U.S. Customs and Border Protection

GRANT OF "LEVER-RULE" PROTECTION

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

ACTION: Notice of grant of application for "Lever-Rule" protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted an application from The Procter & Gamble Co., ("Procter & Gamble") seeking "Lever-Rule" protection against importations of certain anti-dandruff shampoo and conditioner products manufactured in Germany that bear the federally registered and recorded "HEAD & SHOULDERS" trademark. Notice of the receipt of an application for "Lever-rule" protection was published in the March 13, 2024, issue of the *Customs Bulletin*.

FOR FURTHER INFORMATION CONTACT: Morgan McPherson, Intellectual Property Enforcement Branch, Regulations & Rulings, Morgan.N.McPherson@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has granted "Lever-rule" protection for the following anti-dandruff shampoo and conditioner products manufactured abroad and intended for sale in countries outside the United States, that bear the "HEAD & SHOULDERS" trademark (U.S. Trademark Registration No. 0,729,556 / CBP Recordation No. TMK 22–00962[1]):

(1) HEAD & SHOULDERS® Classic Clean 2 in 1 Shampoo & Conditioner products made in Germany and intended for sale in Albania, Bosnia & Herzegovina, Bulgaria, Greece, Kosovo, Moldova, Montenegro, Romania, and Serbia; Procter & Gamble seeks protection for the 200ml, 225ml, 330ml, 360ml, and 400ml product sizes.

[1] We note that Procter & Gamble submitted their application for "Lever-rule" protection for certain products bearing the protected "HEAD & SHOULDERS" wordmark (U.S. Trademark Registration No. 0,729,556) under CBP Recordation No. TMK 12–00804, which expired on July 3, 2022. Procter & Gamble re-applied for, and received, protection for U.S. Trademark Registration No. 0,729,556 on September 8, 2022, which was assigned the new CBP Recordation No. TMK 22–00962.

(2) HEAD & SHOULDERS® Classic Clean Shampoo & Conditioner products made in Germany and intended for sale in Denmark, Finland, Norway and Sweden; Procter & Gamble seeks protection for the 90ml, 200ml, 225ml, 250ml, 280ml, 330ml, and 400ml product sizes.

In accordance with *Lever Bros. Co. v. United States*, 981 F.2d 1330 (D.C. Cir. 1993), CBP has determined that the above-referenced gray market HEAD & SHOULDERS anti-dandruff shampoo and conditioner products manufactured abroad and not labelled for sale in the United States differ physically and materially from HEAD & SHOULDERS anti-dandruff shampoo and conditioner products authorized for sale in the United Sates with respect to the following product characteristics: compliance with regulatory requirements, packaging features, and chemical composition.

ENFORCEMENT

Importation of the foreign-manufactured HEAD & SHOULDERS products referenced *supra*, which are not labelled for sale in the U.S., are restricted, unless the labeling requirements of 19 CFR 133.2 (b) are satisfied.

Dated: November 21, 2024

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

COMMERCIAL CUSTOMS OPERATIONS ADVISORY COMMITTEE

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

ACTION: Committee management; notice of open Federal Advisory Committee meeting.

SUMMARY: The Commercial Customs Operations Advisory Committee (COAC) will hold its quarterly meeting on Wednesday, December 11, 2024, in Washington, DC. The meeting will be open to the public via webinar only.

DATES: The COAC will meet on Wednesday, December 11, 2024, from 1:00 p.m. to 5:00 p.m. Eastern Standard Time (EST). Please note the meeting may close early if the committee has completed its business. Comments must be submitted in writing no later than December 6, 2024.

ADDRESSES: The meeting will be open to the public via webinar only. The webinar link will be posted by 5:00 p.m. EST on

November 29, 2024, at *https://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings.* For information or to request special assistance for the meeting, contact Mrs. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection, at (202) 344–1440, as soon as possible.

Comments may be submitted by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov. Search for Docket Number USCBP–2024–0027.* To submit a comment, click the "Comment" button located on the top-left hand side of the docket page.

• *Email: tradeevents@cbp.dhs.gov.* Include Docket Number USCBP–2024–0027 in the subject line of the message.

Comments must be submitted in writing no later than December 6, 2024, and must be identified by Docket No. USCBP–2024–0027. All submissions received must also include the words "Department of Homeland Security." All comments received will be posted without change to *https://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings* and *www.regulations.gov.* Therefore, please refrain from including any personal information you do not wish to be posted. You may wish to view the Privacy and Security Notice, which is available via a link on *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mrs. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229, (202) 344–1440; or Ms. Felicia M. Pullam, Designated Federal Officer, at (202) 344–1440 or via email at *tradeevents@cbp.dhs.gov*.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the authority of the Federal Advisory Committee Act, Title 5 U.S.C., ch. 10. The COAC provides advice to the Secretary of the Department of Homeland Security, the Secretary of the Department of the Treasury, and the Commissioner of U.S. Customs and Border Protection (CBP) on matters pertaining to the commercial operations of CBP and related functions within the Department of Homeland Security and the Department of the Treasury.

The COAC is committed to ensuring all participants have equal access regardless of disability status. If you require a reasonable accommodation due to a disability to fully participate, please contact Mrs. Latoria Martin at (202) 344–1440 as soon as possible.

Please feel free to share this information with other interested members of your organization or association.

To facilitate public participation, we are inviting public comment on the issues the committee will consider prior to the formulation of recommendations as listed in the AGENDA section below.

There will be a public comment period after each subcommittee update during the meeting on December 11, 2024. During the meeting, comments may be submitted via the trade events mailbox at *tradeevents@cbp.dhs.gov* or through the Microsoft Teams chat feature. Please note the public comment period for speakers may end before the time indicated on the schedule that is posted on the CBP web page: *http://www.cbp.gov/trade/stakeholder-engagement/coac.*

Agenda

The COAC will hear from the current subcommittees on the topics listed below:

1. The Intelligent Enforcement Subcommittee will provide updates on the work completed and topics discussed in its working groups as well as present proposed recommendations for the COAC's consideration. The Antidumping/Countervailing Duty (AD/ CVD) Working Group will provide updates regarding its work and discussions on importer compliance with AD/CVD and other trade remedy measures and requirements. The Intellectual Property Rights (IPR) Process Modernization Working Group anticipates providing updates concerning progress associated with its proposed recommendations specific to IPR enforcement and facilitation. The Forced Labor Working Group (FLWG) will provide updates on continued discussions regarding trade outreach, clarification of requirements, and proposed recommendations. The FLWG reports that it will continue to provide CBP with input as CBP rolls out a case management portal. The Bond Working Group remained on hiatus status since the last public meeting.

2. The Next Generation Facilitation Subcommittee will provide updates on all its existing working groups. The Automated Commercial Environment (ACE) 2.0 Working Group was focused on completing discussions on the Concept of Operations document regarding scenarios for Electronic Export Manifests (EEM) and a portal for infrequent importers, along with the status of previous recommendations proposed earlier this term. The Broker Modernization Working Group (BMWG) remains dedicated to the enhancement of the end user experience and improving the administration of the Customs Broker Licensing Exam (CBLE). This quarter, the Modernized Entry Processes Working Group (MEPWG) continues its National Customs Automation Program (NCAP) discussions and will provide updates on its efforts concerning the reconciliation test. The remaining working group, the Customs Interagency Industry Working Group (CIIWG), was not active this past quarter but will provide a report on topics that the working group will focus on in the coming quarter.

3. The Secure Trade Lanes Subcommittee will provide updates on its seven active working groups: the Centers Working Group, the Cross-Border Recognition Working Group, the De Minimis Working Group, the Export Modernization Working Group, the FTZ/Warehouse Working Group, the Pipeline Working Group, and the Trade Partnership and Engagement Working Group. The Centers Working Group consolidated its review of the Centers' communications functions into the Structure Sub-Working Group and the Operations Sub-Working Group. The Centers Working Group as a whole, through these two sub-working groups, continues to evaluate the structure and operations of the Centers to enhance their effectiveness, increase transparency, and build stronger communities within CBP and with the Trade. The Cross-Border Recognition Working Group is evaluating whether all deliverables outlined in the Statement of Work have been achieved to determine next steps. CBP has formed a Task Force to assist the De Minimis Working Group regarding the timeframe for submitting de minimis shipments. The De Minimis Working Group, via the Task Force, intends to present proposed recommendations at the December quarterly COAC meeting. The Export Modernization Working Group has continued its work on the Electronic Export Manifest Pilot Program and the effects of progressive filing by the shipper to continuously update export information on successive dates, rather than on a specific date. The Export Modernization Working Group is also working on previous proposed recommendations to determine if new proposed recommendations need to be made and is reviewing the status of proposed recommendations that have not been finalized. The Drawback Task Force, within the Export Modernization Working Group, has continued discussions around COAC-approved recommendations that are in the process of being implemented from last quarter. They are also conducting an analysis of program statistics in the areas of streamlining drawback ruling processes, reviewing compliance issues, and examining areas to maximize resources. The FTZ/Warehouse Working Group continues to review 19 CFR part 146, explore areas in which the Customs-Trade Partnership Against Terrorism (CTPAT) program can be expanded, and consider how to modernize ACE functionality for Foreign Trade Zones (FTZs), and it anticipates presenting proposed recommendations for the COAC's consideration at the December public meeting. The Pipeline Working Group has continued discussing the most appropriate commodities for and potential users of Distributed Ledger Technology to engage in the contemplated pilot for tracking pipeline-borne goods. The Global Interoperability Stan-

dard (GIS) Information Collection **Federal Register** Notice (FRN) was published on September 3, 2024 (89 FR 71381), and comments were accepted through November 4, 2024. The Pipeline Working Group has no proposed recommendations for this quarter.

Meeting materials will be available on December 2, 2024, at: *http://www.cbp.gov/trade/stakeholder-engagement/coac/coac-public-meetings.*

FELICIA M. PULLAM,
Executive Director,
Office of Trade Relations.

CUSTOMS BROKER PERMIT USER FEE PAYMENT FOR 2025

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

ACTION: General notice.

SUMMARY: This document provides notice to customs brokers that the annual user fee that is assessed for each permit held by a customs broker, whether an individual, partnership, association, or corporation, is due no later than January 31, 2025. Pursuant to fee adjustments required by the Fixing America's Surface Transportation Act (FAST Act) and the U.S. Customs and Border Protection (CBP) regulations, the customs broker permit user fee payable for calendar year 2025 will be $180.57.

DATES: Payment of the 2025 Customs Broker Permit User Fee is due no later than January 31, 2025.

FOR FURTHER INFORMATION CONTACT: Mohammad O. Qureshi, Chief, Broker Management Branch, Office of Trade, (202) 909–3753, or *mohammad.o.qureshi@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

Pursuant to section 111.96 of title 19 of the Code of Federal Regulations (CFR) (19 CFR 111.96(c)), U.S. Customs and Border Protection (CBP) assesses an annual user fee for each customs broker permit granted to an individual, partnership, association, or corporation. The CBP regulations provide that this fee is payable each calendar year for a national permit held by a customs broker and must be paid by the due date published annually in the **Federal Register**. *See* 19 CFR 24.22(h) and (i); 19 CFR 111.96(c).

