad valorem* pursuant to Section 301 of the Trade Act of 1974 (codified as amended at 19 U.S.C. § 2411). Gov. MSJ at 2. If the subject merchandise is classified under subheading 4910.00.20.00, HTSUS, however, it is not subject to the additional Section 301 duty. *Id.*

C. *Argument*

Blue Sky argues that the merchandise in this case was incorrectly classified as "[o]ther" paper products when it should in fact be classified as calendars. Blue Sky MSJ at 3. Blue Sky argues that this classification is appropriate because the calendar provision is an *eo nomine* provision that the product by definition meets. Blue Sky MSJ at 16–18. Blue Sky further argues that because there is no ambiguity in the HTSUS provision, the ENs should not be reached in this case because they conflict with the HTSUS's unambiguous language. Blue Sky MSJ at 18–20. The Government argues that the subject merchandise is not calendars, but is properly found to be "similar articles" to those listed in subheading 4820.10.40.00, HTSUS. Gov. MSJ at 14. The Government supports this argument by asserting that the predominant use of the objects is not as calendars, and that the ENs support that the product should not be classified as a calendar. Gov. MSJ at 17–22. The Government further argues that the Federal Circuit's ruling in *Mead Corp. v. United States*, 283 F.3d 1342, 1349 (Fed. Cir. 2002) addressed a similar set of facts and classified the subject merchandise in that case as "[o]ther" paper products. Gov. MSJ at 23. The court begins its analysis under GRI 1.

D. *Tariff Classification of the Paper Merchandise*

As a threshold matter, the court must determine whether the merchandise is properly classified under heading 4910, HTSUS, or heading 4820, HTSUS. Heading 4820, HTSUS, falls within Chapter 48 of the HTSUS, which is generally described as containing headings that classify "paper and paperboard; articles of paper pulp, of paper or of paperboard." Chapter 48, HTSUS (2020). Heading 4910, HTSUS falls within Chapter 49 of the HTSUS, which contains headings which classify "printed books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans." Chapter

49, HTSUS (2020). While Chapter 49 includes paper products where the printing provides the essential character of the articles, the ENs clarify that Chapter 48 is for other paper products that can be used to record various kinds of information. *Compare* EN 48.20 ("Some articles of this heading often contain a considerable amount of printed matter but remain classified in this heading (and not Chapter 49) *provided* that the printing is subsidiary to their primary use, for example . . . diaries (essentially for writing)."), *with* EN 49.10 ("This heading relates to calendars of any kind . . . *provided* that the printing gives the article its essential character.").

Blue Sky argues that these products are *eo nomine* calendars. Blue Sky MSJ at 18. The Government argues that although the subject merchandise contains some limited printed calendar pages the subject merchandise is not defined by those pages, but instead as a whole is defined by space to record information. Gov. MSJ at 21. To begin the *eo nomine* analysis, the court looks to the Oxford English Dictionary,[13] which defines a calendar as:

> The system according to which the beginning and length of successive civil years, and the subdivision of the year into its parts, is fixed; as the Babylonian, Jewish, Roman, or Arabic calendar
>
> [or]
>
> A table showing the division of a given year into its months and days, and referring the days of each month to the days of the week; often also including important astronomical data, and indicating ecclesiastical or other festivals, and other events belonging to individual days. Sometimes containing only facts and dates belonging to a particular profession or pursuit, as *Gardener's Calendar*, *Racing Calendar*, etc. Also a series of tables, giving these facts more fully; an almanac
>
> [or]
>
> A contrivance for reckoning days, months, etc.[14]

Portions of the subject merchandise meet this definition, but the whole of each item of the subject merchandise classified in this case

[13] In order to support its argument, Blue Sky cites to the Oxford American Dictionary's definition of "calendar." Blue Sky MSJ at 14. The Government cites to several other definitions. Gov. MSJ at 18. At oral argument, Blue Sky confirmed that the court should look to British English to define the tariff terms. As British English "calendar" is what informs the HTSUS, reference to the Oxford English Dictionary is appropriate. *See, e.g., Victoria's Secret*, 37 CIT at 585–86, 908 F. Supp. 2d at 1345.

[14] *Calendar*, Oxford Eng. Dictionary, https://www.oed.com/dictionary/calendar_n?tl=true (last visited Mar. 21, 2024).

exceeds Blue Sky's proffered *eo nomine* classification, as the products are not merely charts for showing the division of a given year, but rather are bound notebooks that contain charts that meet the calendar definition along with space to write information about each day/ month as well as space to write additional notes, addresses, and telephone numbers. The subject merchandise in this case serves a consumer that not only wishes to keep track of the days, but to make notations regarding them, and thus heading 4820, HTSUS, not heading 4910, HTSUS, is the appropriate heading here, as the ENs further demonstrate.[15]

The EN associated with heading 4910, HTSUS clarifies that heading 4910, HTSUS "*does not cover* articles whose essential character is not determined by the presence of a calendar" and also excludes "[m]emorandum pads incorporating calendars and diaries (including so-called engagement calendars) (*heading 48.20*)."[16] EN 49.10. The Cambridge Essential British English dictionary defines a diary as either "a book in which you write about what you have done and your thoughts and feelings," or "a book in which you write things that you must remember to do."[17] The Oxford English Dictionary defines a diary as "[a] daily record of events or transactions, a journal; specifically, a daily record of matters affecting the writer personally, or which come under his or her personal observation" or "[a] book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings; also, applied to calendars containing daily memoranda on matters of importance to people generally, or to members of a particular profession, occupation, or pursuit."[18] These broad definitions recognize two different uses of the same word: diaries are both retrospective journals, and prospective scheduling devices. Examining the subject merchandise in this case, it appears

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[15] Blue Sky argues that the ENs should be ignored here because they conflict with the unambiguous language of heading 4910, HTSUS. Blue Sky MSJ at 18. There is a difference between a "calendar" and a "book with a calendar," just as there is a difference between a "wheel" and a "vehicle that moves by wheels." The language of heading 4910, HTSUS, is neither so unambiguous as applied here that reference to the ENs is inappropriate nor, when properly understood, does the language of the EN conflict with the language of heading 4910, HTSUS.

[16] Blue Sky argues that because the paper products expire, this makes them calendars. Blue Sky MSJ at 18. The Government responds that the ENs clarify that merely being "dated" does not make an item a calendar. Gov. MSJ at 19–20. Reviewing the EN, it is clear that, even if portions of the subject merchandise could be defined as calendars, not all items incorporating calendars are covered by heading 4910's "calendars of any kind." *See* EN 49.10. Blue Sky's argument is therefore not persuasive.

[17] *Diary*, Cambridge Dictionary, Essential British English, https://dictionary.cambridge.org/dictionary/essential-british-english/diary (last visited Feb. 21, 2024).

[18] *Diary*, Oxford Eng. Dictionary, https://www.oed.com/dictionary/diary_n?tab=meaning_and_use#6942057 (last visited Mar. 18, 2024).

that the court is presented with a series of notebooks "in which you write things that you must remember to do." The subject merchandise therefore appears to the court to be diaries, and thus properly excluded from heading 4910, HTSUS and properly classified within heading 4820, HTSUS.

This conclusion is further supported by examination of the French SH text, which uses "agendas" in place of the English "diary."[19] "Agendas" in French means "[r]egistre, carnet comportant un calendrier et dans lequel on inscrit pour chaque jour ce que l'on se propose de faire,"[20] or "carnet de rendez-vous,"[21] which roughly translates as "registers, a notebook with a calendar and in which one writes for each day what one proposes to do" and "appointment book."[22] Where, as here, the French and English texts may be read in agreement, "that construction which establishes this conformity ought to prevail." *Percheman*, 32 U.S. at 52.

Although perhaps of little interest to the parties, as the tariff does not differ, the court must select the proper classification, here at the eight-digit level.[23] *See* GRI 6, HTSUS. The Government agrees that the subject merchandise is excluded from heading 4910.00, HTSUS, by the EN and should be classified within heading 4820, HTSUS, but argues that the subject merchandise should be classified within subheading 4820.10.40.00, HTSUS, "[o]ther" paper products. Gov. MSJ at 2. Here, in order to classify this subject merchandise as "[o]ther," the court would have to decide that this subject merchandise is not, in fact, a diary. The Government based its argument for the "[o]ther"

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[19] "Registres, livres comptables, carnets (de notes, de commandes, de quittances), blocs-mémorandums, blocs de papier à lettres, *agendas* et ouvrages similaires." *See* Organisation Mondiale des Douanes, Nomenclature du SH Édition 2017, 48.20, https://www.wcoomd.org/-/media/wco/public/fr/pdf/topics/nomenclature/instruments-and-tools/hs-nomenclature-2017/2017/1048_2017f.pdf?la=fr (last visited Apr. 4, 2024).

[20] *Agenda*, Dictionnaire de L'Academie Francaise, https://www.dictionnaire-academie.fr/article/A9A0834 (last visited Mar. 22, 2024).

[21] *Agenda*, Cambridge French-English Dictionary, https://dictionary.cambridge.org/us/dictionary/french-english/agenda (last visited Mar. 22, 2024).

[22] *See* Cambridge French–English Dictionary, https://dictionary.cambridge.org/dictionary/french-english/ (last visited Mar. 27, 2024).

