

# U.S. Customs and Border Protection



## DEPARTMENT OF THE TREASURY

### 19 CFR PART 12

### CBP DEC. 21-01

#### **EXTENSION OF IMPORT RESTRICTIONS IMPOSED ON CATEGORIES OF ARCHAEOLOGICAL MATERIAL OF ITALY**

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

**ACTION:** Final rule.

**SUMMARY:** This document amends U.S. Customs and Border Protection (CBP) regulations to reflect an extension of import restrictions on certain categories of archaeological material of the Italian Republic (Italy). The restrictions, which were originally imposed by Treasury Decision 01-06 and last extended by CBP Decision (CBP Dec.) 16-02, are due to expire on January 12, 2021. The Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has made the requisite determination for extending the import restrictions that previously existed and entered into a new Memorandum of Understanding (MOU) with Italy to reflect the extension of these import restrictions. The new MOU supersedes the existing MOU that was entered into on January 19, 2001, and previously extended, most recently until January 12, 2021. Accordingly, these import restrictions will remain in effect for an additional five years, and the CBP regulations are being amended to reflect this extension until January 12, 2026. CBP Dec. 11-03 contains the amended Designated List of archaeological material of Italy to which the restrictions apply.

**DATES:** Effective on January 12, 2021.

**FOR FURTHER INFORMATION CONTACT:** For legal aspects, Lisa L. Burley, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of

Trade, (202) 325–0300, *ot-otrrculturalproperty@cbp.dhs.gov*. For operational aspects, Genevieve S. Dozier, Management and Program Analyst, Commercial Targeting and Analysis Center, Trade Policy and Programs, Office of Trade, (202) 945–2942, *CTAC@cbp.dhs.gov*.

## SUPPLEMENTARY INFORMATION:

### I. Background

Pursuant to the Convention on Cultural Property Implementation Act, Public Law 97–446, 19 U.S.C. 2601 *et seq.* (hereinafter, “the Cultural Property Implementation Act”) which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)), the United States entered into a bilateral agreement with the Italian Republic (Italy) on January 19, 2001, concerning the imposition of import restrictions on archaeological material representing the pre-Classical, Classical, and Imperial Roman periods (“the prior MOU”).

On January 23, 2001, the former U.S. Customs Service (now U.S. Customs and Border Protection (CBP)) published Treasury Decision 01–06 in the **Federal Register** (66 FR 7399), which amended § 12.104g(a) of Title 19 of the Code of Federal Regulations (19 CFR 12.104g(a)) to reflect the imposition of these restrictions and included a list covering certain types of archaeological material.

Import restrictions listed in 19 CFR 12.104g(a) are effective for no more than five years beginning on the date on which the agreement enters into force with respect to the United States. This period may be extended for additional periods of not more than five years if it is determined that the factors which justified the initial agreement still pertain and no cause for suspension of the agreement exists.

Since the final rule was published on January 23, 2001, the import restrictions that became effective on January 19, 2001, have been extended three times pursuant to exchanges of diplomatic notes as reflected in subsequent final rules. First, on January 19, 2006, CBP published CBP Decision (CBP Dec.) 06–01 in the **Federal Register** (71 FR 3000) which amended 19 CFR 12.104g(a) to reflect the extension for an additional period of five years. Second, on January 19, 2011, CBP published CBP Dec. 11–03 in the **Federal Register** (76 FR 3012) to extend the import restrictions for an additional five-year period. CBP Dec. 11–03 also reflects an amendment to the Designated List to include the subcategory “Coins of Italian Types” as part of the category entitled “Metal,” pursuant to 19 U.S.C. 2604. Third, on

January 15, 2016, CBP published CBP Dec. 16–02 in the **Federal Register** (81 FR 2086) to further extend the import restrictions. This extension was pursuant to the exchange of diplomatic notes that took place between the United States and Italy, with entry into force on January 12, 2016, thus the extension of the import restrictions was implemented for an additional five-year period ending on January 12, 2021. See 19 CFR 12.104g(a); 81 FR 2086.

On September 29, 2020, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, after consultation with and recommendation by the Cultural Property Advisory Committee, determined that the cultural heritage of Italy continues to be in jeopardy from pillage of certain archaeological material representing the pre-Classical, Classical, and Imperial Roman periods and that the import restrictions should be extended for an additional five years. Subsequently, a new MOU was concluded between the United States and Italy on October 29, 2020. The new MOU supersedes and replaces the prior MOU of January 19, 2001, as amended and extended. The new MOU extends the import restrictions that went into effect under the prior MOU, as amended and extended, for five years from entry into force of the new MOU on January 12, 2021. The new MOU is titled: “Memorandum of Understanding between the Government of the United States of America and the Government of the Italian Republic Concerning the Imposition of Import Restrictions on Categories of Archaeological Material of Italy.” Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions.