Section 24.22 of title 19 of the CFR (19 CFR 24.22) sets forth the terms and conditions for when fees for certain services, including specific customs user fees, are required. The specific customs user fee amounts that appear in 19 CFR 24.22 are not the actual fees but represent the base year amounts that are subject to adjustment each fiscal year in accordance with the Fixing America's Surface Transportation Act (FAST Act) (Pub. L. 114–94, December 4, 2015). Section 32201 of the FAST Act amended section 13031 of the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 (19 U.S.C. 58c) by requiring the Secretary of the Treasury to adjust certain customs COBRA user fees and corresponding limitations to reflect certain increases in inflation. Paragraph (k) of section 24.22 of title 19 of the CFR (19 CFR 24.22(k)) sets forth the methodology to adjust fees for inflation and to determine the change in inflation, including the factor by which the fees and limitations will be adjusted, if necessary.

Customs brokers are subject to an annual customs broker permit user fee calculated using the base year amount in appendix A to 19 CFR part 24, as adjusted by the terms in 19 CFR 24.22(k). *See* 19 U.S.C. 58c(a)(7) and 19 CFR 24.22(h). In accordance with 19 CFR 24.22, CBP determines annually whether an adjustment to the fees and limitations is necessary and publishes a **Federal Register** notice specifying the amount of the fees and limitations for each fiscal year. On July 22, 2024, CBP published a **Federal Register** notice, entitled Customs User Fees To Be Adjusted for Inflation in Fiscal Year 2025 (CBP Decision 24–11), which announced, among other fee adjustments, that the annual customs broker permit user fee will increase to $180.57 for calendar year 2025. *See* 89 FR 59126.

Thus, as required by 19 CFR 24.22, CBP provided notice in the **Federal Register** of the annual fee amount at least 60 days prior to the date that the payment is due for each customs broker national permit. This document notifies customs brokers that, for calendar year 2025, the due date for payment of the annual customs broker permit user fee is January 31, 2025. If a customs broker fails to pay the annual customs broker permit user fee by January 31, 2025, the national permit is revoked by operation of law. *See* 19 CFR 111.45(b) and 111.96(c).

Customs brokers may either submit the fee through the eCBP portal or submit the fee at the processing Center, as defined in 19 CFR 111.1, in accordance with the remittance procedures in 19 CFR 24.22(i). CBP encourages customs brokers to pay the annual customs broker permit user fee electronically via the eCBP portal, located at *https://e.cbp.dhs.gov/brokers/#/home.* Customs brokers who are first time users of the eCBP portal must create a *Login.gov* account. Instructions and training resources, such as user and quick reference guides, for customs brokers on how to create a *Login.gov* account and

how to use the eCBP portal can be found on CBP's website at *https://www.cbp.gov/trade/eCBP.*

ROSE M. BROPHY,
Acting Executive Assistant Commissioner,
Office of Trade.

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Entry of Articles for Exhibition

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

ACTION: 30-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 December 23, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Please submit written comments and/or suggestions in English. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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 proposed information collection was previously published in the **Federal Register** (89 FR 59921) on July 24, 2024, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. 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: Entry of Articles for Exhibition.

OMB Number: 1651–0037.

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

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: Goods entered for the purpose of exhibit at fairs, or for use in constructing, installing, or maintaining foreign exhibits at a designated trade fair may be entered free of duty under 19 U.S.C. 1752. In order to substantiate that the goods qualify for duty-free treatment, pursuant to 19 CFR part 147, the consignee of the merchandise must provide information to CBP about the imported goods, under the procedures discussed in as provided in 19 CFR 147.11, and using the form of entry specified in 19 CFR 147.11(c). Without the required information CBP will not be able to determine if the goods qualify for duty free treatment. A trade fair entry does not require the payment of taxes or fees except for

the Harbor Maintenance Fee (HMF), which is required. Moreover, trade Fair entries are not exempt from HMF pursuant to 19 CFR 24.24(c). "The collection of information is made upon arrival at the port of the fair on a special form of entry, 19 CFR 147.11(c)."

Type of Information Collection: Articles for Exhibition.

Estimated Number of Respondents: 50.

Estimated Number of Annual Responses per Respondent: 50.

Estimated Number of Total Annual Responses: 2,500.

Estimated Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 833.

Dated: November 19, 2024.

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

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Application for Exportation of Articles Under Special Bond (CBP Form 3495)

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

ACTION: 30-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 December 23, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.*

Please submit written comments and/or suggestions in English. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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 proposed information collection was previously published in the **Federal Register** (89 FR 76865) on September 19, 2024, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. 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: Application for Exportation of Articles under Special Bond.

OMB Number: 1651–0004.

Form Number: 3495.

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

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: CBP Form 3495, *Application for Exportation of Articles Under Special Bond,* is an application for exportation of articles entered under temporary bond pursuant to chapter 98, subchapter XIII, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202), and 19 CFR 10.38. CBP Form 3495 is used by importers to notify CBP that the importer intends to export goods designated for examination that were subject to a duty exemption based on a temporary stay in this country. It also serves as a permit to export in order to satisfy the importer's obligation to export the same goods and thereby get a duty exemption. This form is accessible at: *https://www.cbp.gov/newsroom/publications/forms?title=3495&=Apply.*

Type of Information Collection: Form 3495.

Estimated Number of Respondents: 500.

Estimated Number of Annual Responses per Respondent: 30.

Estimated Number of Total Annual Responses: 15,000.

Estimated Time per Response: 8 minutes.

Estimated Total Annual Burden Hours: 2,000.

Dated: November 19, 2024.

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

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Cost Submission (Form 247)

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

ACTION: 30-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 December 27, 2024, to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Please submit written comments and/or suggestions in English. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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 proposed information collection was previously published in the **Federal Register** (89 FR 76864) on September 19, 2024, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. 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: Cost Submission.

OMB Number: 1651–0028.

Form Number: 247.

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

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: The information collected on CBP Form 247, Cost Submission, is used by CBP to assist in correctly calculating the duty on imported merchandise. This form includes details on actual costs and helps CBP determine which costs are dutiable and which are not.

This collection of information is provided for by subheadings 9801.00.10, 9802.00.40, 9802.00.50, 9802.00.60 and 9802.00.80 of the Harmonized Tariff Schedule of the United States (HTSUS), and by 19 U.S.C. 1508 through 1509, 19 CFR 10.11–10.24, 19 CFR 141.88 and 19 CFR 152.106.

CBP Form 247 can be found at: http://www.cbp.gov/xp/cgov/toolbox/forms/.

Type of Information Collection: Form 247.

Estimated Number of Respondents: 1,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 1,000.

Estimated Time per Response: 50 hours.

Estimated Total Annual Burden Hours: 50,000.

Dated: November 22, 2024.

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

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Establishment of a Bonded Warehouse (Bonded Warehouse Regulations)

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

ACTION: 30-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 December 27, 2024 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Please submit written comments and/or suggestions in English. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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 proposed information collection was previously published in the **Federal Register** (89 FR 74281) on September 12, 2024, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. 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: Establishment of a Bonded Warehouse (Bonded Warehouse Regulations).

OMB Number: 1651–0041.

Current Actions: This submission will extend the expiration date validity without a change to the information collected or method of collection.

Type of Review: Extension (w/o change).

Affected Public: Businesses.

Abstract: Owners or lessees desiring to establish a bonded warehouse must make written application to the U.S. Customs and Border Protection (CBP) port director of the port where the warehouse is located. The application must include the warehouse location, a description of the premises, and an indication of the class of bonded warehouse permit desired. Owners or lessees desiring to alter or to relocate a bonded

warehouse may submit an application to the CBP port director of the port where the facility is located. The authority to establish and maintain a bonded warehouse is set forth in 19 U.S.C. 1555, and provided for by 19 CFR 19.2, 19 CFR 19.3, 19 CFR 19.6, 19 CFR 19.14, and 19 CFR 19.36.

Type of Information Collection: Bonded Warehouse Application.

Estimated Number of Respondents: 198.

Estimated Number of Annual Responses per Respondent: 47.

Estimated Number of Total Annual Responses: 9,306.

Estimated Time per Response: 32 minutes.

Estimated Total Annual Burden Hours: 4,963.

Dated: November 22, 2024.

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

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Declaration of Ultimate Consignee That Articles Were Exported for Temporary Scientific or Educational Purposes

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

ACTION: 30-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 December 27, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Please submit written comments and/or suggestions in English.

Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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 proposed information collection was previously published in the **Federal Register** (89 FR 78325) on September 25, 2024, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. 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: Declaration of Ultimate Consignee That Articles Were Exported for Temporary Scientific or Educational Purposes.

OMB Number: 1651–0036.

Form Number: N/A.

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

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: The Declaration of the Ultimate Consignee that Articles were Exported for Temporary Scientific or Educational Purposes is used to document duty free entry under conditions when articles are temporarily exported solely for scientific or educational purposes. This declaration is provided for under 19 U.S.C. 1202, HTSUS Subheading 9801.00.40, and 19 CFR 10.67(a)(3) which requires a declaration from the ultimate consignee stating that the articles were sent from the United States solely for temporary scientific or educational use and for no other use abroad than for exhibition, examination, or experimentation; and that the articles are being returned without having been changed in condition in any manner, except by reason of their bona fide use as described in the declaration. This declaration is submitted to CBP by the importer or the agent of the importer and is used by CBP to determine whether the imported articles should be free of duty.

Type of Information Collection: Declaration that Articles were Exported for Temporary Scientific or Educational Purposes.

Estimated Number of Respondents: 55.

Estimated Number of Annual Responses per Respondent: 3.

Estimated Number of Total Annual Responses: 165.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 27.

Dated: November 22, 2024.

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

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Declaration of Unaccompanied Articles (CBP Form 255)

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

ACTION: 30-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 December 27, 2024 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Please submit written comments and/or suggestions in English. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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 proposed information collection was previously published in the **Federal Register** (89 FR 74281) on September 12, 2024, allowing for a 60-day comment period. This notice allows for an additional

30 days for public comments. 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: Declaration of Unaccompanied Articles (CBP Form 255).

OMB Number: 1651–0030.

Form Number: 255.

Current Actions: This submission will renew the expiration validity, without a change to the information requested or method of collection.

Type of Review: Extension (without change).

Affected Public: Individuals.

Abstract: CBP Form 255, Declaration of Unaccompanied Articles, is completed by travelers arriving in the United States either directly or indirectly from the U.S. Virgin Islands, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands who are declaring merchandise purchases while visiting these locations which are to be sent from these insular possessions at a later date. It is the only means whereby the CBP officer, when the traveler arrives, can apply the exemptions or 5 percent flat rate of duty to all of the traveler's purchases.

Type of Information Collection: CBP Form 255.

Estimated Number of Respondents: 7,500.

Estimated Number of Annual Responses per Respondent: 2.

Estimated Number of Total Annual Responses: 15,000.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 1,250.

Dated: November 22, 2024.

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

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Application and Approval To Manipulate, Examine, Sample or Transfer Goods (CBP Form 3499)

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

ACTION: 30-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 December 27, 2024 to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Please submit written comments and/or suggestions in English. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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 proposed information collection was previously published in the **Federal Register** (89 FR 76866) on September 19, 2024, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. 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: Application and Approval to Manipulate, Examine, Sample or Transfer Goods (CBP Form 3499).

OMB Number: 1651–0006.

Form Number: 3499.

Current Actions: This submission will renew the expiration date while updating the burden hours to reflect current usage. No change to information collected or method of collection.

Type of Review: Extension (with change).