[23] This classification dispute is past the six-digit level, but the meaning of the HS is still instructive at this level because the terms broken out at the eight-digit level come from the six-digit level of the HTSUS. For example, subheading 4820.10, HTSUS, which reads "[r]egisters, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles," narrows to become subheading 4820.10.20, HTSUS, "[d]iaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles." Here, the dispute is between subheading 4820.10.20.10, HTSUS, "[d]iaries and address books" or subheading 4820.10.40.00, HTSUS, "[o]ther." As the subheadings are merely more narrow divisions of tariff terms used at the six-digit level, it would be illogical to argue that "diary" should mean one thing at the six-digit level, and another at the eight-digit level, without some evidence of a Congressional intent to redefine the term.

classification on a prior ruling from the Federal Circuit, where a day planner had been classified as subheading 4820.10.40.00, HTSUS, "[o]ther." *See Mead*, 283 F.3d at 1349; Blue Sky MSJ at Ex. 2, 42:12 to 43:7; Gov. MSJ at 23. There, however, the subject merchandise at issue had many different components—it was

> a calendar, a section for daily notes, a section for telephone numbers and addresses, and a notepad . . . with additional items such as a daily planner section, plastic ruler, plastic pouch, credit card holder, and computer diskette holder. A loose-leaf ringed binder holds the contents of the day planner, except for the notepad, which fits into the rear flap of the day planner's outer cover.

*Mead*, 283 F.3d at 1344. In that case, the court found that the items in question were neither diaries nor bound, which required classification as "[o]ther." *See id.* at 1350. Unlike in *Mead*, the notebooks here are clearly bound, and there is very little in them besides date pages for scheduling purposes.[24] What little additional content there is supports the scheduling function; a few pages for notes, a page for goals, and a page for contacts. As the products at issue are diaries, the

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[24] Given the lack of discussion of the HS and the ENs in *Mead* the court need not rely on the narrow definition used there. In *Mead*, the court was asked by the parties to determine whether the subject merchandise then before it met the definition of diary as the court and parties understood it from pre-HTSUS caselaw. *See Mead*, 283 F.3d at 1346; *see also, e.g., Baumgarten v. United States*, 49 Cust. Ct. 275 (1962). The subject merchandise now before the court is different from the subject merchandise that was before the court in *Mead*. Further, in *Mead* no party raised the argument that the subject merchandise in that case was a calendar. *See Mead*, 283 F.3d at 1347 ("Neither party in this case would classify the day planners as calendars."). Because the parties did not raise this issue before the *Mead* court, the *Mead* court was not called upon to examine the EN associated with heading 4910, HTSUS. *See, e.g., Gerson Co. v. United States*, 254 F. Supp. 3d 1271, 1277 (CIT 2017), *aff'd*, 898 F.3d 1232 (Fed. Cir. 2018). Here, because of the arguments of the parties in this case, the court was required to analyze the ENs and finds that the EN for heading 4910, HTSUS, not raised in *Mead*, clarifies the meaning of "diary" within heading 4820, HTSUS. The EN for heading 4910, HTSUS excludes "diaries (including so-called engagement calendars)." EN 49.10. An engagement calendar is not defined by the Oxford English Dictionary, and it appears to primarily be an American English term meaning "an appointment book for the daily recording of social engagements and other appointments." *Engagement Calendar*, Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/engagement-calendar (last visited Mar. 18, 2024); *see also Engagement Calendar*, Dictionary.com, https://www.dictionary.com/browse/engagement-calendar (last visited Mar. 18, 2024) ("[A]n appointment book for the daily recording of social engagements and other appointments"). As previously covered, in British English, a diary may be "a book in which you write things that you must remember to do." *See supra* at n.17. Thus, the terms "diary" and "engagement calendar" appear to be synonyms, one term in British English, and the other American English, both meaning a notebook used for scheduling purposes. The EN's explanation that its exclusion of diaries includes "so-called engagement calendars" confirms that the word diary within the HTSUS is intended to capture both the retrospective definition of a diary and the prospective definition. A diary may, as the Federal Circuit correctly identified, be a document for the retrospective record of events; but, reading the broader British definition and utilizing the ENs for guidance, today it is also "a book in which you write things that you must remember to do."

correct classification is 4820.10.20.10, HTSUS. Accordingly, the Government's asserted basket provision, "[o]ther," is rejected.

The obligation of the court, in interpreting the HTSUS, is to ensure that U.S. law reflects "the nomenclature established internationally by the Convention," *see* 19 U.S.C. § 3001, unless altered by Congress. Reviewing the HS, the SH, multiple English and French definitions, and the ENs, the court finds that "diary" includes "a book in which you write things that you must remember to do," and this particular subject merchandise is a "diary" as the term is used in the HTSUS. Customs' classification of this product under subheading 4820.10.40.00, HTSUS was incorrect and the subject merchandise should instead be classified as subheading 4820.10.20.10, HTSUS.

## CONCLUSION

For the foregoing reasons, the court grants in part Blue Sky's motion for summary judgment, denies Government's motion for summary judgment, and holds that the Government improperly classified the subject merchandise under subheading 4820.10.40.00, HTSUS. The subject merchandise is properly classified as "diaries" under subheading 4820.10.20.10, HTSUS. Judgment will be entered accordingly.

Dated: April 10, 2024
New York, New York

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

## Slip Op. 24–43

YAMA RIBBONS AND BOWS CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and BERWICK OFFRAY LLC, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 20–00059

[Remanding a redetermination in a countervailing duty proceeding on narrow woven ribbons with woven selvedge from the People's Republic of China]

Dated: April 10, 2024

*Brittney R. Powell*, Fox Rothschild LLP, of Washington, D.C., for plaintiff Yama Ribbons and Bows Co., Ltd. With her on the briefs were *Lizbeth R. Levinson* and *Ronald M. Wisla*.

*Kara M. Westercamp*, 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 and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Rachel A. Bogdan*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

*Daniel B. Pickard*, Buchanan Ingersoll and Rooney PC, of Washington D.C., for defendant-intervenor Berwick Offray LLC.

## OPINION AND ORDER

**Stanceu, Judge:**

Plaintiff Yama Ribbons and Bows, Co., Ltd. ("Yama") contested a determination of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in a countervailing duty ("CVD") proceeding. The contested decision concluded the seventh periodic administrative review ("seventh review") of a countervailing duty order on narrow woven ribbons with woven selvedge from the People's Republic of China ("China" or the "PRC").

Before the court is the Department's "Remand Redetermination," issued in response to the court's opinion and order in *Yama Ribbons and Bows Co. v. United States*, 46 CIT __, 611 F. Supp. 3d 1394 (2022) ("*Yama I*"). *Final Results of Redetermination Pursuant to Court Remand* (Int'l Trade Admin. Feb. 15, 2023), ECF No. 48 ("*Remand Redetermination*"). Yama opposes the Remand Redetermination. Because a finding in the Remand Redetermination is not supported by evidence on the administrative record of the seventh review, the court remands this decision to Commerce for reconsideration and corrective action, as appropriate.

## I. BACKGROUND

Background for this case is presented in the court's prior opinion and is supplemented herein. *Yama I*, 46 CIT at __, 611 F. Supp. 3d at 1396—98.

### A. The Contested Determination

Commerce published the determination contested in this litigation (the "Final Results") as *Narrow Woven Ribbons with Woven Selvedge From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2017* 85 Fed. Reg. 10,653 (Int'l Trade Admin. Feb. 25, 2020), ("*Final Results*"). Commerce incorporated by reference an explanatory document, the "Final Issues and Decision Memorandum." *Issues and Decision Memorandum for the Final Results of 2017 Countervailing Duty Administrative Review: Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China* (Int'l Trade Admin. Feb. 19, 2020), P.R. Doc. 171 ("*Final I&D Mem.*").[1] The seventh review of the countervailing duty order pertained to entries made during a period of review ("POR") of January 1, 2017 through December 31, 2017.[2]

In the Final Results, Commerce determined that Yama benefitted from 23 countervailable Chinese government programs and assigned Yama a total countervailable subsidy rate of 31.87%. *Yama I*, 46 CIT at __, 611 F. Supp. 3d at 1397; *Final I&D Mem*. at 3–5.

### B. Yama's Claims in this Litigation

In a motion for judgment on the agency record brought under USCIT Rule 56.2, Yama challenged the Department's decisions to countervail three of the 23 programs and the associated countervailing duty subsidy rates: "a rate of 10.54% for the Export Buyer's Credit Program ("EBCP" or "EBC Program"), which is an export-promoting loan program administered by the Export Import Bank of China; a rate of 17.76% for the provision of synthetic yarn for less than adequate remuneration ("LTAR"); and a rate of 0.17% for the provision

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[1] Documents in the Joint Appendix (Mar. 26, 2021), ECF Nos. 38 (conf.), 39 (public) are cited herein as "P.R. Doc. __." All citations to record documents are to the public versions.