The restrictions on the importation of categories of archaeological material of Italy are to continue in effect until January 12, 2026. Importation of such materials from Italy continues to be restricted until that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

The Designated List of pre-Classical, Classical and Imperial Roman period archaeological material from Italy covered by these import restrictions is set forth in CBP Dec. 11–03. The Designated List and additional information may also be found at the following website address: <https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions> by selecting the materials for “Italy.”

#### *Inapplicability of Notice and Delayed Effective Date*

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

*Regulatory Flexibility Act*

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

*Executive Orders 12866 and 13771*

CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Order 12866 or Executive Order 13771 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866 and section 4(a) of Executive Order 13771.

*Signing Authority*

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

**List of Subjects in 19 CFR Part 12**

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

**Amendments to the CBP Regulations**

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

**PART 12—SPECIAL CLASSES OF MERCHANDISE**

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

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

\* \* \* \* \*

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

\* \* \* \* \*

**§ 12.104g [Amended]**

■ 2. In § 12.104g, amend the table in paragraph (a), in the entry for Italy, by removing the words “CBP Dec. 16–02” and adding in their place the words “CBP Dec. 21–01”.

Mark A. Morgan, the Chief Operating Officer and Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, is delegating the authority to electronically sign this notice document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: January 7, 2021.

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

TIMOTHY E. SKUD,  
*Deputy Assistant*  
*Secretary of the Treasury.*

[Published in the Federal Register, January 12, 2021 (85 FR 2255)]



## 19 CFR PART 177

### REVOCATION OF A RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A PLANT DISTILLATION REFINING MODULE

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

**ACTION:** Notice of revocation of one ruling letter, and of revocation of treatment relating to the tariff classification of a plant distillation refining module.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of a plant distillation refining module under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 42, on October 28, 2020. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 28, 2021.

**FOR FURTHER INFORMATION CONTACT:** Tom P. Beris, Electronics, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325-0292.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 54, No. 42, on October 28, 2020, proposing to revoke one ruling letter pertaining to the tariff classification of a plant distillation refining module. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N300353, dated September 27, 2018, CBP classified a plant distillation refining module in heading 84.19, HTSUS, specifically in subheading 8419.89.95, HTSUS, which provides for "Machinery, plant or laboratory equipment, whether or

not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; Other machinery, plant or equipment: Other: Other.” CBP has reviewed NY N300353 and has determined the ruling letter to be in error. It is now CBP’s position that the plant distillation refining module is properly classified by application of General Rule of Interpretation (GRI) 1 (Note 4 to Section XVI) in heading 84.19, HTSUS, and GRIs 6, 1 and 3 (c) under subheading 8419.60.50, HTSUS, which provides for “other machinery for liquefying air or other gases.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking N300353 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter (“HQ”) H302168, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated:

GREGORY CONNOR  
*for*

CRAIG T. CLARK,  
*Director*

*Commercial and Trade Facilitation Division*

*Attachment*

HQ H302168

January 8, 2021

OT:RR:CTF:EMAIN HQ H302168 TPB

CATEGORY: Classification

TARIFF NO.: 8419.60.50

JOSEPH ACAYAN

GIVENS &amp; JOHNSTON PLLC

950 ECHO LANE, SUITE 360

HOUSTON, TX 77024-2788

Re: Revocation of NY N300353; Classification of a distillation refining module

DEAR MR. ACAYAN:

The following is our decision regarding your request for reconsideration of New York Ruling Letter (NY) N300353, dated September 27, 2018, on behalf of your client, Fluor Enterprises, Inc. (Fluor; Importer), regarding the tariff classification of a certain plant module under the Harmonized Tariff Schedule of the United States (HTSUS).

In that ruling letter, the product at issue, "Module 1101JB," is described as interfacing with various other modules and consists of interconnected components that include reboilers, condensers, pumps, drums and interconnecting pipes. The module was classified under subheading 8419.89.9585, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; Other machinery, plant or equipment: Other: Other." In your request for reconsideration, you argue that the proper classification of the module is under subheading 8419.50.50, HTSUS, which provides for other heat exchange units.

We have now determined that the distillation refining module subject to N300353 is classifiable in subheading 8419.60.50. Notice of the proposed action was published in the Customs Bulletin, Vol. 54, No. 42, on October 28, 2020. No comments were received in response to that notice. For the reasons set forth below, we hereby revoke NY N300353.