Affected Public: Businesses.

Abstract: CBP Form 3499, "Application and Approval to Manipulate, Examine, Sample or Transfer Goods," is used as an application to perform various operations on merchandise located at a Customs and Border Protection (CBP) approved bonded facility. This form is filed by importers, bonded warehouse proprietors, consignees, transferees, or owners of merchandise, and is subject to approval by the port director. The data requested on the form identifies the merchandise for which action is being sought and specifies the operation that is to be

performed. The form may also be approved as a blanket application to manipulate goods for a period of up to one year for continuous or repetitive manipulation. CBP Form 3499 is provided for by 19 U.S.C. 1562, and 19 CFR 158.43, 19.8, 19.11 and is accessible at: *https://www.cbp.gov/newsroom/publications/forms?title=3499&=Apply.*

Type of Information Collection: Form 3499.

Estimated Number of Respondents: 4,200.

Estimated Number of Annual Responses per Respondent: 60.

Estimated Number of Total Annual Responses: 252,000.

Estimated Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 25,200.

Dated: November 22, 2024.

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

AGENCY INFORMATION COLLECTION ACTIVITIES:

Extension; Documents Required Aboard Private Aircraft

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

ACTION: 30-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 December 27, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Please submit written comments and/or suggestions in English.

Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

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 proposed information collection was previously published in the **Federal Register** (89 FR 59921) on July 24, 2024, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. 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: Documents Required Aboard Private Aircraft.

OMB Number: 1651–0058.

Current Actions: CBP proposes to extend the expiration date of this information collection without a change to the burden hours or information collected.

Type of Review: Extension (without change).

Affected Public: Individuals.

Abstract: In accordance with 19 CFR 122.27(c), a commander of a private aircraft arriving in the U.S. must present several documents to CBP officers for inspection. These documents include: (1) a pilot certificate/license; (2) a medical certificate; and (3) a certificate of registration. CBP officers use the information on these documents as part of the inspection process for private aircraft arriving from a foreign country. This presentation of information is authorized by 19 U.S.C. 1433, as amended by Public Law 99–570.

Type of Information Collection: Documents aboard a private aircraft.

Estimated Number of Respondents: 120,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 120,000.

Estimated Time per Response:.0166.

Estimated Total Annual Burden Hours: 1,992.

Dated: November 22, 2024.

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

U.S. Court of International Trade

Slip Op. 24–129

NEW AMERICAN KEG, d/b/a AMERICAN KEG COMPANY, Plaintiff, v. UNITED STATES, Defendant, and NINGBO MASTER INTERNATIONAL TRADE CO., LTD., and GUANGZHOU JINGYE MACHINERY CO., LTD., Defendant-Intervenors.

Before: M. Miller Baker, Judge
Court No. 20–00008

[The court sustains Commerce's third remand redetermination.]

Dated: November 25, 2024

Whitney M. Rolig, *Andrew W. Kentz*, and *Nathaniel Maandig Rickard*, Picard Kentz & Rowe LLP, Washington, DC, on the comments for Plaintiff.

Brian M. Boynton, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; and *Ashley Akers*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, on the comments for Defendant. Of counsel on the comments was *Vania Wang*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, Washington, DC.

Gregory S. Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, Washington, DC, on the comments for Defendant-Intervenors.

OPINION

***Baker*, Judge:**

This long-running antidumping saga involving steel beer kegs from China returns for a fourth time. In its last visit, domestic producer American Keg challenged the Department of Commerce's decision to place contemporaneous (2018) Mexican wage data on the record to determine surrogate labor costs for Chinese producer and mandatory respondent Ningbo Master. *See* Slip Op. 24–11, at 3, 2024 WL 379968, at *1 (CIT Jan. 31, 2024) (*Am. Keg III*).[1] The court held that the agency abused its discretion in so doing. Contrary to the stated rationale, *see* Appx4436, informational accuracy did not require that step when the non-contemporaneous (2016) Brazilian wage data on the existing record—as adjusted to 2018 using that country's consumer price index (CPI), also on the record—were accurate. *Am. Keg III*, Slip Op. 24–11, at 4, 2024 WL 379968, at *1.

[1] The court presumes the reader's familiarity with its previous opinions. *See also* Slip Op. 21–30, 2021 WL 1206153 (CIT Mar. 23, 2021) (*Am. Keg I*); Slip Op. 22–106, 2022 WL 4363320 (CIT Sept. 13, 2022) (*Am. Keg II*).

The court also held that the Department abused its discretion insofar as it reopened the record because of its preference for data from countries producing identical (rather than merely comparable) merchandise.[2] Agency policy is to use information from nations making the latter when there are "difficulties" with figures from countries manufacturing the former, *id.* at 4, 6, 2024 WL 379968, at *2, and because the burden of creating an adequate record lies with the parties, *id.* at 4–5, 2024 WL 379968, at *2. Here, there were difficulties with the existing Mexican labor information because it was non-contemporaneous (2016), *id*. at 4, 2024 WL 379968, at *2, and Ningbo Master failed to place contemporaneous statistics from that nation or the applicable CPI inflator on the record, Appx4485.

On remand, Commerce found the non-contemporaneous Brazilian wage information suitable for determining Ningbo Master's margin and adjusted it using that country's CPI inflator that was also on the record. Appx4482. At the same time, the Department rejected the company's request to reopen the record to allow submission of a Mexican CPI inflator to adjust the latter country's wage data. Appx4485. It reasoned that the former nation's figures were "equally reliable," save for the agency's "general preference" for a country producing identical merchandise. Appx4484. As the applicable CPI inflator on the existing record could make those statistics contemporaneous, it was unnecessary to collect new information. Appx4485.

The agency also rejected Ningbo Master's argument that the Mexican labor data are the best available information, either with the Brazil CPI inflator or with no adjustment at all. Appx4487. It explained that the record does not show whether "the rate of inflation experienced" by those countries is the same. Appx4488. Moreover, the adjusted Brazilian wage rate data satisfied the agency's contemporaneity preference, while the unadjusted Mexican figures did not. *Id*.

Ningbo Master now contends that Commerce's decision not to reopen the record to add a Mexican CPI inflator was arbitrary and capricious. ECF 99, at 5–15. The company also assails the Department's reliance on the Brazilian wage figures and CPI inflator, repeating its argument that the non-contemporaneous Mexican wage information—even without an inflator—is still the "best available information" on the record such that use of the former is not supported by substantial evidence. *Id.* at 15–22. As explained below, the court rejects both lines of attack and sustains the agency's redetermination.

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[2] Mexico produces identical steel kegs, but Brazil only produces "comparable" products. *See id.* at 3, 2024 WL 379968, at *1.

I

In challenging Commerce's decision not to reopen the record and use a Mexican CPI inflator to adjust that nation's wage information, Ningbo Master asserts several theories. It first argues the failure to allow the submission of this new data was arbitrary because the Department sometimes exercises its discretion to do so. *Id*. at 5–9.

But discretionary authority need not be used in every case; instead, it suffices if the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (cleaned up). That's exactly what happened here: Commerce explained that it was unnecessary to reopen the record to inflate the Mexican wage figures when the existing Brazilian information and applicable CPI adjustor suited the agency's purposes. Appx4485.

The company also contends that "Commerce has a frequent practice" of itself placing CPI inflators on the public record. ECF 99, at 9–10. The company cites several such examples. *Id.* at 10–13. It asserts that the Department's failure to do so here is arbitrary because it was "contrary to well-established practice." *Id*. at 13. Those instances, however, did not involve *reopening* a record after remand when the existing one "allow[ed] an accurate margin calculation." *Am. Keg III*, Slip Op. 24–11, at 5, 2024 WL 379968, at *2. Ningbo Master is in the "awkward position [of] argu[ing] that Commerce abused its discretion by not relying on evidence that [the company] itself failed to introduce into the record." *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011). As "the burden of creating an adequate record lies with interested parties and not with Commerce," *id*. (cleaned up), the agency reasonably chose to rely on the record built by the parties, which permitted an accurate margin calculation.

In a variation on the same theme, Ningbo Master asserts that the Department acted contrary to normal practice, and thus arbitrarily, by not selecting the existing Mexican wage data as the best available information and then placing that nation's CPI inflator on the record. ECF 99, at 14–15. The company quotes the second remand results, where the agency stated that it

> applies a hierarchy in selecting the most appropriate labor values, does not typically consider the inflator determinative of which data to select, and may place inflators on the record during an administrative proceeding when necessary. Ordinarily, Commerce determines how to inflate the data (if necessary) after the data has been selected.

ECF 99, at 14 (quoting Appx4435–4436).

There are at least two problems with Ningbo Master's argument. To begin with, it relies on reasoning that the court has already rejected. As explained in *American Keg III*, the Department's reopening of the record to use new contemporaneous Mexican wage data was arbitrary because the existing record—created by the parties—allowed for an accurate margin calculation. Slip Op. 24–11, at 4–5, 2024 WL 379968, at *2. It would be just as arbitrary to reopen the record to use a new CPI inflator from that nation to adjust the existing non-contemporaneous Mexican labor rate information.

Moreover, the agency's (since-recanted) reasoning that the company invokes is flawed on its own terms. That discussion cites (*see* Appx4436 nn.38–39) a Commerce notice announcing the methodology for calculating labor value *after* the Department has selected a primary surrogate country. *See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092, 36,094 (Dep't Commerce June 21, 2011) (explaining that the Department "will value [a non-market-economy] respondent's labor input using industry-specific labor costs prevailing *in the primary surrogate country*, as reported in Chapter 6A of the [International Labour Organization] Yearbook of Labor Statistics" under a methodology applying various "filters") (emphasis added); *id.* at 36,094 n.11 (explaining the "filters"). The disputed issue in this case involves an antecedent question: the *selection* of a surrogate country for labor valuation.[3] As discussed below, a different agency practice governs that subject. *See* Import Administration Policy Bulletin 04.1, *Non-Market Economy Surrogate Country Selection Process* (Mar. 1, 2004).

Finally, Ningbo Master maintains that the CPI inflator (based on Brazilian currency, the real) was a mismatch for the wage data from that country (denominated in U.S. dollars) and thus "introduce[d] inaccuracies" that warranted reopening the record. ECF 99, at 15. The Department, however, noted that under its practice, "U.S. dollar–denominated surrogate values should be inflated based on the country in which the expense was incurred, not the currency in which it was reported." Appx4487 (quoting 79 Fed. Reg. 57,047 and accompanying Issues & Decision Memo. at Cmt. 4). The company does not outline the "inaccuracies" that it contends result from this approach, and in any event the agency reasonably explained its choice.

[3] Commerce originally selected Malaysia as the primary surrogate country. Appx3529. The Department has since abandoned that choice as to labor costs, *see* Appx1452– 1457, and instead (finally) settled on Brazil.

II

Ningbo Master argues in the alternative that even if Commerce did not abuse its discretion in declining to reopen the record to allow use of the Mexican CPI, its decision to rely on the Brazilian wage data and inflator is unsupported by substantial evidence. ECF 99, at 15. The company asserts that the Mexican wage data on the record were still the best available information for the margin calculation, either inflated using the Brazilian CPI or with no such adjustment. *Id.* at 20–22.