[2] The countervailing duty order was issued in 2010. *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Countervailing Duty Order*, 75 Fed. Reg. 53,642 (Int'l Trade Admin. Sept. 1, 2010). Subject merchandise is defined generally in the countervailing duty order as woven ribbons twelve centimeters or less in width, and of any length, that are composed in whole or in part of man-made fibers and that have woven selvedge; some exclusions apply. *Id.* at 53,642–43. The term "selvedge" refers to "the edge on either side of a woven or flat-knitted fabric so finished as to prevent raveling." *Selvage or selvedge*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (2002).

of caustic soda for LTAR." *Yama I*, 46 CIT at __, 611 F. Supp. 3d at 1398. For the derivation of all three of those subsidy rates, Commerce invoked its authority to use "facts otherwise available" under section 776(a) of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1677e(a), and "adverse inferences" under section 776(b) of the Tariff Act, 19 U.S.C. § 1677e(b).[3] When relying on both the "facts otherwise available" and "adverse inference" provisions of the statute, Commerce uses the term "adverse facts available" or "AFA." *Yama I*, 46 CIT at __, 611 F. Supp. 3d at 1399; *Final I&D Mem*. at 2.

In the Final Results, Commerce based its use of facts otherwise available on findings that the government of the PRC withheld requested information; it found, further, that adverse inferences were warranted because the Chinese government failed to cooperate by not acting to the best of its ability to comply with the Department's information requests. *Yama I*, 46 CIT at __, 611 F. Supp. 3d at 1399—1400, 1404. Commerce did not find that Yama itself withheld any information or failed to cooperate to the best of its ability in responding to the Department's questionnaires.

### C. The Court's Opinion in *Yama I*

In response to Yama's Rule 56.2 motion, the court remanded the Final Results to Commerce with directions to reconsider the 10.54% rate applied as an adverse inference for the Export Buyer's Credit Program. *Yama I*, 46 CIT at __, 611 F. Supp. 3d at 1405. The court denied relief on Yama's Rule 56.2 motion in all other respects.

### D. The Remand Redetermination and Comment Submissions

In response to *Yama I*, Commerce reconsidered the 10.54% rate it assigned for the EBCP. Commerce again assigned this rate in the Remand Redetermination and included an explanation of its revised reasoning. Yama opposed the Remand Redetermination in a comment submission to the court. Pl.'s Comments in Opposition to the Results of the Remand Redetermination (Mar. 17, 2023), ECF No. 50 ("Yama's Comments"). Defendant-intervenor did not comment. Defendant replied to Yama's opposition, advocating that the court sustain the Remand Redetermination. Def.'s Response to Comments on Remand Redetermination (Apr. 1, 2023), ECF No. 51 ("Def.'s Resp.").

[3] Citations to the United States Code are to the 2018 edition.

## II. DISCUSSION

### A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants this Court authority to review actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a, including actions contesting a final determination that Commerce issues to conclude an administrative review of a countervailing duty order. *Id.* § 1516a(a)(2)(B)(iii).

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." *Id.* § 1516a(b)(1). 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. Prior Proceedings

With respect to the EBCP, Yama claimed in its Rule 56.2 motion that "Commerce should not have imposed countervailing duties upon Yama's exports for the EBCP" as the record evidence demonstrated that "neither Yama nor its customers used this program." *Yama I*, 46 CIT at __, 611 F. Supp. 3d at 1400 (quoting Mem. of P. & A. in Supp. of Pl.'s 56.2 Mot. for J. on the Agency R. 24–25 (Oct. 28, 2020), ECF No. 29–2 ("Pl.'s Br.")). "In the alternative, Yama claims that the 10.54% subsidy rate that Commerce . . . attributed to the program was 'extremely adverse, punitive and not related to exports or this industry, or connected to the EBC.'" *Id.*

Concerning the provision of synthetic yarn and caustic soda for LTAR, Yama argued that Commerce improperly determined, through the use of facts otherwise available and adverse inferences, that "each of the private companies which supplied Yama with synthetic yarn and caustic soda is an 'authority,'" i.e., a government or public entity from which a countervailable subsidy may originate, as provided in 19 U.S.C. § 1677(5)(B). *Id.*, 46 CIT at __, 611 F. Supp. 3d at 1404 (quoting Pl.'s Br. 9).

In *Yama I*, the court determined that "Commerce acted lawfully in deciding that the record before it, based on actual evidence and permissible adverse inferences, allowed Yama to benefit from 'programs' allowing it to obtain the inputs [synthetic yarn and caustic soda] for LTAR." *Id.*, 46 CIT at __, 611 F. Supp. 3d at 1405 (citation omitted).

On the EBCP, *Yama I* held that "Commerce was within its authority in using an adverse inference that Yama benefitted from the EBCP" during the POR. *Id.*, 46 CIT at __, 611 F. Supp. 3d at 1401. The court based its conclusion on the failure of the Chinese government to respond to a request from Commerce that was specific to the POR, i.e., calendar year 2017, and was worded as follows: "If you claim that no customer of the respondent companies used buyer credits, please explain in detail the steps the government took to determine that no customer used Export Buyer's Credits." *Id.* (quoting *2017 Administrative Review of the Countervailing Duty Order on Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Countervailing Duty Questionnaire* at II-13 (Nov. 26, 2018), P.R. Doc. 4). Commerce used adverse inferences regarding the EBCP because the government of China (the "GOC"), making no meaningful attempt to comply with the Department's information request, did not provide any answers specific to the period of review and provided the same questionnaire response it had provided Commerce in the prior review. *Id.* (citing *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: GOC Response* (Feb. 19, 2019), P.R. Docs. 21, 23).

The court concluded in *Yama I* that "Commerce must be afforded discretion to determine the scope of its inquiry in conducting reviews of countervailing duty orders, so long as it does so reasonably" and that "[h]ere, it was reasonable for Commerce to request information from the Chinese government to supplement and corroborate the information Yama provided to show that neither Yama nor its U.S. customers used the EBCP." *Id.* "But because the Chinese government made no effort to provide the requested information as it related specifically to the period of review, Commerce was within its authority in using an adverse inference that Yama benefitted from the EBCP during that period." *Id.* The POR-specific information Commerce requested from the Chinese government "was missing from the record due to the failure of the Chinese government to make even a minimal effort to assist Commerce in confirming that Yama received no benefit from the EBCP during that year." *Id.*, 46 CIT at __, 611 F. Supp. 3d at 1402. Upon providing Commerce only its answer to the Department's questionnaire in the prior review, the government of China informed Commerce that it would not submit any further responses in the proceeding. *Id.*, 46 CIT at __, 611 F. Supp. 3d at 1400. The court recognized that the record contained information to support a finding that neither Yama nor its customers used the EBCP during the POR but reasoned that "Commerce was not required to consider that information determinative in the particular situation this case pres-

ents."[4] *Id.* "It was reasonable in that situation for Commerce to consider the POR-specific information it sought from the GOC—none of which it obtained—to be essential to its inquiry." *Id.*

Although concluding that Commerce permissibly could use an adverse inference that Yama benefitted from the EBCP, the court in *Yama I* remanded the Final Results to Commerce upon concluding that Commerce, in selecting the 10.54% subsidy rate for the EBCP as that adverse inference, had relied upon a finding unsupported by substantial evidence on the record. The finding at issue was that a Chinese government program for preferential lending to the coated paper industry, for which Commerce had determined a subsidy rate of 10.54% in another countervailing duty proceeding, was available to the woven ribbons industry, of which Yama was a part. The court directed as follows:

> On remand, Commerce must reconsider, in the entirety, its use of the 10.54% rate as an adverse inference and explain why whatever rate it decides to use is appropriate under 19 U.S.C. § 1677e(b) and is consistent with the purpose of that statute, which, rather than to impose a rate that is "punitive," is to encourage interested parties to act to the best of their ability to comply with the agency's information requests. Commerce must explain, specifically, why it considers the rate it chooses to be appropriate for that purpose in the special case presented here, in which an unreasonably high rate could unduly prejudice Yama, as the "interested party" that was fully cooperative during the review.

*Id.*, 46 CIT at __, 611 F. Supp. 3d at 1403.

### C. The Remand Redetermination

The issue remaining to be decided is whether Commerce acted lawfully in again assigning Yama, using facts otherwise available and an adverse inference, a countervailable subsidy rate of 10.54% for the EBCP. This requires the court to determine whether the assignment of this rate complies with the "adverse inference" provisions in the Tariff Act, 19 U.S.C. § 1677e(b), and, specifically, whether the findings Commerce made to support its conclusion under those provisions are supported by substantial evidence on the record of the seventh review.

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[4] Yama told the agency that it did not use the Export Buyers Credit Program during the period of review and was informed by its customers that they had not used the program either. Yama provided certifications of non-use from only some of its customers. *Yama Ribbons and Bows Co. v. United States*, 46 CIT __, 611 F. Supp. 3d 1394, 1401 (2022).

In the Remand Redetermination, Commerce described a methodology for choosing an adverse inference rate that differed from the one it applied in the Final Results. For the Final Results, Commerce explained that "[c]onsistent with section 776(d) of the Act [19 U.S.C. § 1677e(d)] and our established practice, we select the highest calculated rate for the same or similar program as AFA" and described a "three-step" methodology for selecting that rate. *Yama I*, 46 CIT at __, 611 F. Supp. 3d at 1402—03 (citations and footnotes omitted).