**FACTS:**

The article at issue in NY N300353 is Module 1101JB, which is described in the ruling as follows:

The Distillation Refining Module, module 1101JB, interfaces with various other modules and consists of interconnected components that include reboilers, condensers, pumps, drums and interconnecting pipes. It is noted that the distillation module does not include the distillation columns and does not complete a distillation process. The function of the multi-tiered module is to complete a transfer of heat process that vaporizes liquid and a cooling process that liquefies gas.



The reboilers are configured as shell and tube heat exchangers that use steam or gas to vaporize liquid. The vapor is then returned to the boilers and liquid drawn from the boilers is collected by a drum and subsequently pumped to another module.

The condensers, which are also said to be configured as a shell and tube heat exchangers, cool vapor and liquefy gas. The condensed liquid produced by the condensers is sent to a drum and later pumped to another module.

As implied above, the subject module is one of several separately imported modules that comprise the South Louisiana Methanol Plant (the Plant). The Plant includes a 93-tray distillation column (the "column") that is used to separate a mixed stream of liquid methanol and water. The column produces a stream of 99%+ pure methanol gas out of the top and a stream of 99%+ pure water out of the bottom. You note that the subject distillation module does not include the distillation columns and does not complete a distillation process. While the reboilers and the condensers are both included in Module 1101JB and are imported together, they are two separate systems supporting the column, which performs two distinctly different, albeit complementary, functions.

In your submission, you note that the reboilers provide the heat necessary for the distillation column to function by boiling and recycling a portion of the column's bottom liquid fraction back into the column, while the condensers dissipate heat from the column to help regulate the temperature in the column by condensing and recycling a portion of the column's top gaseous fraction back into the column.

NY N300353 states that the function of the multi-tiered module is to complete a transfer of heat process that vaporizes liquid and a cooling process that liquefies gas. The reboilers are configured as shell and tube heat exchangers that use steam or gas to vaporize liquid. The vapor is then returned to the boilers and liquid drawn from the boilers is collected by a drum and subsequently pumped to another module. The condensers, which are also said to be configured as a shell and tube heat exchangers, cool vapor and liquefy gas. The condensed liquid produced by the condensers is sent to a drum and later pumped to another module.

#### **ISSUE:**

What is the classification of the distillation refining module?

#### **LAW AND ANALYSIS:**

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

The HTSUS provisions under consideration are as follows:

8419 Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking,

roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, nonelectric; parts thereof:

- 8419.50 - Heat exchange units
- 8419.60 - Machinery for liquefying air or other gases
  - Other machinery, plant and equipment
- 8419.89 - - Other

You note that while the reboilers and the condensers are both included in Module 1101JB and are imported together they are two separate systems supporting the column that perform two distinctly different, albeit complementary, functions. As such, they should be classified separately. However, from the schematics provided with your request, the Module 1101JB comprises a complete system where the component reboilers and condensers are interconnected. As such, Note 4 to Section XVI is applicable. That Note states:

Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function.

The components, reboilers and condensers, contribute together to perform a function covered by heading 8419, i.e., the treatment of materials by a process involving a change of temperature. As such, there is no difference of opinion between Importer and CBP as to the heading for these modules are classified under.

With regard to the subheading, GRI 6 instructs that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to GRIs 1 – 5, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

In your submission, you argue that the reboilers and the condensers are all shell and tube heat exchangers and based on their function, should be classified under subheading 8419.50 as heat exchangers.

We agree that the reboilers are shell and tube heat exchangers, and if these were the sole components of the module, they would be classified under subheading 8419.50, HTSUS. However, the module is comprised of additional components, which include condensers. As you indicate, the gaseous fraction of the methane feed enters the condensers shell, where it is cooled to the point of condensing. Subheading 8419.60, HTSUS, specifically provides for machinery for liquefying air or other gases, and therefore covers the instant condensers regardless of whether they accomplish their function by virtue of heat transfer.

Taking the above into consideration, the instant Module 1101JB performs the functions of vaporizing liquid *and* liquefying gas through a combination of reboilers and condensers. Looking again at Note 4 to Section XVI, it states that where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by

transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function. Application of this Note at the subheading level does not resolve the classification issue, since neither subheading 8419.50 or 8419.60 describes a clearly defined function performed by the module; each subheading describes only a part of the module's operation. Subheading 8419.89 is a residual subheading, which provides for other machinery or plant equipment not described in any of the previous subheadings. But in this case, the functions of the module have been described in two preceding subheadings of heading 8419, HTSUS. As such, GRI 1 (*via* GRI 6) instructs us to proceed to the subsequent GRIs.