When, as here, the agency must determine the normal value of a product from a nonmarket-economy country, its "valuation of the factors of production shall be based on the best available information" as to the value of those factors in a nation *with* a market economy. 19 U.S.C. § 1677b(c)(1). Because Congress did not define "best available information," Commerce identified "non-dispositive policy preferences" to guide its selection. *Xiamen Int'l Trade & Indus. Co. v. United States*, 953 F. Supp. 2d 1307, 1312 (CIT 2013). "[T]he Department prefers surrogate[ ] values that are contemporaneous with the period of review, publicly available, product-specific, representative of broad market average prices, and free of taxes and import duties." *Id.* at 1312–13. The agency also has a general preference for surrogate values from producers of identical goods, but will use figures from "countries that produce a broader category of reasonably comparable merchandise" when the former present "data difficulties." Policy Bulletin 04.1, at 2 n.6; Appx4484.

As noted above, the Department found "no definitive information on the record" showing the Brazilian wage data were inaccurate. Appx4482. Commerce acknowledged its "general preference" for identical subject merchandise when calculating surrogate values, Appx4484, but found that both countries' wage data were "equally reliable" in all other respects, *id.* And it acknowledged that the inability to inflate the non-contemporaneous Mexican figures was a "data difficult[y]." *Id.* Thus, the Department faced using either the Brazilian information, which satisfied each of the non-dispositive policy preferences, or its Mexican counterpart, which did not. The agency determined that its general preference for a surrogate value derived from a country producing identical merchandise "does not outweigh" the Brazilian data's satisfaction of the other preferences. Appx4484–4485; *see Xiamen*, 953 F. Supp. 2d at 1312–13 ("Commerce has not identified a hierarchy among these factors, and the weight accorded to a factor varies depending on the facts of each case.").

Ningbo Master attacks that decision, arguing that the Mexican data are preferable because that country produces identical merchandise. ECF 99, at 18. But Commerce's preference for a surrogate value from a country making the same goods is just that: a *preference*, one of several non-dispositive factors the agency considers. *See Xiamen*, 953 F. Supp. 2d at 1312; *see generally* Policy Bulletin 04.1. The Department found that its predilection for data contemporaneity carried more weight than its partiality for product likeness. Appx4484. The company may be unhappy with how the agency weighed those factors, but the latter's decision is supported by substantial evidence.

Put differently, it appears Ningbo Master seeks to convert a regulatory preference into a substantive rule of decision. But because the statute requires Commerce to identify the "best available information" by comparing the datasets on the record, the Department cannot point to a regulatory preference as its only reason—rather, a preference can be a tiebreaker between datasets that are otherwise equal. *See NTSF Seafoods Joint Stock Co. v. United States*, Ct. Nos. 20–00104, 20–00105, Slip Op. 22–38, at 50–51, 2022 WL 1375140, at *17 (CIT Apr. 25, 2022) (citing *Peer Bearing Co.–Changshan v. United States*, 752 F. Supp. 2d 1353, 1373 (CIT 2011)). Moreover, to the extent this case presents *competing* regulatory preferences (identical merchandise versus contemporaneity), Policy Bulletin 04.1 explains how the agency will resolve that matter. It followed those instructions here.

Ningbo Master also argues that there are no actual "data difficulties" with the Mexican wage information because Commerce can simply apply the Brazilian inflator. ECF 99, at 20. But that issue has already been resolved. When this case returned from the initial remand, the Department used a Brazilian inflator on Mexican labor data. The court remanded again because the agency failed to explain how it was appropriate to use an inflator applicable to a different country, especially in view of its published guidance calling for the use of the "*relevant* Consumer Price Index." *Am. Keg II*, Slip Op. 22–106, at 6, 2022 WL 4363320, at *2 (emphasis in original) (quoting 76 Fed. Reg. at 36,094).

Commerce then acknowledged that such an adjustment would be inappropriate. Appx3638. In the most recent remand, it explained that it "has no practice of adjusting the underlying data from one alternative surrogate country using another [such] country's CPI data." Appx4487. In asserting that the Department should nevertheless do so here, Ningbo Master's only arguments are that the adjust-

ment would be minimal and that Brazil is economically comparable to Mexico. ECF 99, at 20, 21–22. But that is not the agency's standard practice. *See* 76 Fed. Reg. at 36,094 (describing practice of inflating earnings data "using the *relevant* Consumer Price Index") (emphasis added). Commerce also observed that the two countries being "economically comparable" in terms of GDP does not intrinsically show that "the rate of inflation experienced by each country is the same." Appx4488. Ningbo Master points to no other evidence to support its conclusion that the Brazilian inflator is "relevant" to Mexico.

The company also asserts that even without an inflator, the Mexican wage data are superior to the Brazilian. ECF 99, at 19, 21. It overlooks that the issue before the court "is not to evaluate whether the information Commerce used was actually the best available, but rather whether a reasonable mind could conclude that [the agency] chose the best available information." *Jiangsu Zhongji Lamination Materials Co. (HK) v. United States*, Ct. No. 21–00138, Slip Op. 23–84, at 11, 2023 WL 3863201, at *4 (CIT June 7, 2023) (cleaned up) (quoting *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011)). Given the choice between non-contemporaneous and non-inflatable Mexican data and non-contemporaneous but inflatable Brazilian data, the Department chose the latter. *Id.* That was reasonable.

Finally, Ningbo Master contends that Commerce cannot rely on the Brazilian data because that country does not produce a comparable product. ECF 99, at 18–19. The company failed to exhaust its administrative remedies by not definitively raising the issue before the agency.[4] *See Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008) (holding parties are "procedurally required to raise [an] issue before Commerce at the time [the agency] was addressing the issue"); *Dorbest, Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) (finding the exhaustion requirement justified because "fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made

[4] Even though American Keg advocated for the use of Brazilian wage information in the initial investigation, Ningbo Master did not challenge "the comparability of Brazilian production." ECF 101, at 22. And when commenting on Commerce's draft first remand redetermination, which found that Brazil manufactures comparable goods, the Chinese company's only response was an aside that its American counterpart submitted "information that Brazil produces a *supposedly* comparable product, steel wheels." Appx3563 (emphasis added). Such "[p]assing references do not raise arguments." *I.D.I. Int'l Dev. & Inv. Corp. v. United States*, Ct. No. 20–00107, Slip Op. 21–82, at 32, 2021 WL 3082807, at *11 (CIT July 6, 2021) (citing *ArcelorMittal France v. AK Steel Corp.*, 700 F.3d 1314, 1325 n.6 (Fed. Cir. 2012)).

at the time appropriate under its practice") (quoting *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952)).

* * *

Just as beer kegs eventually (and sadly) run dry, all litigation—even this case—must end in the fullness of time. The court sustains the Department's third remand redetermination. A separate judgment will issue. *See* USCIT R. 58(a).

Dated: November 25, 2024
New York, NY

/*s*/ *M. Miller Baker*
JUDGE

Slip Op. 24–130

BIOPARQUES DE OCCIDENTE, S.A. DE C.V., AGRICOLA LA PRIMAVERA, S.A. DE C.V., AND KALIROY FRESH LLC, Plaintiffs, CONFEDERACION DE ASOCIACIONES AGRICOLAS DEL ESTADO DE SINALOA, A.C., CONSEJO AGRICOLA DE BAJA CALIFORNIA, A.C., ASOCIACION MEXICANA DE HORTICULTURA PROTEGIDA, A.C., ASOCIACION DE PRODUCTORES DE HORTALIZAS DEL YAQUI Y MAYO, AND SISTEMA PRODUCTO TOMATE, Consolidated Plaintiffs, v. UNITED STATES, Defendant, and THE FLORIDA TOMATO EXCHANGE, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 19–00204

[Granting the Partial Consent Motion to Intervene Out of Time filed by NS Brands, Ltd. and Naturesweet Invernaderos S. de R.L. de C.V./NatureSweet Comercializadora, S. de R.L. de C.V.]

Dated: November 25, 2024

Jeffrey M. Winton, *Michael Chapman*, *Amrietha Nellan*, *Ruby Rodriguez*, and *Vi N. Mai*, Winton & Chapman PLLC, of Washington, D.C., for Plaintiffs Bioparques de Occidente, S.A. de C.V., Agricola La Primavera, S.A. de C.V., and Kaliroy Fresh LLC.

Yujin K. McNamara, *Bernd G. Janzen*, *Devin S. Sikes*, and *Paul S. Bettencourt*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington, D.C., for Consolidated Plaintiffs Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C., Consejo Agricola de Baja California, A.C., Asociacion Mexicana de Horticultura Protegida, A.C., Asociacion de Productores de Hortalizas del Yaqui y Mayo, and Sistema Producto Tomate.

Douglas G. Edelschick, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. Of counsel are *Ayat Mujais* and *Emma T. Hunter*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Robert C. Cassidy, Jr., *Charles S. Levy*, *Chase J. Dunn*, *James R. Cannon, Jr.*, *Jonathan M. Zielinski*, *Mary Jane Alves*, and *Nicole Brunda*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for The Florida Tomato Exchange.

Jessica R. DiPietro, ArentFox Schiff, LLP, of Washington, D.C., for Proposed Plaintiff-Intervenors NS Brands, Ltd. and Naturesweet Invernaderos S. de R.L. de C.V./NatureSweet Comercializadora, S. de R.L. de C.V. Also on the brief were *Matthew M. Nolan* and *Leah N. Scarpelli*.

OPINION AND ORDER

Choe-Groves, Judge:

Before the Court is the Partial Consent Motion to Intervene Out of Time filed by NS Brands, Ltd. and Naturesweet Invernaderos S. de R.L. de C.V./NatureSweet Comercializadora, S. de R.L. de C.V. (collectively, "NatureSweet"). NatureSweet's Part. Consent Mot. Interv. Out of Time ("NatureSweet's Motion" or "NatureSweet's Mot."), ECF No. 122. Plaintiffs Bioparques de Occidente, S.A. de C.V., Agricola La Primavera, S.A. de C.V., and Kaliroy Fresh LLC and Consolidated

Plaintiffs Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C., Consejo Agricola de Baja California, A.C., Asociacion Mexicana de Horticultura Protegida, A.C., Asociacion de Productores de Hortalizas del Yaqui y Mayo, and Sistema Producto Tomate consent to NatureSweet's Motion. *Id.* at 9. Defendant United States and Defendant-Intervenor The Florida Tomato Exchange oppose NatureSweet's Motion. *Id.* at 8–9; Def.'s Resp. Opp'n NatureSweet's Out-of-Time Mot. Interv. ("Def.'s Resp.") ECF No. 128; Def.-Interv.'s Cmts. Opp'n NatureSweet's Mot. Interv. Out of Time ("Def.-Interv.'s Resp."), ECF No. 127.