As the first step in its methodology, Commerce stated that "[w]hen selecting rates in an administrative review, we first determine if there is an identical program from any segment of the proceeding and use the highest calculated rate for the identical program (excluding *de minimis* rates)." *Id*. at 1402. Where, as here, there was no such identical program, Commerce described as its second step that it would "determine if there is a similar/comparable program (based on the treatment of the benefit) within the same proceeding and apply the highest calculated rate for the similar/comparable program, excluding *de minimis* rates." *Id*. There having been no similar or comparable program "within the same proceeding," Commerce proceeded to its third step, stating that "we apply the highest calculated rate from any non-company specific program in any CVD case involving the same country, *but we do not use a rate from a program if the industry in the proceeding cannot use that program*." *Id*. at 1402—1403 (emphasis added). Commerce explained that the 10.54% rate it chose was determined in "*Coated Paper from China*" for the "Preferential Lending to the Coated Paper Industry program."[5] *Yama I*, 46 CIT at __, 611 F. Supp. 3d at 1403 (citing *Decision Memorandum for Preliminary Results of 2017 Countervailing Duty Administrative Review: Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China* at 11 (Int'l Trade Admin. Aug. 5, 2019), P.R. Doc. 110).

Based on the Department's own description of its AFA rate selection methodology, Yama argued in its Rule 56.2 motion that Commerce failed to demonstrate that a loan program for the coated paper industry was available to the woven ribbons industry, and the court

[5] "*Coated Paper from China*" is a reference to a separate, prior countervailing duty proceeding. *Yama Ribbons and Bows Co. v. United States*, 46 CIT __, 611 F. Supp. 3d 1394, 1403 (2022) (citing *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 Fed. Reg. 70,201 (Int'l Trade Admin. Nov. 17, 2010) (amending an earlier determination for ministerial errors, *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Countervailing Duty Determination*, 75 Fed. Reg. 59,212 (Int'l Trade Admin. Sept. 27, 2010)).

agreed with this argument. *Yama I*, 46 CIT at __, 611 F. Supp. 3d at 1403.

In the Remand Redetermination, Commerce stated that it "reconsidered our selection of the 10.54 percent subsidy rate," *Remand Redetermination* at 3, and concluded again "that the 10.54 percent AFA rate is appropriate." *Id.* at 5. Commerce explained that it had "incorrectly described the steps of Commerce's CVD AFA hierarchy" in the Final Results "as having three steps." *Id.* at 3 (footnote omitted). "However, Commerce's CVD AFA hierarchy is more accurately described as having four steps." *Id.* (footnote omitted). The four-step "hierarchy" it described was as follows:

> Under the first step of Commerce's CVD AFA hierarchy for administrative reviews, Commerce applies the highest non-de minimis rate calculated for the identical program in any segment of the same proceeding. If there is no identical program match within the same proceeding, or if the rate is de minimis, under step two of the hierarchy, Commerce applies the highest non-de minimis rate calculated for a similar program within any segment of the same proceeding. *If there is no non-de minimis rate calculated for a similar program within the same proceeding, under step three of the hierarchy, Commerce applies the highest non-de minimis rate calculated for an identical or similar program in another CVD proceeding involving the same country.* Finally, if there is no non-de minimis rate calculated for an identical or similar program in another CVD proceeding involving the same country, under step four, Commerce applies the highest calculated rate for any program from the same country that the industry subject to the review could have used.

*Id.* at 3—4 (emphasis supplied). Commerce explained, further, that as "we had not previously calculated an above-*de minimis* rate for the Export Buyer's Credit program in this proceeding," it could not use step one of its methodology, and as "we found no similar/comparable program within this proceeding without a de minimis rate," it could not use step two. *Id.* at 4. Commerce instead relied on step three of its restated hierarchy to determine an AFA rate for the EBCP based on its findings in the prior CVD proceeding pertaining to a program for preferential lending to the Chinese coated paper industry. *Id.*

In the Remand Redetermination, Commerce reasoned that "only the fourth step" of the Department's AFA methodology "requires that Commerce use a program available to the industry in the proceeding." *Id.* at 5. Because Commerce relied on the third step of the methodology it described in the Remand Redetermination, it "has not con-

sidered whether this program is available to the narrow woven ribbons with woven selvedge (narrow woven ribbons) industry in China." *Id.* Thus, Commerce found it sufficient, for the purpose of determining an AFA rate for the EBCP, that a "preferential policy lending program in *Coated Paper from China* is similar to the Export Buyer's Credit program." *Id.* (citing *Final I&D Mem.* at 28). Commerce, therefore, "continue[d] to apply the 10.54 percent subsidy rate as AFA for the Export Buyer's Credit Program" and "made no changes to Yama's overall subsidy rate presented in the *Final Results* (*i.e.*, 31.87 percent)." *Id.* at 9.

### D. Yama's Objections to the Remand Redetermination

Yama raises two objections to the Remand Redetermination. It argues, first, that Commerce "has not supported with substantial evidence on *this* record its finding that the preferential policy lending program is similar to the EBCP." Yama's Comments 2. Yama argues, second, that "Commerce applied essentially the same unsupported rationale as before to justify the use of the punitive AFA rate to Yama Ribbons, a fully cooperative respondent." *Id.* at 3.

#### 1. Evidence Is Not on the Record to Support the Finding that the Preferential Lending Program Cited in *Coated Paper from China* is Similar to the EBCP

With respect to its first objection, Yama argues that "in the issues and decision memorandum for the Final Results, which is the only apparent support for its Remand Results, Commerce does not cite to any evidence on the record of *this* proceeding demonstrating that the preferential policy lending program is similar to the EBCP," *id.* at 2—3, and that "[s]uch a failure ignores the Court's explicit instructions in the Remand Opinion." *Id.* at 3. Because the administrative record is insufficient to support a comparative analysis of the EBCP with the coated paper lending program Commerce cites, the court is persuaded by Yama's first objection.

The Tariff Act, in 19 U.S.C. § 1677e(d), provides that when Commerce "uses an inference that is adverse to the interests of a party under subsection (b)(1)(A) [19 U.S.C. § 1677e(b)(1)(A)] in selecting among the facts otherwise available," Commerce may "use a countervailable subsidy rate applied for the same *or similar program* in a countervailing duty proceeding involving the same country," *id.* § 1677e(d)(1)(A)(i) (emphasis added), or "if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reason-

able to use." *Id.* § 1677e(d)(1)(A)(ii). In the Remand Redetermination, Commerce invoked only the first of these two subsections, § 1677e(d)(1)(A)(i).

In both the Final Results and the Remand Redetermination, Commerce found that the preferential lending program identified in *Coated Paper from China* was similar to the EBCP. In both, the Department's finding of similarity was "based on the treatment of the benefit because the credits function as short-term or medium-term loans." *Final I&D Mem.* at 28 (footnote omitted); *Remand Redetermination* at 5 (footnote omitted).

One problem in this case arises because the administrative record does not support a finding that there is a coated paper lending program involving government-conferred credits that "function as short-term or medium-term loans" and in that respect is similar to the EBCP. Yama does not contest that the record is sufficient to show that the EBCP is a government program to promote Chinese industries through the provision of loans with preferential interest rates. Pl.'s Br. 9—12 (detailing a "statement of facts relevant to the EBC Program," including that the EBCP is "an export promoting loan program administered by the Export-Import Bank of China"); *Yama I*, 46 CIT at __, 611 F. Supp. 3d at 1398—1400 (explaining that the EBCP is "an export-promoting loan program" that is "administered by the Export Import Bank of China"); *Final I&D Mem.* at 15 (describing the EBCP credits as "medium- and long-term loans" with "preferential, low interest rates") (citation omitted). Yama objects to the insufficiency of the record of the seventh review to establish facts about a coated paper lending program that would be needed to demonstrate similarity with the EBCP.

In referencing *Coated Paper from China* in both its Final Results, *Final I&D Mem.* at 28 n.133, and the Remand Redetermination, *Remand Redetermination* at 4 n.8, Commerce cited the final determination and countervailing duty order published in the Federal Register. *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 Fed. Reg. 70,201 (Int'l Trade Admin. Nov. 17, 2010). Neither contains a meaningful description of a coated paper lending program.

A terse description of a coated paper lending program may be gleaned from the issues and decision memorandum Commerce incorporated by reference into the final determination for *Coated Paper from China*. *See Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain*

*Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China* at 11 (Int'l Trade Admin. Sept. 20, 2010). This public document, of which the court may take judicial notice, describes a coated paper program as involving "Policy Loans to Coated Paper Producers and Related Pulp Producers from State-Owned Commercial Banks and Government Policy Banks," *id.* at 11, but the evidentiary basis for that factual finding is not present on the administrative record of the review at issue in this litigation. Moreover, the issues and decision memorandum for *Coated Paper from China* does not indicate that the terms of the credits provided under a coated paper program necessarily were in the form of short-term or medium-term loans, as Commerce found. Even were the issues and decision memorandum to have so stated, the supporting record evidence is not available for the court's review.

A second problem in this case arises because, in the absence of any meaningful record evidence about a coated paper lending program, the court cannot presume that, had such evidence been placed on the record, it necessarily would *not* have included evidence of ways in which these two "programs" may have been *dis*similar. Thus, any presumption of similarity so as to satisfy the criterion of 19 U.S.C. § 1677e(d)(1)(A)(i) would rest almost entirely on speculation.