In this case, we have a product comprised of components described in two different subheadings, i.e., subheading 8419.50 and 8419.60, making it a composite good. These types of goods are classified by application of GRI 3. Further, because both the reboilers and the condensers provide necessary functions to the module, neither component imparts the essential character of the module. Therefore, by application of GRI 3 (c), the module will be classified under the subheading which occurs last in numerical order among those which equally merit consideration. In this case, subheading 8419.60, which provides for machinery for liquefying air or other gases.

#### **HOLDING:**

As explained above, by application of GRI 1 (Note 4 to Section XVI) Module 1101JB is classified under heading 8419, HTSUS, which provides for machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature. Further, by application of GRIs 6 and 3 (c), the module is classified in subheading 8419.60.50, HTSUS, which provides for other machinery for liquefying air or other gases. The general rate of duty is free.

Pursuant to U.S. Note 20 to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8419.60.50, HTSUS, unless specifically excluded, are subject to an additional 25-percent ad valorem rate of duty. At the time of importation, you must report the Chapter 99 subheading, i.e., 9903.88.01, in addition to subheading 8419.60.50, HTSUS, listed above.

The HTSUS is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP websites, which are available at <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> and <https://www.cbp.gov/trade/remedies/301-certain-products-china>, respectively.

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

#### **EFFECT ON OTHER RULINGS:**

New York Ruling Letter N300353, dated September 27, 2018, is hereby REVOKED. In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

*Sincerely,*

GREGORY CONNOR

*for*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

## AGENCY INFORMATION COLLECTION ACTIVITIES:

### Entry Summary

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

**ACTION:** 30-Day notice and request for comments; extension of an existing collection of information.

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

**DATES:** Comments are encouraged and must be submitted (no later than February 10, 2021) to be assured of consideration.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). 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](mailto: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** (Volume 85 FR Page 47977) on August 7, 2020, 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 Summary.

**OMB Number:** 1651-0022.

**Form Number:** 7501.

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

**Type of Review:** Extension (without change).

**Affected Public:** Importer, importer's agent for each import transaction.

**Abstract:** CBP Form 7501, *Entry Summary*, is used to identify merchandise entering the commerce of the United States, and to document the amount of duty and/or tax paid. CBP Form 7501 is submitted by the importer, or the importer's agent, for each import transaction. The data on this form is used by CBP as a record of the import transaction; to collect the proper duty, taxes, certifications and enforcement information; and to provide data to the U.S. Census Bureau for statistical purposes. CBP Form 7501 must be filed within 10 working days from the time of entry of merchandise into the United States. Collection of the data on this form is authorized by 19 U.S.C. 1484 and provided for by 19 CFR 142.11 and CFR 141.61. CBP Form 7501 and accompanying instructions can be found at <https://www.cbp.gov/newsroom/publications/forms?title=7501&=Apply>.