NatureSweet moves to intervene as a matter of right pursuant to USCIT Rule 24. NatureSweet's Mot. at 3. In actions filed pursuant to 19 U.S.C. § 1516a, a party may intervene as a matter of right if that party is an "interested party," 19 U.S.C. § 1516a(f)(3), "would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade," 28 U.S.C. § 2631(j)(1), and "was a party to the proceeding in connection with which the matter arose," *id.* § 2631(j)(1)(B). Pursuant to 19 U.S.C. § 1516a(f)(3), "interested party" includes "a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise." 19 U.S.C. §§ 1516a(f)(3), 1677(9)(A). "Interested party" also includes "a manufacturer, producer, or wholesaler in the United States of a domestic like product." *Id.* § 1677(9)(C). To be timely, the motion to intervene as a matter of right must be made no later than 30 days after the date of service of the complaint. USCIT R. 24(a)(3). A motion to intervene will only be considered after the 30-day period upon a showing of "mistake, inadvertence, surprise or excusable neglect" or that, despite the proposed intervenor having exercised due diligence, the motion could not have been timely filed. *Id.*

NatureSweet is an interested party to this proceeding because Naturesweet Invernaderos S. de R.L. de C.V. and NatureSweet Comercializadora, S. de R.L. de C.V. are foreign producers of tomatoes and NS Brands, Ltd. is a domestic importer and producer of tomatoes. NatureSweet's Mot. at 4; *see* 28 U.S.C. § 1677(9)(A), (C). NatureSweet participated in the underlying administrative proceedings during the remand by requesting an examination, submitting comments, and meeting with the U.S. Department of Commerce ("Commerce"). NatureSweet's Mot. at 4, Exs. 4, 5. NatureSweet's Motion was untimely filed on October 25, 2024, more than 30 days after Plaintiff filed the initial Complaint on December 20, 2019. NatureSweet's Mot.; Compl., ECF No. 9.

Defendant and Defendant-Intervenor oppose NatureSweet's untimely motion on three grounds. First, they contend that the motion is procedurally defective because it does not identify the issues sought to be raised through intervention, as required by USCIT Rule 24(c)(2). Def.'s Resp. at 5; Def.-Interv.'s Resp. at 3–4. Second, Defendant argues that NatureSweet's arguments have been waived because NatureSweet did not file an administrative brief during the remand proceedings. Def.'s Resp. at 5–7. Third, Defendant and Defendant-Intervenor assert that NatureSweet has not demonstrated good cause for the nearly five-year delay in filing its intervention motion. Def.'s Resp. at 7–8; Def.-Interv.'s Resp. at 1–3.

Beginning with the first argument, USCIT Rule 24(c)(2) requires that "[w]hen the movant for intervention seeks to intervene on the side of the plaintiff, the motion must state the movant's standing, and must state the administrative determination to be reviewed and the issues that the intervenor desires to litigate." USCIT R. 24(c)(2). Defendant contends that "[i]t is unclear whether NatureSweet desires to litigate issues that it raised in comments during the remand or the underlying investigation, because NatureSweet's motion fails to identify the issues that it actually intends to litigate." Def.'s Resp. at 5. In its motion, NatureSweet explains that during the 2019 investigation, it "repeatedly requested an investigation of its operations in order to obtain an individually calculated rate, which was denied by Commerce." NatureSweet's Mot. at 7. On remand, NatureSweet submitted comments in response to Commerce's *Draft Results of Redetermination Pursuant to Court Remand*, arguing that Commerce should conduct a changed circumstances review or a new shipper review to determine if NatureSweet is entitled to an individually calculated dumping margin. NatureSweet's Mot. at 6, Ex. 5; *see Final Results of Redetermination Pursuant to Court Remand* ("*Remand Redetermination*") at 31–32, ECF Nos. 120–1, 121–1. In the *Remand Redetermination*, Commerce expressly addressed NatureSweet's comments and determined that neither a changed circumstances review nor a new shipper review is possible under the applicable statutes because an antidumping duty order has not been issued. *Remand Redetermination* at 32–33. In its motion for intervention, NatureSweet states that "the circumstances that now exist regarding NatureSweet providing information on the record of the remand proceeding and its information being used in Commerce's remand redetermination did not exist during the initial thirty-day period for intervention from when the Complaint was filed." *NatureSweet's Mot.* at 8. Read in its totality, the Court concludes that NatureSweet's Motion sufficiently articulates its reasons for seeking intervention.

Defendant next argues that NatureSweet's arguments have been waived because NatureSweet did not file an administrative brief during the remand proceedings. Def.'s Resp. at 5–7. Before a claim may be brought to the Court, an aggrieved party must exhaust available administrative remedies. 28 U.S.C. § 2637(d). The Court "generally takes a 'strict view' of the requirement that parties exhaust their administrative remedies." *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013) (citations omitted). 19 C.F.R. § 351.309(c)(2) requires that, "[t]he case brief must present all arguments that continue in the submitter's view to be relevant to the . . . final determination or final results." 19 C.F.R. § 351.309(c)(2). Among the limited exceptions to the exhaustion requirement is that "exhaustion may be excused if the issue was raised by another party, or if it is clear that the agency had an opportunity to consider it." *Holmes Prod. Corp. v. United States*, 16 CIT 1101, 1104 (1992) ("[E]xhaustion may be excused if the issue was raised by another party, or if it is clear that the agency had an opportunity to consider it."). NatureSweet did not file an administrative case brief during the remand, but submitted comments to Commerce. *See Remand Redetermination* at 9. Commerce expressly responded to arguments raised by NatureSweet in the *Remand Redetermination*, demonstrating that Commerce had an opportunity to consider the arguments raised by NatureSweet during the administrative process. Therefore, the exception to administrative exhaustion applies and the Court concludes that NatureSweet's arguments were not waived.

Defendant's and Defendant-Intervenor's final objection asserts that NatureSweet has not demonstrated good cause for the nearly five-year delay in filing its intervention motion. Def.'s Resp. at 7–8; Def.-Interv.'s Resp. at 1–3. In *Bioparques de Occidente, S.A. v. United States*, 48 CIT __, 698 F. Supp. 3d 1265 (2024), the Court remanded this case to Commerce in 2024 to "resume its investigation flowing from the affirmative preliminary determination issued on November 1, 1996, including focusing its analysis on the evidence submitted regarding the original period of investigation of March 1, 1995 through February 29, 1996, and reviewing the original six mandatory respondents." *Id.* at __, 698 F. Supp. at 1276–77. In doing so, the Court drastically changed the landscape of this litigation by ordering Commerce to investigate the tomato market in 1995–1996, approximately 29 years earlier. Despite all appropriate due diligence, it would have been nearly impossible in 2019 for NatureSweet to anticipate the results of the Court's 2024 remand in this unique case, and NatureSweet should not be penalized now for failing to anticipate in 2019 that it needed to intervene to participate in the 2024 court

proceeding. *See* USCIT R. 24(a)(3). The Court finds that good cause exists to excuse NatureSweet's delay in seeking to intervene.

Upon consideration of NatureSweet's Partial Consent Motion to Intervene Out of Time, ECF No. 122, Defendant-Intervenor's Comments Opposing NatureSweet's Motion to Intervene Out of Time, ECF No. 127, Defendant's Response in Opposition to NatureSweet's Out-of-Time Motion to Intervene, ECF No. 128, and all other papers and proceedings in this action, it is hereby

ORDERED that NatureSweet's Partial Consent Motion to Intervene Out of Time, ECF No. 122, is granted; and it is further

ORDERED that NS Brands, Ltd. and Naturesweet Invernaderos S. de R.L. de C.V./NatureSweet Comercializadora, S. de R.L. de C.V. are added as Plaintiff-Intervenors in *Bioparques de Occidente, S.A. de C.V. v. United States*, Consol. Court No. 19–00204.

Dated: November 25, 2024
New York, New York

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

Slip Op. 24–131

UNICHEM ENTERPRISES, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge
Court No. 24–00033

[Denying defendant's motion to dismiss for lack of subject matter jurisdiction.]

Dated: November 26, 2024

Christopher J. Duncan and *Elon Abram Pollack*, Stein Shostak Shostak Pollack & O'Hara, LLP, of Los Angeles, CA, argued for plaintiff Unichem Enterprises, Inc.

Hardeep K. Josan, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Justin R. Miller*, Attorney-In-Charge, International Trade Field Office. Of counsel on the brief was *Michael A. Anderson*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION AND ORDER

Reif, Judge:

Before the court is the motion to dismiss of defendant United States ("defendant"). Def.'s Mot. to Dismiss ("Def. Br."), ECF No. 11. Plaintiff Unichem Enterprises, Inc. ("'plaintiff") alleges that one of its entries was "deemed excluded" by operation of law under section 499 of the Tariff Act of 1930, 19 U.S.C. § 1499(c)(5)(A), after U.S. Customs and Border Protection ("Customs") failed to make a determination as to the entry's admissibility within the time period provided by that statute.[1] Pl.'s Compl. ("Compl.") ¶¶ 11–20, ECF No. 5. Plaintiff requests that the court order Customs to admit and release the entry. *Id.* ¶ 20. Defendant responds that the instant admissibility determination is vested in the Drug Enforcement Agency ("DEA") — not Customs. Def. Br. at 10. Defendant argues on this basis that Customs has not made a "protestable decision" under 19 U.S.C. § 1514(a)(4), and that, as a consequence, this court lacks subject matter jurisdiction under 28 U.S.C. § 1581(a). *Id.* at 6–15.

For the reasons that follow, the court denies defendant's motion to dismiss.

BACKGROUND

The instant action covers one entry, Entry No. BED-0054200–4, of 7-Keto dehydroepiandrosterone ("7-Keto DHEA" or "subject merchandise"). Compl. ¶ 2. On November 6, 2023, plaintiff imported the

[1] Subsequent citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2018 edition.

subject merchandise. Protest No. 4601–23-136557 at 7 (Entry Summary), ECF No. 13–1; Compl. ¶¶ 2, 11; 19 C.F.R. § 141.68(b). On November 8, 2023, the subject merchandise was presented for customs examination. Def. Br. at 3–4; Summons, ECF No. 1. On that day, Customs detained the subject merchandise because plaintiff had not submitted to Customs a Controlled Substance Import/Export Declaration (DEA Form 236).[2] Compl. ¶ 13; Def. Br. at 3.

When Customs detains imported merchandise, 19 U.S.C. § 1499(c)(2) requires that Customs "issue a notice to the importer . . . no later than 5 days . . . after the decision to detain the merchandise is made." In all, Customs issued to plaintiff four detention notices. On November 8, 2023, the date on which Customs detained the subject merchandise, Customs issued the first detention notice. Compl. ¶ 13; Pl.'s Ex. A ("First Detention Notice"), ECF No. 12–1. In that notice, Customs stated that the reason for detention was "Further Investigation."[3] First Detention Notice.

Defendant states that on November 14, 2023, Customs sent a sample of the subject merchandise to Customs' Laboratory of Scientific Services ("LSS") for analysis and identification. Def. Br. at 4.

Defendant maintains that on or around November 14, 2023, the DEA requested that Customs continue to detain the subject merchandise and that Customs provide the laboratory report to the DEA. *Id.* Defendant asserts further that the DEA requested the detention because it suspected that the subject merchandise is an anabolic steroid treated as a Schedule III controlled substance under the Controlled Substances Act and the DEA's regulations. *Id.*

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[2] Registered importers are permitted to import Schedule III non-narcotic controlled substances by filing a controlled substances import declaration, called a DEA Form 236. 21 U.S.C. § 952(b) prohibits the importation of "any non-narcotic controlled substance in Schedule III, IV, or V, unless" that non-narcotic controlled substance "(1) is imported for medical, scientific, or other legitimate uses, and (2) is imported pursuant to such notification, or declaration, or in the case of any nonnarcotic controlled substance in schedule III, such import permit, notification, or declaration, as the Attorney General may by regulation prescribe." *See also* 21 C.F.R. § 1312.11(b) (requiring importers of non-narcotic Schedule III drugs to be "properly registered under the act"); *id.* § 1312.18(a) (stating that certain Schedule III listed non-narcotic controlled substances needed for "medical, scientific or other legitimate uses" may be imported "pursuant to a controlled substance import declaration"); *id.* § 1312.18(b) (allowing "any person registered" to import "any non-narcotic controlled substance listed in Schedule[] III . . . which is not subject to the requirement of an import permit . . . [by] fil[ing] a controlled substances import declaration (DEA Form 236) with the Administration through the DEA Diversion Control Division . . . not later than 15 calendar days prior to the anticipated date of release by a customs officer").