Defendant does not offer a convincing response to Yama's argument, Yama's Comments 2—3, that record evidence is lacking to demonstrate the claimed similarity. Defendant argues that "the final results of *Coated Paper from China*" describe the preferential lending program as "a loan program from policy banks, as the title of the program also reasonably suggests." Def.'s Resp. 8—9 (citing *Certain Coated Paper Suitable For High–Quality Print Graphics Using Sheet–Fed Presses from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination* 75 Fed. Reg. 10,774 (Int'l Trade Admin. Mar. 9, 2010). The English-language title of the cited coated paper program is stated in the Federal Register documents as "Preferential Lending to the Coated Paper Industry program"; *see, e.g.*, *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 Fed. Reg. 70,201 (Int'l Trade Admin. Nov. 17, 2010), but the court has no way of reviewing even so much as a finding that this was the official title and also lacks essential information on how any such program operated.

In summary, the Department's finding of similarity between the cited coated paper program and the EBCP is not based on evidence present on the administrative record of the seventh review. Under the "substantial evidence" element of the standard of review, the court is, therefore, unable to conclude that the Department's ultimate determination of similarity would satisfy the requirement of 19 U.S.C. § 1677e(d)(1)(A)(i). *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (stating that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). Commerce, therefore, must reconsider its decision to use the references to a coated paper program as the basis for an adverse inference subsidy rate.

### 2. The Court Defers Consideration of Yama's Second Objection

For its second objection, Yama argues that Commerce failed in its obligation to "justify the 10.54% AFA rate as appropriate in the 'special case presented here, in which an unreasonably high rate could unduly prejudice' Yama Ribbons." Yama's Comments 3 (quoting *Yama I*, 46 CIT at __, 611 F. Supp. 3d at 1403). Because Commerce must reconsider its choice to use the references to a coated paper program with the associated subsidy rate, the court defers consideration of Yama's second objection pending a response to the remand order the court is issuing.

## III. CONCLUSION

For the reasons set forth in the foregoing, the court remands the Remand Redetermination to Commerce for reconsideration in accordance with this Opinion and Order.

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

**ORDERED** that Commerce shall submit a new determination upon remand (the "Second Remand Redetermination") that complies with this Opinion and Order; it is further

**ORDERED** that Commerce shall submit its Second Remand Redetermination within 60 days of the date of this Opinion and Order; it is further

**ORDERED** that any comments by plaintiff or defendant-intervenor on the Second Remand Redetermination must be filed with the court no later than 30 days after the filing of the Second Remand Redetermination; and it is further

**ORDERED** that defendant may file a response to comments within 15 days after the filing of the last comment submission on the Second Remand Redetermination.

Dated: April 10, 2024
New York, New York

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

## Slip Op. 24–44

ASSAN ALUMINYUM SANAYI VE TICARET A.S., Plaintiff and Consolidated Defendant-Intervenor, v. UNITED STATES, Defendant, and ALUMINUM ASSOCIATION COMMON ALLOY ALUMINUM SHEET TRADE ENFORCEMENT WORKING GROUP AND ITS INDIVIDUAL MEMBERS, ALERIS ROLLED PRODUCTS, INC.; ARCONIC CORPORATION; COMMONWEALTH ROLLED PRODUCTS INC.; CONSTELLIUM ROLLED PRODUCTS RAVENSWOOD, LLC; JW ALUMINUM COMPANY; NOVELIS CORPORATION; AND TEXARKANA ALUMINUM, INC., Defendant-Intervenors and Consolidated Plaintiffs.

Before: Gary S. Katzmann, Judge
Consol. Court No. 21–00246

[ The court remands Commerce's *Remand Results*. ]

Dated: April 11, 2024

*Leah Scarpelli*, Arent Fox LLP, of Washington, D.C., argued for Plaintiff and Consolidated Defendant-Intervenor Assan Aluminyum Sanayi ve Ticaret A.S. With her on the briefs were *Matthew M. Nolan* and *Jessica R. DiPietro*.

*Kyle S. Beckrich*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant the United States. With him on the briefs 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 *Ashlande Gelin*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

*John M. Herrmann*, Kelley Drye & Warren LLP, of Washington, D.C., argued for Defendant-Intervenors and Consolidated Plaintiffs Aluminum Association Common Alloy Aluminum Sheet Trade Enforcement Working Group and its Individual Members Aleris Rolled Products, Inc., Arconic Corporation, Commonwealth Rolled Products Inc., Constellium Rolled Products Ravenswood, LLC, JW Aluminum Company, Novelis Corporation, and Texarkana Aluminum, Inc. With him on the brief were *Paul C. Rosenthal* and *Joshua R. Morey*.

## ***OPINION***

**Katzmann, Judge:**

Last year, the court granted a voluntary remand request by Defendant the United States ("the Government") to allow the U.S. Department of Commerce ("Commerce") to recalculate a duty drawback adjustment. *See Assan Aluminyum Sanayi ve Ticaret A.S. v. United*

*States*, 47 CIT __, 624 F. Supp. 3d 1343 (2023) ("*Assan I*").[1] The original calculation, the Government acknowledged, was incompatible with a recent holding by the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") that disfavored "duty neutral" adjustment methodologies. *Id.* at 1362–63; *see also Uttam Galva Steels Ltd. v. United States*, 42 CIT __, __, 311 F. Supp. 3d 1345, 1355 (2018), *aff'd*, 997 F.3d 1192 (Fed Cir. 2021).

On remand, Commerce's recalculation resulted in a larger drawback adjustment—and accordingly a higher calculated export price—for Assan Aluminyum Sanayi ve Ticaret A.S. ("Assan"), a Turkish producer of subject merchandise. *Redetermination Pursuant to Court Remand Order* at 16 (Dep't Com. May 31, 2023), ECF No. 94 ("*Remand Results*"). This in turn brought Assan's overall dumping margin below the *de minimis* level. *See id.* If upheld, Commerce's redetermination would thus extinguish Assan's entire antidumping duty liability for the period of investigation. *See* 19 U.S.C. §§ 1673b(b)(3), 1673d(a)(4).

A consortium of U.S. aluminum producers, the Aluminum Association Common Alloy Aluminum Sheet Trade Enforcement Working Group and its Individual Members ("Association"), challenges this redetermination. *See* Consol. Pls.' Cmts. on Remand Redetermination, June 30, 2023, ECF No. 100 ("Ass'n's Br."). That challenge is now before the court. To resolve it, the court must examine the interaction between Commerce's new adjustment methodology and the Turkish government's system for exempting import duties.

The court concludes that Commerce's new methodology, as currently explained, does not take proper account of the Turkish exemption system. The court accordingly remands Commerce's redetermination for further explanation or reconsideration.

## BACKGROUND

### *I. Legal and Regulatory Framework*

The court set forth the legal framework of Commerce's application of duty drawback adjustments in *Assan I*, 624 F. Supp. 3d at 1356. The key provision is as follows:

> The price used to establish export price and constructed export price shall be . . . increased by . . . the amount of any import

[1] To ensure internal consistency and compatibility with future publication formats, the court represents Turkish-language proper names without diacritics. For example, the name "Assan Alüminyum Sanayi ve Ticaret A.Ş." becomes "Assan Aluminyum Sanayi ve Ticaret A.S." *See, e.g.*, *Civility Experts Worldwide v. Molly Manners, LLC*, 167 F. Supp. 3d 1179, 1191 n.5 (D. Colo. 2016) (omitting French diacritics); *Akina v. Hawaii*, 141 F. Supp. 3d 1106, 1111 n.1 (D. Haw. 2015) (Hawaiian).

> duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States . . . .

19 U.S.C. § 1677a(c)(1)(B). In other words, "a duty drawback adjustment shall be granted when, but for the exportation of the subject merchandise to the United States, the manufacturer would have shouldered the cost of an import duty." *Saha Thai Steel Pipe (Pub.) Co. v. United States*, 635 F.3d 1335, 1341 (Fed. Cir. 2011).

The court in *Assan I* also discussed the Turkish government's system—known as an Inward Processing Regime ("IPR")—for exempting duty liability on imports of input materials "if the exporter satisfies certain requirements":

> Specifically, interested firms in Turkey secure Inward Processing Certificates ("IPC"), which represent that inputs used for the production of relevant exports fall within the same 8-digit HTS classification as those inputs for which an exemption has been sought. Duty liability is extinguished when an IPC is "closed," meaning that an exporter has demonstrated sufficient amounts of corresponding imports and exports to Turkish authorities.

624 F. Supp. 3d at 1357 (footnote and citation omitted). An IPC holder has two options: it can either pay import duties as usual and then obtain a refund of those duties upon the closure of an IPC, or it can pay no import duties at the time of importation and instead submit a guarantee (effectively an IOU) for the amount that would otherwise be owed. *See* Letter from Mayer Brown, LLP to W. Ross, Sec'y of Com., re: Section C Questionnaire Response at 42 (June 29, 2020), P.R. 142–43, C.R. 52 ("Assan Questionnaire Resp.").[2] Either way, an IPC holder remains liable for any import duties incurred until it exports a sufficient quantity of qualifying merchandise to close the IPC. *See id.* at 42. If an IPC does not close, the result is "retroactive collection" by the Turkish government "of all the customs duties, charges and VAT, as applicable, plus penalties." *Id.* at 43.