*7501-Formal Entry (Electronic Submission)*

**Estimated Number of Respondents:** 2,336.

**Estimated Number of Annual Responses per Respondent:** 9,903.

**Estimated Number of Total Annual Responses:** 23,133,408.

**Estimated Time per Response:** 5 minutes.

**Estimated Total Annual Burden Hours:** 1,920,072.86.

*7501-Formal Entry (Paper Submission)*

**Estimated Number of Respondents:** 28.

**Estimated Number of Annual Responses per Respondent:** 9,903.

**Estimated Number of Total Annual Responses:** 277,284.

**Estimated Time per Response:** 20 minutes.

**Estimated Total Annual Burden Hours:** 92,335.57.

*7501-Formal Entry With Softwood Lumber Act of 2008 \* (Paper Only)*

**Estimated Number of Respondents:** 210.

**Estimated Number of Annual Responses per Respondent:** 1,905.

**Estimated Number of Total Annual Responses:** 400,050.

**Estimated Time per Response:** 40 minutes.

**Estimated Total Annual Burden Hours:** 266,433.

*7501-Informal Entry (Electronic Submission)*

**Estimated Number of Respondents:** 1,883.

**Estimated Number of Annual Responses per Respondent:** 2,582.

**Estimated Number of Total Annual Responses:** 4,861,906.

**Estimated Time per Response:** 5 minutes.

**Estimated Total Annual Burden Hours:** 403,538.19.

*7501-Informal Entry (Paper Submission)*

**Estimated Number of Respondents:** 19.

**Estimated Number of Annual Responses per Respondent:** 2,582.

**Estimated Number of Total Annual Responses:** 49,058.

**Estimated Time per Response:** 15 minutes.

**Estimated Total Annual Burden Hours:** 12,264.5.

*7501A-Document / Payment Transmittal (Paper Only)*

**Estimated Number of Respondents:** 20.

**Estimated Number of Annual Responses per Respondent:** 60.

**Estimated Number of Total Annual Responses:** 1,200.

**Estimated Time per Response:** 15.

**Estimated Total Annual Burden Hours:** 300.

*Exclusion Approval Information Letter*

**Estimated Number of Respondents:** 5,000.

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

**Estimated Number of Total Annual Responses:** 5,000.

**Estimated Time per Response:** 3 minutes.

**Estimated Total Annual Burden Hours:** 250.

Dated: January 6, 2021.

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

[Published in the Federal Register, January 11, 2021 (85 FR 1983)]

**AGENCY INFORMATION COLLECTION ACTIVITIES:****Drawback Process Regulations**

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

**ACTION:** 30-Day notice and request for comments; extension of an existing collection of information.

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

**DATES:** Comments are encouraged and must be submitted (no later than February 10, 2021) to be assured of consideration.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of



publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). 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](mailto: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** (85 FR 68905) on October 30, 2020, 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:** Drawback Process Regulations.

**OMB Number:** 1651-0075.

**Form Number:** CPB Form 7553.

**Current Action:** This submission is being made to extend the expiration date with no change to the burden hours.

**Type of Review:** Extension (without change).

**Affected Public:** Businesses.

**Abstract:** The collections of information related to the drawback process are required as per 19 CFR part 190 (Modernized Drawback), which provides for refunds of duties, taxes, and fees for certain merchandise that is imported into the United States where there is a subsequent related exportation or destruction. All claims for drawback, sometimes referred to as TFTEA-Drawback, must be filed electronically in the Automated Commercial Environment (ACE), in accordance with the Trade Facilitation Trade Enforcement Act of 2015 (TFTEA) (Pub. L. 114–125, 130 Stat. 122), 19 U.S.C. 1313, and in compliance with the regulations in part 190, 181 (NAFTA Drawback), and 182 (USMCA Drawback). Specific information on completing a claim is available in the drawback CBP and Trade Automated Interface Requirement (CATAIR) document at: <https://www.cbp.gov/document/guidance/ace-drawback-catair-guidelines>.

CBP Form 7553, Notice of Intent to Export, Destroy or Return Merchandise for Purposes of Drawback (NOI), documents both the exportation and destruction of merchandise eligible for drawback. The NOI is the official notification to CBP that an exportation or destruction will occur for drawback eligible merchandise. The CBP Form 7553 has been updated to comply with TFTEA-Drawback requirements and is accessible at <http://www.cbp.gov/newsroom/publications/forms>.

### Relevant Regulations and Statutes

Title 19, part 181—<https://ecfr.io/Title-19/Part-181>.

Title 19, part 182—<https://ecfr.federalregister.gov/current/title-19/chapter-I/part-182?toc=1>.

Title 19, part 190—<https://ecfr.io/Title-19/Part-190>.

19 U.S.C. 1313—<https://www.govinfo.gov/content/pkg/USCODE-2011-title19/pdf/USCODE-2011-title19-chap4-subtitleII-partI-sec1313.pdf>.

19 U.S.C. 1313 authorizes the information collected on the CBP form 7553 as well as in the ACE system for the electronic drawback claim.

The New Data Elements in ACE for Drawback include the following:

1. Substituted Value per Unit
2. Entry Summary Line Item Number

3. Bill of Materials/Formula
4. Certificate of Delivery/Drawback Eligibility Indicator
5. Import Tracing Identification Number (ITIN)
6. Manufacture Tracing Identification Number (MTIN)
7. Certification for Valuation of Destroyed Merchandise
8. Substituted Unused Wine Certification
9. Certification of Eligibility for AP and/ or WPN Privilege(s)
10. Identification of Accounting Methodology
11. Indicator for Notice of Intent To Export or Destroy
12. Indicator for Waiver of Drawback Claim Rights

New data elements added to the CBP Form 7553:

1. Continuation sheet (#15–19)
2. Line item number added (#15)
3. Rejected merchandise box added (#20)
4. Instructions were edited to comply with TFTEA-Drawback requirements

This collection of information applies to the individuals and companies in the trade community who are and are not familiar with drawback, importing and exporting procedures, and with the CBP regulations.