[3] According to defendant, three separate entries belonging to plaintiff were subject to separate DEA investigations when plaintiff imported those entries. Def. Br. at 3–4 n.3. In May 2023, plaintiff imported a product that the DEA subsequently concluded was an anabolic steroid and Schedule III controlled substance. *Id.* Consequently, defendant asserts that on November 16, 2023, the DEA requested that Customs seize that merchandise. *Id.* Defendant states that the other two entries were released after the DEA concluded that the entries did not contain controlled substances. *Id.*

On December 7, 2023, Customs issued the second detention notice for the subject merchandise because, according to defendant, Customs had not completed testing samples of the merchandise and the DEA had not determined whether the merchandise was admissible. *Id.*; *see* Pl.'s Ex. B ("Second Detention Notice"), ECF No. 12–2. That detention notice stated that the "reason for the detention" was "[f]urther analysis needed." Second Detention Notice. In addition, the notice stated that the subject merchandise was detained "pursuant to" Customs' authority under 19 U.S.C. § 1499 and 19 C.F.R. § 151.16. *Id.*

On December 11, 2023, plaintiff filed Protest No. 4601–23–136557, which challenged what plaintiff described as Customs' "deemed exclusion" of the subject merchandise. Protest No. 4601–23–136557; Compl. ¶ 15. According to plaintiff in that protest, the subject merchandise was deemed excluded on December 8, 2023, which was 30 days after the date on which the subject merchandise had been presented for customs examination. Protest No. 4601–23–136557 at 4; *see* 19 U.S.C. § 1499(c)(5)(A). On January 9, 2024, Customs rejected plaintiff's protest on the basis that the challenged decision was "non-protestable."[4] Protest No. 4601–23–136557; *Id.*¶ 16.

On January 6, 2024, Customs issued the third detention notice for the subject merchandise. Def. Br. at 4. According to defendant, Customs was "still waiting" for the lab to complete its testing and the DEA had not determined whether the merchandise was admissible. *Id.*

On January 10, 2024, 30 days after plaintiff filed the instant protest, plaintiff's protest was deemed denied. *See* 19 U.S.C. § 1499(c)(5)(B) (providing that "a protest against the decision to exclude . . . merchandise which has not been allowed or denied in whole or in part before the 30th day after the day on which the protest was filed shall be treated as having been denied on such 30th day").

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[4] Both plaintiff and defendant characterize Customs' actions on January 9, 2024, as a "denial" of plaintiff's protest of the deemed exclusion. *See* Def. Br. at 4; Compl. ¶ 16. The basis for that "denial" was that the challenged decision was "non-protestable." Def. Br. at 4. The court notes that the protest form used in this case (CBP Form 19) indicates that where Customs determines that a challenged action is "non-protestable," the protest is not considered "denied" but is rather considered to have been "rejected." Protest No. 4601–23–136557 at 5 (CBP Form 19). Indeed, where Customs *denies* a protest, this Court has "exclusive jurisdiction" over any civil action "to contest the denial." 28 U.S.C. § 1581(a); *see* 19 U.S.C. § 1515(a); *see also Padilla v. United States*, 33 CIT 1515, 1519, 659 F. Supp. 2d 1290, 1294 (2009) ("Marking rejected protests as denied only fosters confusion among the parties bringing or challenging such protests, government attorneys defending against such litigation, and the courts."). Because the basis for Customs' disposition of plaintiff's protest was that the protest was "non-protestable," the court considers Customs' actions on January 9, 2024, to be a rejection — as opposed to a denial — of that protest.

Defendant asserts that on January 10, 2024, Customs' laboratory report presumptively confirmed the identity of the subject merchandise in the shipment of November 8, 2023, as 7-Keto DHEA, as declared by plaintiff. *Id.* at 4–5. Defendant asserts also that Customs subsequently forwarded the laboratory report to the DEA. *Id.* at 5.

On February 5, 2024, Customs issued a fourth detention notice. Pl.'s. Ex. C ("Fourth Detention Notice"), ECF No. 12–3. In its briefing, defendant asserts that Customs continued to detain plaintiff's merchandise "because the DEA was actively investigating the subject merchandise and it had not yet determined if the subject merchandise was admissible." Def. Br. at 5; Fourth Detention Notice. However, like the second and third detention notices, Customs stated in the notice that the reason for the detention was "[f]urther analysis needed" and that the detention was "pursuant to" Customs authority under § 1499. Fourth Detention Notice. As with the three previous notices, the fourth detention notice did not mention the DEA or explain that Customs was detaining the merchandise on behalf of another federal agency. *Id.*

On February 6, 2024, plaintiff commenced this action with the filing of its summons. Summons. On February 7, 2024, plaintiff filed the instant complaint. Compl. On April 8, 2024, defendant filed its motion to dismiss, alleging that this court lacks subject matter jurisdiction because "there [was] no protestable decision by CBP" for the court to review. Def. Br. at 6.

On June 25, 2024, defendant submitted to the court a status report "regarding the [DEA's] investigation of merchandise covered by the entry in this case."[5] June 25, 2024 Status Report at 1, ECF No. 21. In that status report, defendant stated that on June 18, 2024, the "DEA informed CBP that, 'at this time,' DEA 'believes UniChem's shipment of 7-keto dehydroepiandrosterone is a Schedule III anabolic steroid and its importation violates DEA regulations.'" *Id.* Defendant reported that, accordingly, the DEA requested that Customs seize the subject merchandise. *Id.* Defendant specified in that status report that Customs "intend[ed] to seize the entry on DEA's behalf no sooner than thirty (30) days from" the June 25 status report. *Id.*

On September 18, 2024, defendant filed with the court a second status report. Sept. 18, 2024 Status Report, ECF No. 25. In that status report, defendant stated that "Customs seized the merchandise . . . on September 10, 2024, and issued [to plaintiff] the notice of

[5] In the House Report accompanying the North American Free Trade Agreement Implementation Act, of which the Customs Modernization Act was a part, the Committee stated its intent that "[o]nce an action has commenced before the CIT, the Customs Service shall immediately notify the Court if a decision to release, exclude or seize has been reached." H.R. Rep. No. 103–361, pt. 1, at 110 (1993).

seizure on September 17, 2024." *Id.* at 1.

On September 19, 2024, the court held oral argument. Oral Arg. Tr., ECF No. 30. At oral argument, the court requested that counsel for plaintiff file "post-hearing" a citation to a statute that vests the authority for determining the admissibility of merchandise in an agency other than Customs. Oral Arg. Tr. 51:14–21.

On September 24, 2024, plaintiff filed a two-page document listing five authorities, three of which plaintiff asserted vested admissibility authority in an agency other than Customs, and two of which did not. Pl.'s Supp. Filing on Federal Agencies' Authority to Detain and Admit Imported Merchandise, ECF No. 27. In response to plaintiff's filing, on October 1, 2024, defendant submitted a motion to supplement its motion to dismiss to provide "additional documentation and briefing." Def.'s Mot. to Supp. ("Def. Mot. Supp."), ECF No. 28. On October 8, 2024, plaintiff filed a response in opposition to defendant's motion to supplement. Pl.'s Resp. in Opp'n Def.'s Mot. to Supp. ("Pl. Resp. Def. Mot. Supp."), ECF No. 29.

JURISDICTION AND STANDARD OF REVIEW

Rule 12(b)(1) provides that "a party may assert . . . by motion" the defense of "lack of subject-matter jurisdiction." USCIT R. 12(b)(1). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." USCIT R. 12(h)(3).

Whether a court has subject matter jurisdiction to hear an action is a "threshold" inquiry. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). "It is fundamental that the existence of a jurisdictional predicate is a threshold inquiry in which plaintiff bears the burden of proof." *CR Indus. v. United States*, 10 CIT 561, 562 (1986).

DISCUSSION

I. Defendant's motion to supplement with additional documentation and briefing

The court addresses first defendant's motion to supplement its motion to dismiss with additional documentation and briefing. Defendant seeks to supplement its motion to dismiss with: (1) "email and letter communications between [Customs] and the [DEA]," which defendant asserts support its position that the DEA was responsible for the instant admissibility determination; (2) "a written response to plaintiff's supplemental submission" to explain "why the authority to detain and admit [merchandise] is not the controlling analysis"; and (3) "written analysis regarding the Court's jurisdiction now that the merchandise has been seized." Def. Mot. Supp. at 1, 3.

Plaintiff opposes defendant's motion. According to plaintiff, defendant's request is not permitted by the Rules of the U.S. Court of International Trade (the "Court"). Plaintiff argues also that defendant's motion is not — but is required to be — supported by "newly discovered facts or arguments arising after [defendant's] prior filing." Pl. Resp. Def. Mot. Supp. at 3–4. Plaintiff asserts that defendant "has had multiple opportunities to argue its motion to dismiss," and for that reason additional briefing is unwarranted. *Id.* at 5.

The court denies for three reasons defendant's motion to supplement. First, with respect to any emails or letters between Customs and the DEA, the court does not consider such internal communications relevant to the question before the court. Such communications between Customs and the DEA would be relevant in showing only that Customs may have consulted the DEA in reaching an admissibility determination — not whether such determination is vested in the DEA. In addition, such communications would do nothing to notify the importer that authority for determining admissibility of the subject merchandise was vested in the DEA and that the protest remedy was therefore unavailable. On this point, the court notes once again that none of the notices that Customs sent to plaintiff instructed it that an agency other than Customs was responsible for determining the admissibility of plaintiff's merchandise.

Second, as to defendant's request to provide "a written response to plaintiff's supplemental submission" and "written analysis" concerning the effect of Customs' seizure, the Rules of the Court in general permit only a response to a dispositive motion followed by a reply of the moving party. *See* USCIT R. 7(d). Moreover, specifically as to defendant's request to file "a written response to plaintiff's supplemental submission," defendant seeks an opportunity to explain to the court that "authority to detain and admit [merchandise] is not the controlling analysis." Def. Mot. Supp. at 3. However, defendant has already made this argument, both in its opening brief and in its reply brief. *See* Def. Br. at 10 ("The question of whether Congress vested an admissibility determination in an agency other than CBP . . . hinges on whether another agency has taken responsibility for determining the legality of the merchandise, even if that agency does not necessarily have separate authority to detain or exclude the merchandise."); Def. Reply Br. at 4–5 (same). Because this basis for defendant's request "does not raise any issue that could not have been or was not already addressed" in defendant's opening brief and reply brief, the court will not grant supplemental briefing to address the issue further. *LG Elecs., Inc. v. U.S. Int'l Trade Comm'n*, 37 CIT 1589,

1591–92 (2013) (citing *Crummley v. Soc. Sec. Admin.*, 794 F. Supp. 2d 46, 62–64 (D.D.C. 2011)).