Commerce's practice is to decline to apply a duty drawback adjustment on the basis of an IPC until that IPC is closed. *See, e.g.*, *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi, A.S. v. United States*, 44

[2] "P.R." and "C.R." respectively refer to the (pre-remand) Public Record and Confidential Record in this case. *See* Pub. Joint App'x, Apr. 7, 2022, ECF No. 48; Conf. Joint App'x, Apr. 7, 2022, ECF No. 47. "P.R.R." and "C.R.R." respectively refer to the Public Remand Record and Confidential Remand Record. *See* Pub. Remand Joint App'x, Aug. 14, 2023, ECF No. 108; Conf. Remand Joint App'x, Aug. 14, 2023, ECF No. 107.

CIT __, __, 439 F. Supp. 3d 1342, 1349 (2020) ("Commerce reasonably predicates its inclusion of IPCs on evidence of closure as demonstrating final duty exemption . . . ."); *Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. v. United States*, 47 CIT __, __, 654 F. Supp. 3d 1311, 1319 (2023) ("Commerce declined to provide Icdas any adjustment because Icdas did not provide evidence that demonstrated that any of the IPCs were closed."); *see also* Def.'s Resp. to Cmts. on Remand Redetermination at 5–6, July 31, 2023, ECF No. 103 ("Gov't Resp."). Over the past decade, however, Commerce has applied an increasingly strict definition of IPC closure for the purpose of determining entitlement to a duty drawback adjustment. *See Icdas*, 654 F. Supp. 3d at 1320–21. Whereas Commerce used to require a mere demonstration that "the exporting company has applied to the Turkish government for closure," Commerce now requires "some indication from the [Turkish government] that the IPC was approved." *Id.* (internal quotation marks and citations omitted).

### *II. Procedural History*

The court presumes familiarity with the background of this case as of the court's decision in *Assan I*. In *Assan I*, the court sustained "Commerce's general grant of a duty drawback adjustment to Assan." 624 F. Supp. 3d at 1362.[3] As to Commerce's specific calculation of that adjustment, however, the court granted the Government's request for a voluntary remand on the ground that "[a] remand is generally required when an intervening event affects the validity of the agency action." *Assan I*, 624 F. Supp. 3d at 1363 (citing *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001)). The intervening event in question was the Federal Circuit's May 2021 decision in *Uttam Galva*, 997 F.3d 1192. The decision affected the validity of Commerce's determination because Commerce had "allocated the exempted duties over Assan's total production rather than over only Assan's total exports of the subject merchandise, thereby utilizing a so-called 'duty neutral methodology.' " *Assan I*, 624 F. Supp. 3d at

[3] *Assan I* also involved four unrelated issues. The court (1) sustained Commerce's denial to Assan of a home market rebate adjustment, (2) sustained Commerce's deduction of Assan's affiliated freight costs from its calculation of Assan's constructed export price, (3) remanded for further explanation Commerce's determination not to apply an adverse inference as to Assan's reporting of certain billing adjustments, and (4) stayed consideration of Assan's challenge to Commerce's deduction of certain tariffs until the Federal Circuit's then-pending decision in *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 63 F.4th 25 (Fed. Cir. 2023). Because the *Remand Results* announce a *de minimis* dumping margin for Assan, these issues are not now live. *See* Assan's Cmts. on Remand Redetermination at 9, June 30, 2023, ECF No. 99 ("Assan's Br.") ("Assan supports the Final Remand Redetermination and will not request a second remand to the agency on . . . [the adverse inference] issue solely in the interest of expediency.").

1362; *see also Common Alloy Aluminum Sheet from Turkey: Final Affirmative Determination of Sales at Less Than Fair Value*, 86 Fed. Reg. 13326 (Dep't Com. Mar. 8, 2021), P.R. 358. In *Uttam Galva*, however, the Federal Circuit held that "[t]here is no basis" in 19 U.S.C. § 1677a(c)(1)(B) for dividing exempted duties by both exports and home-market sales of subject merchandise. 997 F.3d at 1197.

Commerce issued a draft redetermination and a revised dumping margin calculation on May 10, 2023. *See Draft Results of Redetermination & Revised Margin Calculation for Assan Aluminyum Sanayi ve Ticaret A.S.* (Dep't Com. May 10, 2023), C.R.R. 1, P.R.R. 2 ("*Draft Remand Results*"). Referring (seemingly) to the Federal Circuit, Commerce stated that it "revised its calculation of duty drawback consistent with the Court's opinion that the statute requires an upward adjustment to [Constructed Export Price] based on the entire drawback." *Id.* at 2. Commerce stated that it accomplished this "by dividing the amount of duties exempted on the Inward Processing Certificate (IPC) closed during the [period of investigation] over the total quantity of exports made under that closed IPC." *Id.* This calculation yielded a "a per-unit duty drawback" figure that Commerce added to the adjusted gross unit price of each of Assan's U.S. sales of subject merchandise. *Id.* at 3.

Before Commerce's revised drawback adjustment, the dumping margin[4] Commerce calculated for Assan hovered barely above the 2 percent *de minimis* level. *Assan I*, 624 F. Supp. at 1380. Following the revised adjustment, which increased Assan's calculated export price, the margin dropped below the *de minimis* level. *Draft Remand Results* at 16.

The Association submitted comments on the *Draft Remand Results*, arguing that Commerce's revised methodology was flawed and proposing an alternate methodology that it suggested Commerce adopt instead. *See* Letter from Association to G. Raimondo, Sec'y of Com., re: Comments on Draft Redetermination (May 17, 2023), C.R.R. 11, P.R.R. 8 ("Ass'n's Cmts. on *Draft Remand Results*"). Assan objected to the Association's comments on the ground that they contained "new arguments . . . which were not previously raised before this agency or the reviewing court." Letter from Assan to G. Raimondo, Sec'y of Com., re: Objection to Petitioner's Comments on Draft Redetermination and Request to Strike New Factual Information at 1–2 (May 23, 2023), C.R.R. 12, P.R.R. 9. Assan stated that the Association's pro-

[4] A dumping margin is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). An adjustment that increases (constructed) export price thus decreases the ultimate dumping margin.

posed alternate methodology constituted "untimely filed new factual information" and should therefore "be stricken from the record of this proceeding." *Id.* at 2 (citing 28 U.S.C. § 2637(d)). Assan also filed comments of its own. *See* Letter from Assan to G. Raimondo, Sec'y of Com., re: Assan's Comments on Draft Remand Redetermination Pursuant to Court Remand (May 17, 2023), Bar Code 4377730–01.

Commerce made no changes to the *Draft Remand Results* and issued a final remand redetermination on May 31, 2023. *See Remand Results* at 16. The Association and Assan each filed comments before the court. *See* Assan's Br.; Ass'n's Br. The Government responded to both comments, *see* Gov't Resp., and the Association and Assan each filed responses to the other's comments. *See* Assan's Resp. to Cmts. on Remand Redetermination, July 31, 2023, ECF No. 104 ("Assan's Resp."); Ass'n's Resp. to Assan's Cmts. on Remand Redetermination, July 31, 2023, ECF No. 106 ("Ass'n's Resp.").

On August 14, 2023, the Association moved for oral argument. *See* Ass'n's Request for Leave to File and Mot. for Oral Arg., Aug. 14, 2023, ECF No. 109. The court granted this motion and issued questions to the parties. *See* Ct.'s Qs. for Oral Arg., Jan. 18, 2024, ECF No. 111. Oral argument took place on January 25, 2024. *See* Oral Arg. Tr., Jan. 26, 2024, ECF No. 114 ("Oral Arg. Tr."). At that argument and in a subsequent letter, the court ordered the parties to file additional briefs in response to the court's supplemental questions. *See* Ct.'s Supp. Qs., Jan. 26, 2024, ECF No. 113. The parties did so. *See* Assan's Resp. to Supp. Qs., Jan. 31, 2024, ECF No. 115; Ass'n's Resp. to Supp. Qs., Jan. 31, 2024, ECF No. 116; Gov't Resp. to Supp. Qs., Jan. 31, 2024, ECF No. 118.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I), (a)(2)(B)(ii). 19 U.S.C. § 1516a(b)(l)(B)(i) provides the standard of review: "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," *id.*; *see also Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003), "which includes compliance with the court's remand order," *SMA Surfaces, Inc. v. United States*, 47 CIT __, __, 658 F. Supp. 3d 1325, 1328 (2023).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Broadcom Corp. v. Int'l Trade Comm'n*, 28 F.4th 240, 249 (Fed. Cir. 2022). To be supported by substantial evidence, a determination must account for

evidence in the record that fairly detracts from its weight, *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016), including "contradictory evidence or evidence from which conflicting inferences could be drawn," *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487 (1951)).

An agency acts contrary to law if its decisionmaking is arbitrary or unreasoned. *Burlington Truck Lines v. United States*, 371 U.S. 156, 167–68 (1962). Commerce must establish and articulate a "rational connection between the facts found and the choice[s] made." *Id.* at 168; *see also Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013).

## DISCUSSION

During the period of investigation, Assan exported subject merchandise to the United States under four distinct Turkish IPCs. *See* Assan Questionnaire Resp. at Ex. C-10. One of these IPCs closed during the period of investigation; the other three remained open. *See id.*; Oral Arg. Tr. at 7. Sales of subject merchandise exported under the closed IPC contributed to Assan's receipt of duty exemptions from the Turkish government. *See Remand Results* at 10. But Assan's sales under the three IPCs that remained open did not have this consequence. Under Turkey's Inward Processing Regime, the Turkish government does not grant drawbacks or exemptions "earned" under an IPC until the entire import balance of the IPC is matched by an equivalent value of exports. *Assan I*, 624 F. Supp at 1357. This means that an export under an open IPC does not result in a duty exemption (or drawback) until additional exports reach the amount required to close the IPC. *Id.* As the Government puts it, "a duty liability remains contingent until an IPC is closed by the Turkish government." Gov't Resp. at 7.