Please note that CBP Forms 7551 and 7552 are both abolished. From February 24, 2019, onward, TFTEA-Drawback, as provided for in part 190, is the only legal framework for filing drawback claims. Sections 190.51, 190.52, and 190.53 provide the requirements to submit a drawback claim electronically. Sections 190.10 and 190.24 require that any transfers of merchandise must be evidenced by business records, as defined in section 190.2.

*Type of Information Collection:* CBP Form 7553 Notice of Intent to Export/Destroy Merchandise.

**Estimated Number of Respondents:** 3,066.

**Estimated Number of Annual Responses per Respondent:** 20.

**Estimated Number of Total Annual Responses:** 66,772.

**Estimated Time per Response:** 33 minutes (.55 hours).

**Estimated Total Annual Burden Hours:** 38,582.

Dated: January 6, 2021.

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

**AGENCY INFORMATION COLLECTION ACTIVITIES:****Cargo Manifest/Declaration, Stow Plan, Container Status Messages and Importer Security Filing**

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

**ACTION:** 30-Day Notice and request for comments; Extension of an existing collection of information.

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

**DATES:** Comments are encouraged and must be submitted (no later than February 10, 2021) to be assured of consideration.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). 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](mailto: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** (Volume 85 FR Page 68903) on October 30, 2020, 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:** Cargo Manifest/Declaration, Stow Plan, Container Status Messages and Importer Security Filing.

**OMB Number:** 1651-0001.

**Form Number:** CBP Form 1302, CBP Form 1302A, CBP Form 7509, CBP Form 7533.

**Current Action:** This submission is being made to extend the expiration date with a change to the burden hours.

**Type of Review:** Extension (with change).

**Affected Public:** Businesses.

**Abstract:** *CBP Form 1302:* The master or commander of a vessel arriving in the United States from abroad with cargo on board must file CBP Form 1302, *Inward Cargo Declaration*, or submit the information on this form using a CBP-approved electronic equivalent. CBP Form 1302 is part of the manifest requirements for vessels entering the United States and was agreed upon by treaty at the United Nations Inter-government Maritime Consultative Organization (IMCO). This form and/or electronic equivalent, is provided for by 19 CFR 4.5, 4.7, 4.7a, 4.8, 4.33, 4.34, 4.38, 4.84, 4.85, 4.86, 4.91, 4.93 and 4.99 and is accessible at: [https://www.cbp.gov/sites/default/files/assets/documents/2020-Apr/CBP%20Form%201302\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Apr/CBP%20Form%201302_0.pdf). Although the form has been mostly automated through the Automated Commercial Environment (ACE), there are still circumstances where a paper CBP Form 1302 is required due to not being captured in ACE. CBP is working to automate the remaining use cases of the CBP for the CBP Form 1302 through the Vessel Entrance and Clearance System (VECS).

**CBP Form 1302A:** The master or commander of a vessel departing from the United States must file CBP Form 1302A, *Cargo Declaration Outward With Commercial Forms*, or CBP-approved electronic equivalent, with copies of bills of lading or equivalent commercial documents relating to all cargo encompassed by the manifest. This form and/or electronic equivalent, is provided for by 19 CFR 4.62, 4.63, 4.75, 4.82, and 4.87–4.89, and is accessible at: [https://www.cbp.gov/sites/default/files/assets/documents/2018-Feb/CBP%20Form%201302A\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2018-Feb/CBP%20Form%201302A_0.pdf). Certain functions of the paper CBP Form 1302A that are not part of the automated export manifest process will also be automated through VECS.

**Electronic Ocean Export Manifest:** CBP began a pilot in 2015 to electronically collect the ocean export manifest information. This information is transmitted to CBP in advance via the Export Information System within the Automated Commercial Environment (ACE).

**CBP Form 7509:** The aircraft commander or agent must file Form 7509, *Air Cargo Manifest*, with CBP at the departure airport, or respondents may submit the information on this form using a CBP-approved electronic equivalent. CBP Form 7509 contains information about the cargo onboard the aircraft. This form, and/or electronic equivalent, is provided for by 19 CFR 122.35, 122.48, 122.48a, 122.52, 122.54, 122.73, 122.113, and 122.118 and is accessible at: [http://www.cbp.gov/sites/default/files/documents/CBP%20Form%207509\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/CBP%20Form%207509_0.pdf).

**Air Cargo Advance Screening (ACAS):** As provided by 19 CFR 122.48b, for any inbound aircraft required to make entry that will have commercial cargo aboard, the inbound air carrier or other eligible party must transmit, via a CBP-approved electronic interchange system, specified advance data concerning the inbound cargo to CBP as early as practicable, but no later than prior to loading of the cargo onto the aircraft.