Third, as to how Customs' seizure of the merchandise affects the question of this court's jurisdiction, during oral argument, the court asked parties to address this issue directly.[6] Specifically, the court inquired as to parties' views of this Court's decision in *CBB Grp., Inc. v. United States*, 35 CIT 743, 783 F. Supp. 2d 1248 (2011), in which the Court held that Customs' seizure of merchandise did not divest the Court of jurisdiction where that seizure occurred after jurisdiction over a deemed exclusion had attached. Oral Arg. Tr. at 48:19–24. When asked whether the court could exercise jurisdiction over the deemed exclusion in light of Customs' seizure of September 10, 2024, counsel for defendant responded: "Yes." *Id.* at 50:22.

In any event, the court does not consider additional briefing necessary in deciding the question presented. As this Court has held, a Customs' seizure of merchandise "after the jurisdiction of the Court of International Trade has attached to a plaintiff's cause of action contesting a deemed exclusion cannot be binding on this Court, for otherwise the agency's determination would be permitted to usurp the Court's judicial power and prevent the Court from fulfilling its judicial responsibility." *CBB Grp.*, 35 CIT at 749, 783 F. Supp. 2d at 1254; *see also Root Scis., LLC v. United States*, 45 CIT __, __, 543 F. Supp. 3d 1358, 1367 (2021) ("[W]here a seizure occurs *prior to a deemed exclusion by operation of law*, a deemed exclusion will not occur." (emphasis supplied)); *Blink Design, Inc. v. United States*, 38 CIT 746, 759, 986 F. Supp. 2d 1348, 1360 (2014) (collecting cases) ("[T]his court repeatedly has found subject matter jurisdiction wanting in cases, such as this one, where Customs seized a plaintiff's entries *prior to the plaintiff's filing suit in this Court*." (emphasis supplied)). In the instant case, Customs seized the subject merchandise — and issued the notice of seizure — *after* the date that the entries were allegedly deemed excluded and also *after* the date that plaintiff filed suit in this Court. *See* Summons; Sept. 18, 2024 Status Report at 1. For that reason, Customs' seizure of plaintiff's merchandise does not strip the court of jurisdiction over the alleged deemed exclusion.

For the reasons outlined above, the court denies defendant's motion to supplement.

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[6] This Court lacks jurisdiction to hear challenges to a Customs decision to seize imported merchandise. *See* 28 U.S.C. § 1356 (granting to the district courts original jurisdiction "of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title"); 28 U.S.C. § 1582 (granting jurisdiction to this Court over "any civil action which arises out of an import transaction and which is commenced by the United States").

II. Whether the Court has jurisdiction under § 1581(a)

U.S. law vested the authority to determine the admissibility of the subject merchandise in Customs, not the DEA. Therefore, the court has subject matter jurisdiction over the exclusion by operation of law of the merchandise, and defendant's motion to dismiss is denied.

A. Legal framework

28 U.S.C. § 1581(a) confers upon the Court exclusive jurisdiction "of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." *See Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1291 (Fed. Cir. 2008) ("In subsection 1581(a), Congress set out an express scheme for administrative and judicial review of Customs' actions.") (citations omitted). Under 19 U.S.C. § 1514(a)(4), "the exclusion of merchandise from entry" is "final and conclusive upon all persons . . . unless a protest is filed."

19 U.S.C. § 1499(c) governs the requirements for when Customs determines to detain merchandise presented for customs examination.[7] Under § 1499(c)(1), Customs is required to "decide whether to release or detain the merchandise," within five days "following the date on which merchandise is presented for customs examination." Merchandise not released within the five-day period "shall be considered to be detained merchandise." *Id.* If Customs fails "to make a final determination with respect to the admissibility of detained merchandise within 30 days after the merchandise has been presented for customs examination," that failure "shall be treated as a decision of the Customs Service to exclude the merchandise for purposes of section 1514(a)(4) of [title 19]." *Id.* § 1499(c)(5)(A).

However, the requirements of § 1499(c) — including the notice requirement under subsection (c)(1) and exclusion by operation of law under subsection (c)(5)(A) — do not apply with respect to merchandise for which "the determination of admissibility is vested in an agency other than the Customs Service." *Id.* § 1499(c).

19 U.S.C. § 1499(c)(4) authorizes Customs to seize "detained merchandise" if "otherwise provided by law." 19 U.S.C. § 1595a(c) in turn gives Customs the authority to seize "[m]erchandise introduced contrary to law." As relevant here, § 1595a(c)(1)(B) provides that merchandise "which is introduced or attempted to be introduced into the United States . . . shall be seized and forfeited if it . . . is a controlled

[7] Customs' regulations require that the port director "examine such packages or quantities of merchandise as he deems necessary for the determination of duties and for compliance with the Customs laws and any other laws enforced by the Customs Service." 19 C.F.R. § 151.1.

substance, as defined in the Controlled Substances Act (21 U.S.C. 801 et seq.), and is not imported in accordance with applicable law."

B. Analysis

The court considers whether plaintiff's merchandise was "deemed excluded" by reason of Customs' failure to make a final determination as to the admissibility of the merchandise within 30 days after plaintiff presented it to Customs for examination.

Defendant contends that § 1499(c) does not apply because the instant admissibility determination is vested in the DEA, not Customs. Def. Br. at 10. According to defendant, the DEA "is actively determining whether the subject merchandise violates the controlled substances laws and thus whether it is admissible and, therefore, for purposes of jurisdiction, the provisions of 19 U.S.C. § 1499(c) do not apply."[8] Def. Reply Br. at 6.

According to plaintiff, the determination as to the admissibility of plaintiff's merchandise is vested in Customs, not the DEA.

The court concludes that Customs determined to detain the subject merchandise under § 1499(c), and that Customs continued that detention greater than 30 days after the merchandise was presented to Customs for examination. As a result, § 1499(c)(5)(A) requires that Customs' inaction "be treated as a decision of the Customs Service to exclude the merchandise for purposes of section 1514(a)(4)."

"Customs must engage in some sort of decision-making process in order for there to be a protestable decision." *Xerox Corp. v. United States*, 423 F.3d 1356, 1363 (Fed. Cir. 2005) (quoting *U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997)). "[A] decision may not be protested when Customs is merely taking action to effectuate a decision of another agency." *Wirtgen Am., Inc. v. United States*, 44 CIT __, __, 437 F. Supp. 3d 1302, 1306 (2020) (citing *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994)); 19 U.S.C. § 1514(a) (stating that protests may be filed to challenge "decisions of the Customs Service").

Once merchandise is presented for customs examination, § 1499(c)(5)(A) gives Customs 30 days to make the "final determination with respect to the admissibility of detained merchandise." The purpose of § 1499(c)(5) is to provide the importer a remedy where Customs takes no action concerning merchandise that Customs has detained. *Root Scis., LLC*, 45 CIT at __, 543 F. Supp. 3d at 1369. Failure by Customs to make the final determination within the 30-day period

[8] At oral argument, counsel for defendant stated: "Both agencies have the legal authority" to determine whether the merchandise is a controlled substance. Oral Arg. Tr. at 31:4–7. Nevertheless, defendant continued to maintain that "here, it is the DEA[] [b]ecause of the circumstances of the case." *Id.* at 31:11–12.

"shall be treated as a decision of the Customs Service to exclude the merchandise for purposes of section 1514(a)(4)." 19 U.S.C. § 1499(c)(5)(A). As defendant acknowledges, § 1499(c) by its terms applies only in situations in which Customs has the authority to determine the admissibility of merchandise. Def. Br. at 3 (quoting 19 U.S.C. § 1499(c)).

In the instant case, Customs exercised its authority pursuant to § 1499(c) to detain the subject merchandise pending Customs' "final determination with respect to" its admissibility. On November 8, 2023, Customs detained the subject merchandise because, according to defendant, "*CBP was concerned* that the shipment contained controlled substances." Def. Br. at 3–4 (emphasis supplied). On that day, Customs issued to plaintiff the first detention notice.[9] *See* First Detention Notice. Over the course of the next three months, Customs issued to plaintiff three additional detention notices, none of which mentioned the DEA and each of which expressly and specifically invoked Customs' authority under § 1499. *See* Second Detention Notice (dated December 7, 2023); Fourth Detention Notice (dated February 5, 2024).[10] As stated, Customs is required to provide such notices to the importer under § 1499(c)(2), "[e]xcept in the case of merchandise" for which "the determination of admissibility is vested in an agency other than the Customs Service." Therefore, that Customs issued the detention notices refutes defendant's position and establishes that Customs was exercising its authority to determine the admissibility of the detained merchandise.

In addition, the notice of November 8, 2023, directed plaintiff to "[s]end all correspondence" to "ATCET" — Customs' Anti-Terrorism Contraband Enforcement Team. First Detention Notice. And, according to defendant, on November 14, 2023, Customs sent a sample of the subject merchandise to Customs' Laboratory of Scientific Services for analysis and identification of the product. Def. Br. at 4. So, Customs detained the subject merchandise, sent a sample of that merchandise to Customs' own lab and instructed plaintiff that correspondence pertaining to that merchandise should be sent to Customs.

Customs' failure to make the "final determination with respect to the admissibility" of plaintiff's detained merchandise within 30 days

[9] The detention notice of November 8, 2023, included in Box 1 a space for Customs to inform plaintiff whether its merchandise was held by Customs on behalf of another agency. First Detention Notice. Specifically, Box 1 stated: "Held for other agency?" *Id.* Underneath the question were two boxes — a box for "Yes" and a box for "No" — along with a space for Customs to provide the name of the agency on whose behalf Customs was holding the merchandise. *Id.* Customs left Box 1 blank. *Id.*

[10] On January 6, 2024, Customs issued to plaintiff a third detention notice, which defendant submitted to the record at oral argument. Except for the date, the third detention notice was identical in all respects with the second and fourth detention notices.

of November 8, 2023, resulted by operation of law in the "exclu[sion] [of] the merchandise for purposes of [19 U.S.C. § 1514(a)(4)]." 19 U.S.C. § 1499(c)(5)(A). On December 11, 2023, plaintiff filed a timely protest of the deemed exclusion. Protest No. 4601–23–136557; Compl. ¶ 15. Then, on January 10, 2024, plaintiff's protest was deemed denied. 19 U.S.C. § 1499(c)(5)(B). Accordingly, because plaintiff timely protested Customs' deemed exclusion of the subject merchandise, the court has subject matter jurisdiction over plaintiff's action "to contest [that] denial" under 28 U.S.C. § 1581(a). *See also* 19 U.S.C. § 1514(a)(4).

Defendant maintains that the subject merchandise was not deemed excluded under § 1499(c) because the admissibility determination is vested in the DEA.[11] Def. Reply Br. at 4–5. Defendant argues that the DEA is "the agency responsible for enforcing the controlled substances laws and regulations," and that the DEA's responsibilities in that capacity include "regulating the importation of controlled substances." Def. Br. at 8 (citing 21 U.S.C. § 952). According to defendant, "[t]he question of whether Congress vested an admissibility determination in an agency other than CBP (for purposes of 19 U.S.C. § 1499(c)) hinges on whether another agency has taken responsibility for determining the legality of the merchandise, even if that agency does not necessarily have separate legal authority to detain or exclude the merchandise." Def. Reply Br. at 5 (citing *CBB Grp.*, 35 CIT at 746, 783 F. Supp. 2d at 1251); *see also* Def. Br. at 11–13 (citing

[11] To support its position, defendant attached to its reply brief the declaration of Brian Six, Division Counsel for the San Francisco Field Division of the DEA. Declaration of Mr. Brian J. Six, ECF No. 14–1. In that declaration, Mr. Six recounts his correspondence with plaintiff's counsel, in which they discussed whether three of plaintiff's entries, including the instant entry, contained controlled substances. *Id.* ¶¶ 4–14. The declaration does not support defendant's position that the authority to determine the admissibility of the subject merchandise is vested in the DEA. To the contrary, Mr. Six states that he advised plaintiff's counsel that "[he] was aware of the additional detentions in Newark but was not familiar with specifics of DEA's investigation of Unichem's" merchandise in that entry. *Id.* ¶ 6. The declaration does not negate that Customs had the authority to determine the admissibility of the subject merchandise.