In this case, Commerce applied a duty drawback adjustment to all of Assan's U.S. sales of subject merchandise even though only some of those sales contributed directly to Assan's receipt of exemptions during the period of investigation. Commerce did this by (1) deriving a uniform per-unit duty drawback rate from the exports attributable to the closed IPC—dividing "the amount of total duties exempted on the IPC closed during the [period of investigation] over the total quantity of exports made under that closed IPC to calculate a per-unit duty drawback adjustment"—and (2) applying that adjustment to *all* of Assan's sales of subject merchandise. *Remand Results* at 12. As a result, Commerce applied a duty drawback adjustment to certain U.S. sales of merchandise whose export did not contribute to Assan's

receipt of the Turkish duty exemptions used to calculate the adjustment. Commerce stated that this methodology nevertheless "reasonably reflects the duties actually exempted for the exports of subject merchandise made to the United States during the [period of investigation]." *Id.*

The Association disagrees, arguing that Commerce's methodology is not in accordance with 19 U.S.C. § 1677a(c)(1)(B)'s limitation of upward export price adjustments to "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." *See* Ass'n's Br. at 4. The Association argues that Commerce ignored "a temporal aspect of the statute" by applying a per-unit drawback adjustment to increase the calculated price of sales of merchandise whose exportation from Turkey did not yet earn a duty exemption (because their associated IPCs remained open during the period of investigation). *Id.* at 6.

The Government responds that Commerce's application of a duty drawback adjustment to sales under open IPCs was lawful because "the record demonstrates" that with respect to all of Assan's U.S. sales, "a connection exists between the non-payment of import duties and the exportation of subject merchandise to the United States." Gov't Resp. at 7. According to the Government, Commerce's application of a closed IPC–derived duty drawback adjustment to open-IPC U.S. sales is consistent with the Federal Circuit's holding in *Uttam Galva* that § 1677a(c)(1)(B) "requires an adjustment to 'export price' based on the full extent of the duty drawback" and that "[i]t does not impose an additional requirement that the respondent trace particular imported goods to U.S. exports." *Id.* (quoting 997 F.3d at 1197–98).

### *I. Commerce's Revised Duty Drawback Adjustment Is Not in Accordance with Law*

It appears that Commerce's revised methodology impermissibly increased Assan's export price by more than "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B). This is because Commerce calculated a per-unit duty drawback adjustment on the basis of a single closed IPC and applied that adjustment to all of Assan's U.S. sales of subject merchandise, including to sales of merchandise exported under *open* IPCs. *See Draft Remand Results* at 3. Even though certain open-IPC sales did not earn "benefits of the exempted duties," Gov't Resp. at 3, Commerce adjusted its calculation of their U.S. prices as though they did.

There was no clear statutory basis for doing so. Under what the Government acknowledges is Commerce's practice, the amount of exempted duties under an open IPC is zero. *See* Gov't Resp. at 3, 7 ("[A] duty liability remains contingent until an IPC is closed by the Turkish government."). The adjustments to open-IPC sales thus exceed, in their entirety, "the amount" of duties exempted by the Turkish government "by reason of" the open-IPC exports of subject merchandise to the United States. 19 U.S.C. § 1677a(c)(1)(B).

The Government argues that applying the closed-IPC–derived drawback adjustment to open-IPC sales nevertheless "reasonably reflects the duties exempted for the exports of subject merchandise made to the U.S. during the period of investigation." Gov't Resp. at 10. Assan develops this argument further, stating that "Commerce has endorsed a general principle whereby one closed [IPC] is used as a proxy for other IPCs in its drawback calculation," Assan's Resp. to Supp. Qs. at 1, and that "[b]ecause all of Assan's U.S. sales are made pursuant to an IPC, and are thus eligible for a drawback adjustment, application of the calculated per-unit adjustment to all U.S. sales is appropriate and does not involve any 'unrelated' duty liability," Assan's Resp. at 3 (internal quotation marks and citation omitted).

These arguments assert reasonableness but do not demonstrate it: neither the Government nor Assan explains *why* it was reasonable for Commerce to adjust the calculated price of open-IPC sales using a per-unit adjustment derived from duties exempted under a closed IPC. The Government's reference to "duties exempted for the exports of subject merchandise," Gov't Resp. at 10, appears to refer only to duties exempted pursuant to the closure of the closed IPC. This leaves unanswered the question of why Commerce extended an adjustment based on these closed-IPC exempted duties to increase anything more than the calculated price of closed-IPC U.S. sales.

Assan's suggestion that it was reasonable for Commerce to adjust the price of all of Assan's U.S. sales of subject merchandise because all were made pursuant to "an IPC," Assan's Resp. at 3, is similarly unpersuasive. It appears to rest on a tacit assumption that an IPC that is open during the period of investigation will close at some point in the future—such that it is reasonable to treat all IPCs, open or closed, as closed for the purpose of calculating drawback adjust-

ments.[5] But Commerce itself appears to have rejected the validity of this assumption, meaning that "the grounds upon which [Commerce] acted in exercising its powers" are not those upon which Assan suggests that Commerce's "action can be sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). "Commerce's practice," the Government explains, "is to consider the benefits of the exempted duties once an [IPC] is closed." Gov't Resp. at 3; *see also Icdas*, 654 F. Supp. 3d at 1320–21 (collecting Commerce determinations); *see also* Assan's Resp. to Supp. Qs. at 2 (describing Commerce's "requirement that IPCs be 'closed' to be included in the numerator of the per-unit calculation" (internal quotation marks and citation omitted)). An open IPC yields no duty exemptions during the period of investigation—and indeed may never close at all. *See* Assan Questionnaire Resp. at 43.

The court does not read 19 U.S.C. § 1677a(c)(1)(B) to allow deeming the background operation of an IPC scheme to confer exempt status on certain unexempted duties under open IPCs for the narrow purpose of calculating drawbacks. "[T]he statute," the court has explained, "references only import duties, not import duty programs." *Saha Thai Steel Pipe (Public) Co. v. United States*, 33 CIT 1541, 1543 (2009). In other words, Commerce's directive is to predicate drawback adjustments on the exemption of duties—not a likelihood of future exemption through the contingent operation of a foreign government's duty exemption scheme.

Assan further argues that "Commerce properly granted Assan a full adjustment to U.S. price in accordance with its usual practice, i.e.[,] by dividing the amount of the uncollected duty under the closed IPC by Assan's total exports covered by that closed IPC and applying that per-unit adjustment to Assan's U.S. sales." Assan's Br. at 11. But Assan does not substantiate this description of Commerce's "practice" with an example of a past determination or case in which Commerce has applied a uniform per-unit adjustment to increase the calculated price of both closed- and open-IPC sales. As Assan acknowledged at oral argument, this aspect of Commerce's methodology has never been litigated before. *See* Oral Arg. Tr. at 35.

By focusing narrowly on Commerce's initial calculation of the per-unit adjustment, Assan loses sight of the equally important consid-

[5] The Government raised a similar point at oral argument, stating that although Commerce's methodology in this case "could result, in some cases, in a slightly higher duty drawback adjustment, or a slightly lower duty drawback adjustment," applying a uniform adjustment derived from one closed IPC is "probably going to work out right, because Commerce is using the consumption ratios under the closed IPC, which are unlikely to vary much from IPC to IPC." Oral Arg. Tr. at 45. As with Assan's argument, however, this argument rests on an unstated and unsupported assumption that the open IPCs (for which the closed IPC serves as a proxy) will close in the future.

eration of that adjustment's application. Recall that the per-unit adjustment is intended to reflect, as a practical matter, "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B). Even if this adjustment is based on an internally correct numerator and denominator as to one IPC, it may cease to reflect "the amount" of exempted duties if it is subsequently applied to sales of merchandise whose exportation did not earn any duty exemptions at all during the period of investigation. It would be analogously incongruous to apply one taxpayer's properly-calculated deductions to another taxpayer's income. *See* 26 U.S.C. § 161.