**Electronic Air Export Manifest:** CBP began a pilot in 2015 to electronically collect the air export manifest information. This information is transmitted to CBP in advance via the ACE's Export Information System.

**CBP Form 7533:** The master or person in charge of a conveyance files CBP Form 7533, *INWARD CARGO MANIFEST FOR VESSEL UNDER FIVE TONS, FERRY, TRAIN, CAR, VEHICLE, ETC*, which is required for a vehicle or a vessel of less than 5 net tons arriving in the United States from Canada or Mexico, otherwise than by sea, with baggage or merchandise. Respondents may also submit the

information on this form using a CBP-approved electronic equivalent. CBP Form 7533, and/or electronic equivalent, is provided for by 19 CFR 123.4, 123.7, 123.61, 123.91, and 123.92, and is accessible at: [http://www.cbp.gov/sites/default/files/documents/CBP%20Form%207533\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/CBP%20Form%207533_0.pdf).

*Electronic Rail Export Manifest:* CBP began a pilot in 2015 to electronically collect the rail export manifest information. This information is transmitted to CBP in advance via the ACE's Export Information System.

*Manifest Confidentiality:* An importer or consignee (inward) or a shipper (outward) may request confidential treatment of its name and address contained in manifests by following the procedure set forth in 19 CFR 103.31.

*Vessel Stow Plan:* For all vessels transporting goods to the US, except for any vessel exclusively carrying bulk cargo, the incoming carrier is required to electronically submit a vessel stow plan no later than 48 hours after the vessel departs from the last foreign port that includes information about the vessel and cargo. For voyages less than 48 hours in duration, CBP must receive the vessel stow plan prior to arrival at the first port in the United States. The vessel stow plan is provided for by 19 CFR 4.7c.

*Container Status Messages (CSMs):* For all containers destined to arrive within the limits of a U.S. port from a foreign port by vessel, the incoming carrier must submit messages regarding the status of events if the carrier creates or collects a container status message (CSM) in its equipment tracking system reporting that event. CSMs must be transmitted to CBP via a CBP-approved electronic data interchange system. These messages transmit information regarding events such as the status of a container (full or empty); booking a container destined to arrive in the United States; loading or unloading a container from a vessel; and a container arriving or departing the United States. CSMs are provided for by 19 CFR 4.7d.

*Importer Security Filing (ISF):* For most cargo arriving in the United States by vessel, the importer, or its authorized agent, must submit the data elements listed in 19 CFR 149.3 via a CBP-approved electronic interchange system within prescribed time frames outlined in 19 CFR 149.2. Transmission of these data elements provide CBP with advance information about the shipment.

*Type of Collection:* Air Cargo Manifest (CBP Form 7509) Air Cargo Advanced Screening (ACAS).

**Estimated Number of Respondents:** 215.

**Estimated Number of Annual Responses per Respondent:** 6820.4651.

**Estimated Number of Total Annual Responses:** 1,466,400.

**Estimated Time per Response:** 15 minutes.

**Estimated Total Annual Burden Hours:** 366,600.

*Type of Collection:* Inward Cargo Manifest for Truck, Rail, Vehicles, Vessels, etc. (CBP Form 7533).

**Estimated Number of Respondents:** 33,000.

**Estimated Numbers of Annual Responses per Respondent:** 291.8.

**Estimated Number of Total Annual Responses:** 9,629,400.

**Estimated Time per Response:** 6 minutes.

**Estimated Total Annual Burden Hours:** 962,940.

*Type of Collection:* Cargo Declaration (CBP Form 1302).

**Estimated Number of Respondents:** 10,000.

**Estimated Number of Annual Responses per Respondent:** 300.

**Estimated Number of Total Annual Responses:** 3,000,000.

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

**Estimated Total Annual Burden Hours:** 1,500,000.

*Type of Collection:* Export Cargo Declaration (CBP Form 1302A).

**Estimated Number of Respondents:** 500.

**Estimated Number of Annual Responses per Respondent:** 400.

**Estimated Number of Total Annual Responses:** 200,000.

**Estimated Time per Response:** 3 minutes.

**Estimated Total Annual Burden Hours:** 10,000.

*Type of Collection:* Importer Security Filing.

**Estimated Number of Respondents:** 240,000.

**Estimated Number of Annual Responses per Respondent:** 33.75.

**Estimated Number of Total Annual Responses:** 8,100,000.

**Estimated Time per Response:** 2.19 hours.

**Estimated Total Annual Burden Hours:** 17,739,000.

*Type of Collection:* Vessel Stow Plan.