Andritz Sundwig GMBH v. United States, 42 CIT __, __, 322 F. Supp. 3d 1360, 1364 (2018)).[12]

Defendant's proffered approach is untenable. Specifically, as this case illustrates, defendant's approach leaves importers with no way of knowing whether the authority for determining the admissibility of their merchandise is vested in Customs — in which case the protest remedy is available — or in another agency — in which case the protest remedy is not available. Def. Reply Br. at 5. Instead, the authority for determining the admissibility of merchandise is "vested in an agency other than the Customs Service" under § 1499(c) when the law by statute or regulation so provides.

The House Report accompanying the Customs Modernization Act described the circumstances in which the admissibility determination is "vested in an agency other than the Customs Service," § 1499(c):

> The Committee recognizes that Customs often detains merchandise on behalf of other Government agencies and is not directly involved in the activities which result in the decision to admit or exclude merchandise. These agencies include the Food and Drug Administration (FDA) and the Department of Agriculture [(USDA)], among others. This procedure providing recourse through the Court of International Trade would be reserved for admissibility determinations for which the Customs Service is responsible. Nothing in this section is intended to change the procedures or relationship between Customs and other Federal agencies. However, this would not preclude application of this new procedure and remedy in those cases where Customs has the responsibility and the authority to determine the admissibility of the merchandise, and such procedures and remedies are agreed to by the other agency.

H.R. Rep. No. 103–361, pt. 1, at 112 (1993).

[12] Neither case on which defendant relies supports its approach. In fact, the cases prove the opposite. In *CBB Grp., Inc. v. United States*, 35 CIT 743, 746, 783 F. Supp. 2d 1248, 1251 (2011), the Court observed only that the admissibility determination in that case "turn[ed] on the question of whether copyright violations occurred upon importation" — a determination "not vested in any agency other than Customs." There, § 1595a(c)(2)(C) authorized Customs to seize merchandise imported in violation of the copyright laws, just as § 1595a(c)(1)(B) authorizes Customs to seize merchandise imported in violation of the controlled substances laws. *Id.* Then, in *Andritz Sundwig GMBH v. United States*, 42 CIT __, __, 322 F. Supp. 3d 1360, 1364 (2018), the Court concluded only that it lacked jurisdiction over decisions of the USDA to exclude merchandise from entry. In that case, the exclusions were pursuant to "Emergency Action Notifications," which "list[ed] USDA as the supervisory agency and cit[ed] to the Plant Protection Act and regulations promulgated thereunder." *Id.* (citing 7 U.S.C. § 7701). By contrast, and as noted above, in the instant case Customs (not DEA) issued to plaintiff detention notices that were "pursuant to" *Customs'* authority under § 1499 (not any statutory authority of the DEA) and did not reference any other agency.

The House Report demonstrates that Congress did not intend for the requirements of § 1499(c) to apply to instances in which Customs detains merchandise "on behalf of another agency" such that Customs "is not directly involved in the activities which result in the decision to admit or exclude merchandise."[13] *Id.* That report referenced the FDA and the USDA as illustrative examples of agencies on whose behalf Customs "often detains merchandise." *Id.* Titles 21 and 7 in turn include express statutory authority for those agencies to "refuse[] admission" to, 21 U.S.C. § 381(a), or "hold, seize . . . or otherwise dispose" of, 7 U.S.C. § 7714(a), certain merchandise regulated by those agencies. *See* 21 U.S.C. § 381(a) (requiring the Secretary of the Treasury to "deliver to the Secretary of Health and Human Services [(HHS)], upon his request, samples of food, drugs, devices, tobacco products, and cosmetics which are being imported . . . into the United States" and allowing the Secretary of HHS to "refuse[] admission" of those products under certain conditions); 7 U.S.C. § 7714(a) (authorizing the Secretary of USDA to "hold, seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of any plant, plant pest, noxious weed, biological control organism, plant product, article, or means of conveyance that . . . is moving into or through the United States" if "the Secretary has reason to believe [the merchandise] is a plant pest or noxious weed or is infested with a plant pest or noxious weed"); *see also Andritz*, 42 CIT at __, 322 F. Supp. 3d at 1364 (holding that this Court lacked jurisdiction over an action by the USDA to exclude merchandise from entry). Congress has authorized other agencies to regulate certain imported products, and those agencies have promulgated regulations delegating to themselves express authority to determine the admissibility of those products. *See, e.g.*, 16 U.S.C. §§ 1538(d)(3), 1540(e)(3) (Secretary of the Interior); *see also* 50 C.F.R. § 14.52 ("[A] Service officer [of the U.S.

[13] On this point, and as outlined above, Customs issued to plaintiff detention notices "pursuant to" § 1499, sent samples of the subject merchandise to Customs' lab and instructed plaintiff to send correspondence to Customs. Any contention that Customs either detained plaintiff's merchandise "on behalf of another agency" or "[was] not directly involved in the activities which result[ed] in the decision to admit or exclude" plaintiff's merchandise is without merit.

Fish and Wildlife Service] must clear all wildlife imported into the United States prior to release from detention by Customs officers.").[14]

The statutory and regulatory scheme in the instant case stands in stark contrast. Defendant points to 21 U.S.C. § 952(a), which grants to the Attorney General authority to prescribe regulations governing the importation of controlled substances. Def. Br. at 8. Under that authority, the Attorney General has issued regulations that, inter alia, prohibit persons from importing controlled substances unless those persons either have a permit and are "properly registered," 21 C.F.R. § 1312.11(a), or have "filed an import declaration," *id.* § 1312.11(b).[15] However, those provisions do not provide authority to the DEA to determine the admissibility of any particular entry. *See Inspired Ventures, LLC v. United States*, Slip Op. 24–121, 2024 WL 4616192, at *5 (CIT Oct. 30, 2024) ("The mere promulgation of product standards and regulations does not vest that agency with the authority to deny [admissibility to] imports that fail to meet those standards."). Defendant has not identified any statute or regulation that grants to the DEA authority to determine whether imported merchandise suspected to contain controlled substances is admissible into the United States. To the contrary, 19 U.S.C. § 1595a(c)(1)(B)

[14] As another example, the Animal Health Protection Act, 7 U.S.C. § 8301, et seq., gives to the Secretary of Agriculture authority to issue regulations restricting the importation of meat and meat-food products. Under that authority, Department of Agriculture regulations provide that *Customs* may detain certain imports regulated under that statute, but *officers of the USDA* will determine whether the detained imports may enter the United States:

> (a) All imported meat and meat-food products offered for entry into the United States are subject to the regulations prescribed by the Secretary of Agriculture under the Animal Health Protection Act. . . . Such meat and meat-food products will not be released from CBP custody prior to inspection by an inspector of the Food Safety and Inspection Service, Meat and Poultry Inspection, except when authority is given by such inspector for inspection at the importer's premises or other place not under CBP supervision.

19 C.F.R. § 12.8(a).

[15] Similar to the DEA, the U.S. Fish and Wildlife Service has established by regulation an "import declaration requirement." 50 C.F.R. § 14.61. However, in contrast to the DEA, the U.S. Fish and Wildlife Service has established by regulation also the authority to determine whether imported wildlife actually complies with that requirement. 50 C.F.R. § 14.53 governs the "[d]etention and refusal of clearance" of imported wildlife:

> (a) Detention. Any Service officer, or Customs officer [where the Service officer is unavailable], may detain imported . . . wildlife. . . . As soon as practicable following the importation . . . and decision to detain, the Service will mail a notice of detention . . . to the importer. . . .
>
> (b) Refusal of clearance. Any Service officer may refuse clearance of imported . . . wildlife . . . when there are responsible grounds to believe that:
>
> (1) A Federal law or regulation has been violated;
> (2) . . .
> (3) Any permit, license, or other documentation required for such wildlife is not available, is not currently valid, has been suspended or revoked, or is not authentic;
> (4) The importer . . . has filed an incorrect or incomplete declaration for importation as provided in § 14.61 or § 14.63 . . . .

grants to Customs — not the DEA — the authority to seize merchandise imported in violation of the controlled substances laws. In short, Congress did not grant to the DEA — nor has the DEA by regulation claimed — the authority to determine the admissibility of imported merchandise. For that reason, and for the reasons outlined above, the authority to determine the admissibility of the subject merchandise was not "vested in an agency other than the Customs Service." 19 U.S.C. § 1499(c).[16]

In sum, Customs' failure to make a final determination as to the admissibility of the subject merchandise within the required 30 days resulted in the exclusion of the merchandise by operation of law. *See* 19 U.S.C. § 1499(c)(5)(A). As a consequence, the court has subject matter jurisdiction over the deemed denial of plaintiff's protest.

CONCLUSION

For the reasons set out above, it is hereby

ORDERED that defendant's motion to supplement its motion to dismiss is **DENIED**; and it is further

ORDERED that defendant's motion to dismiss for lack of subject matter jurisdiction is **DENIED.**

Dated: November 26, 2024
New York, New York

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

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[16] "[O]nce an action respecting a detention is commenced," the statute requires that the court "grant the appropriate relief," which may include "an order to cancel the detention and release the merchandise," unless "the Customs Service establishes by a preponderance of the evidence that an admissibility decision has not been reached for good cause." 19 U.S.C. § 1499(c)(5)(C). The House Report supporting the Customs Modernization Act that established § 1499(c)'s procedures elaborated on the "good cause" standard:

> In meeting the "good cause" burden related to an admissibility decision before the Court of International Trade, the Committee intends that the Customs Service may satisfy the "good cause" burden by showing that another federal agency with jurisdiction over an admissibility decision has not yet reached a determination regarding the admissibility of the merchandise. The Committee intends, however, that this not provide the basis for continued inordinate delay and would encourage the determination by the court of a reasonable date certain for a decision.

H.R. Rep. No. 103–361, pt. 1, at 112 (1993). The court considers this language relevant to the question of whether the court may exercise jurisdiction in the instant case. Congress plainly envisioned a scenario, such as the one before the court, in which Customs may decide on its own to detain merchandise for which Customs is authorized under the customs laws to determine admissibility, but where "jurisdiction over" that admissibility determination resides in another agency. The court therefore has subject matter jurisdiction to review the deemed denial of plaintiff's protest of the deemed exclusion. The nature of the DEA's communications to Customs — a matter of dispute in parties' briefing on defendant's motion to dismiss — will likely be a relevant consideration in the court's decision as to "the appropriate relief." 19 U.S.C. § 1499(c)(5)(C); *see also* 28 U.S.C. § 2640(a)(1) (providing that in "[c]ivil actions contesting the denial of a protest" under 19 U.S.C. § 1515, the court "shall make its determination upon the basis of the record made before the court").

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