The Government, meanwhile, transplants *Uttam Galva* to an inapplicable context. *Uttam Galva* involved an Indian steel producer that imported input materials into India and used those materials together with Indian-origin inputs to produce outputs that were exported to the United States as subject merchandise, resulting in the producer's receipt of duty drawbacks from the Indian government. 997 F.3d at 1195–96. Commerce's drawback adjustment methodology reduced[6] the amount of the export price adjustment based on the estimated proportion of drawback-earning U.S.-bound exports of subject merchandise that incorporated non-dutiable Indian-origin input materials. *Uttam Galva*, 997 F.3d at 1195–96; *see also Uttam Galva*, 42 CIT at __, 311 F. Supp. 3d at 1352–53. The Federal Circuit held that this was unlawful, explaining that "[i]t does not make a difference whether the imported inputs that qualified for a drawback were actually incorporated into goods sold in the exporter's domestic market." *Uttam Galva*, 997 F.3d at 1198. In other words, Commerce failed to implement 19 U.S.C. § 1677a(c)(1)(B) when it reduced an export price adjustment to account for a foreign manufacturing process that incorporated non-dutiable, non-imported inputs into subject merchandise. *See id.* at 1198. Where an importer's country's government exempts duties "by reason of the exportation of the subject merchan-

[6] Commerce did this by "allocat[ing] the import duties exempted or rebated based on the import duty absorbed into, or imbedded in, the overall cost of producing the merchandise under consideration." *Id.* at 1196 (internal quotation marks and citation omitted). Commerce calculated the duty adjustment by dividing the amount of exempted duties by the cost of all production of merchandise, not just the production of U.S.-bound exports. *Uttam Galva Steels Ltd. v. United States*, 42 CIT __, __, 311 F. Supp. 3d 1345, 1352–53 (2018). This, in turn, was based on Commerce's assumption that "imported raw material and the domestically sourced raw material are proportionally consumed in producing the merchandise, whether sold domestically or exported." *Id.* at 1352 (citation omitted). In other words, Commerce diluted the duty drawback adjustment to export price to account for the estimated proportional use of Indian-origin inputs in producing U.S.-bound subject merchandise. *See id.*

dise to the United States," 19 U.S.C. § 1677a(c)(1)(B), Commerce is to adjust export price by the full amount of the exemption—regardless of the destination of the imports that incurred the exempted duties. *See Uttam Galva*, 997 F.3d at 1198.

All parties agree that Commerce avoided the *Uttam Galva* pitfall in this case. *See Remand Results* at 16; Assan's Resp. at 10–11. But § 1677a(c)(1)(B) is not a single-pitfall provision. There are other ways to increase export price by an amount other than "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B). One of them is to increase export price by an amount that includes duties which have been collected and *not* rebated as of the end of the period of investigation—which is precisely what Commerce appears to have done in this remand proceeding. The court accordingly remands the *Remand Results* for Commerce's reconsideration or further explanation of its adjustment calculation methodology.

### *II. Commerce Did Not Adequately Explain Its Determination*

Remand is also warranted for the separate reason that Commerce failed to adequately explain its redetermination. *See Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 41 CIT __, __, 222 F. Supp. 3d 1255, 1269 (2017). Commerce is required to provide "an explanation of the basis for its determination that addresses relevant arguments, made by interested parties who are parties to the investigation or review." 19 U.S.C. § 1677f(i)(3)(A); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1357 (Fed. Cir. 2005) (holding that § 1677f(i) codifies the *State Farm* standard). And while the court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)), Commerce's explanation "must reasonably tie the determination under review to the governing statutory standard and to the record evidence by indicating . . . what facts the agency is finding," *CS Wind Viet. Co*, 832 F.3d at 1376.

The *Remand Results* do not meet this standard because Commerce did not substantively address two of the Association's relevant arguments. First, the Association argued that Commerce's drawback methodology improperly applied a closed IPC–derived adjustment to open-IPC sales:

> By assigning to each U.S. sale a per-unit drawback amount that applies only to exports made pursuant to [the closed IPC], regardless of whether Assan exported that U.S. sale pursuant to [the closed IPC], the Department . . . exaggerates the duty drawback applicable to Assan's U.S. sales. Because the Department has identified no record evidence that Assan exported all its U.S. sales pursuant to [the closed IPC], the Department's methodology for Assan's reported per-unit drawback is unsupported by substantial evidence.

Ass'n's Cmts. on *Draft Remand Results* at 4. Commerce acknowledged this argument in its "Petitioner's Comments" summary and restated it as follows: "By assigning to each U.S. sale a per-unit drawback amount that applies only to exports made pursuant to the closed IPC, regardless of whether Assan exported that U.S. sale pursuant to that closed IPC, Commerce exaggerates the duty drawback applicable to Assan's U.S. sales." *Remand Results* at 10.

But instead of addressing the Association's argument directly, Commerce devoted its response to a discussion of how the record "demonstrate[s] that a reasonable link exists between the duties imposed and those rebated or exempted." *Id.* at 11 (citing *Maverick Tube Corp. v. Toscelik Profil ve Sac Endustrisi A.S.*, 861 F.3d 1269, 1274 (Fed. Cir. 2017)). Referring repeatedly to *Uttam Galva* (which, as explained above, does not apply to the Association's challenge here), Commerce stated (twice, verbatim) that its methodology "reasonably reflects the duties actually exempted for the exports of subject merchandise made to the United States during the [period of investigation]." *Id.* at 12–14. Commerce thus misconstrued the Association's argument as applying to a link between duties imposed and duties exempted. In fact, the Association's argument did not concern the nature of Turkish import duties or their links to exported merchandise. What the Association did challenge was the link between duties exempted and adjustments applied. Perhaps because of this misreading, Commerce did not acknowledge the Association's argument regarding the permissibility of applying a closed-IPC–derived duty drawback adjustment to open-IPC U.S. sales.

Commerce instead raised the specter of "tracing"—whereby a methodology runs afoul of *Uttam Galva* by attempting to match imported inputs to exported outputs—and claimed that the Association's proposed alternative methodology invokes that concern. *See Remand Results* at 12. But this kind of "tracing" is not relevant here. The Association has not advanced an alternative methodology whereby the amount of Commerce's duty drawback adjustment would depend

on the nature of the pre-production sources of Assan's inputs. *See* Ass'n's Cmts. on *Draft Remand Results* at 7. What the Association recommends "tracing" is the link between the exemption of a duty and the U.S. sale that earns a corresponding drawback adjustment. *Id.* That kind of tracing was not at issue in *Uttam Galva*, and the Federal Circuit accordingly did not address it.

Avoidance of the type of "tracing" referenced by the Federal Circuit in *Uttam Galva* has a decades-long history in Commerce's determinations. It stems from Commerce's reasonable need to relieve itself "of the difficult, if not impossible, task of determining whether the raw materials used in producing the exported merchandise actually came from imported or domestic sources." *Far E. Mach. Co. v. United States*, 12 CIT 428, 431, 688 F. Supp. 610, 612 (1988). Based on Commerce's explanation here, however, the court cannot discern how the task the Association suggests that Commerce undertake—attributing specific adjustments to specific duty exemptions—would implicate this concern. Commerce has not established that linking U.S. sales to corresponding IPCs is as Herculean a task as linking, for example, specific imported physical steel coils to specific exported physical steel pipes (by analyzing a production process in a foreign country). *See Avesta Sheffield, Inc. v. United States*, 17 CIT 1212, 1216, 838 F. Supp. 608, 610 (1993). It is indeed a task that Commerce has suggested that it is capable of completing in this case, dividing as it did "the amount of total duties exempted on the IPC closed during the POI over the total quantity of exports made under that closed IPC to calculate a per-unit duty drawback adjustment." *Remand Results* at 12; *see also* Assan's Questionnaire Resp. at 61 ("As noted above, all duties are tracked on a sales specific basis in . . . Assan's accounting systems.").

Second, Commerce did not address the Association's relevant argument that duty exemptions pursuant to the closed IPC do not all constitute exemptions "by reason of the exportation of the subject merchandise to the United States," 19 U.S.C. § 1677a(c)(1)(B), because, as summarized by Commerce, "the closed IPC . . . includes export destinations other than the United States as well as exports made outside of the [period of investigation]." *Remand Results* at 10; Ass'n's Cmts. on *Draft Remand Results* at 4–5. Commerce made no

mention[7] of this specific statutory argument beyond this summary—this omission contravenes the text of 19 U.S.C. § 1677f(i)(3)(A).

## CONCLUSION

For the reasons described above, the court remands the *Remand Results* for Commerce to (1) reconsider or further explain its duty drawback calculation methodology in light of the statutory constraints imposed by 19 U.S.C. § 1677a(c)(1)(B), and (2) respond to the arguments raised by the Association in its comments on the *Draft Remand Results*.

The court does not direct a result on remand. Commerce need not adopt, for instance, the Association's proposed drawback methodology. Commerce could adopt an altogether different methodology. Commerce could also leave its methodology unchanged and attempt to explain the reasonableness of its determination. If Commerce chooses this latter path, it must explain why 19 U.S.C. § 1677a does not prohibit adjustments to the price of open-IPC sales using a per-unit adjustment derived from closed-IPC sales—why, in other words, the universal application of that adjustment to all sales of subject merchandise does not increase "the price used to establish export price" by more than "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B).

The court does not reach the merits of any other unresolved issue in this litigation. Nor does the court opine on any questions of waiver or exhaustion pertaining to those issues. *See, e.g.*, Gov't Resp. at 12; Ass'n's Resp. at 8. If Commerce's second redetermination results in a dumping margin for Assan that is above the *de minimis* level, the court will consider those issues (and related questions) as necessary. It is hereby:

**ORDERED** that Commerce shall file its second remand redetermination with the court within ninety days of the date of this opinion. The timeline for filings and comments regarding the second remand redetermination shall proceed according to USCIT Rule 56.2(h).

**SO ORDERED.**

[7] Commerce's statement that "[t]he statute does not impose an additional requirement that the respondent trace particular imported goods to U.S. exports," Remand Results at 13, is not a response to the Association's argument. Whether a particular *imported* good was exported to the United States is one question; whether goods *exported* under an IPC were exported to countries other than the United States is another. 19 U.S.C. § 1677a(c)(1)(B) (emphasis added).

Dated: April 11, 2024
New York, New York

*/s/ Gary S. Katzmann*
Gary S. Katzmann, Judge

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