**Estimated Number of Respondents:** 163.

**Estimated Number of Annual Responses per Respondent:** 109.

**Estimated Number of Total Annual Responses:** 17,767.



**Estimated Time per Response:** 1.79 hours.

**Estimated Total Annual Burden Hours:** 31,803.

*Type of Collection:* Container Status Messages.

**Estimated Number of Respondents:** 60.

**Estimated Number of Annual Responses per Respondent:** 4,285,000.

**Estimated Number of Total Annual Responses:** 257,100,000.

**Estimated Time per Response:** .0056 minutes.

**Estimated Total Annual Burden Hours:** 23,996.

*Type of Collection:* Request for Manifest Confidentiality.

**Estimated Number of Respondents:** 5,040.

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

**Estimated Number of Total Annual Responses:** 5,040.

**Estimated Time per Response:** 15 minutes.

**Estimated Total Annual Burden Hours:** 1,260.

*Type of Collection:* Electronic Air Export Manifest.

**Estimated Number of Respondents:** 260.

**Estimated Number of Annual Responses per Respondent:** 5,640.

**Estimated Number of Total Annual Responses:** 1,466,400.

**Estimated Time per Response:** 5 minutes.

**Estimated Total Annual Burden Hours:** 121,711.

*Type of Collection:* Electronic Ocean Export Manifest.

**Estimated Number of Respondents:** 500.

**Estimated Number of Annual Responses per Respondent:** 400.

**Estimated Number of Total Annual Responses:** 200,000.

**Estimated Time per Response:** 1.5 minutes.

**Estimated Total Annual Burden Hours:** 5,000.

*Type of Collection:* Electronic Rail Export Manifest.

**Estimated Number of Respondents:** 50.

**Estimated Number of Annual Responses per Respondent:** 300.

**Estimated Number of Total Annual Responses:** 15,000.

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

**Estimated Total Annual Burden Hours:** 2,490.

Dated: January 6, 2021.

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

[Published in the Federal Register, January 11, 2021 (85 FR 1984)]



# U.S. Court of International Trade

Slip Op. 21–4

MID CONTINENT STEEL & WIRE, INC. et al., Plaintiff and Consolidated Plaintiffs, v. UNITED STATES, Defendant, and PT ENTERPRISE INC. et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge  
Consol. Court No. 15–00213

[Sustaining Commerce’s decision to use a simple average to calculate a pooled standard deviation as part of its differential pricing analysis in its antidumping duty investigation of certain steel nails from Taiwan.]

Dated: January 8, 2021

*Adam H. Gordon and Ping Gong*, The Bristol Group PLLC of Washington, DC, for plaintiff and consolidated defendant-intervenor Mid Continent Steel & Wire, Inc.

*Bruce M. Mitchell, Ned H. Marshak, Andrew T. Schutz, and Dharmendra Choudhary*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP of Washington, DC, and New York, NY, for consolidated plaintiffs and defendant-intervenors PT Enterprise Inc., Pro-Team Coil Nail Enterprise Inc., Unicatch Industrial Co., Ltd., WTA International Co., Ltd., Zon Mon Co., Ltd., Hor Liang Industrial Corp., President Industrial Inc., and Liang Chyuan Industrial Co., Ltd.

*Mikki Cottel*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. Also on the brief were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

## **OPINION AND ORDER**

### **Kelly, Judge:**

Before the court is the U.S. Department of Commerce’s (“Commerce”) second remand redetermination in the antidumping duty (“ADD”) investigation of certain steel nails from Taiwan, pursuant to the court’s order implementing the Court of Appeals for the Federal Circuit’s (“Court of Appeals”) mandate in *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662 (Fed. Cir. 2019) (“*Mid Continent III*”) *rev’g in part* 41 CIT \_\_, 219 F. Supp. 3d 1326 (2017) (“*Mid Continent P*”). *See also* *Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT \_\_, 273 F. Supp. 3d 1161 (2017) (“*Mid Continent II*”); Final Results of Redetermination Pursuant to Court Order, June 16, 2020, ECF No. 144–1 (“*Second Remand Results*”); Order, Dec. 3, 2019, ECF No. 132 (“Order”).

The court remanded to Commerce for further proceedings in conformity with *Mid Continent III*, see Order, where the Court of Appeals found wanting, for several reasons, Commerce's explanation of its use of a simple average when determining the pooled standard deviation in its Cohen's *d* test. See *Mid Continent III*, 940 F.3d at 673–75. The Court of Appeals observed that: Commerce failed to address that the relevant part of the literature Commerce itself cites, calls for the use of weighted averages; Commerce's statement that simple averaging will not "skew" the outcome of its analysis, was conclusory; Commerce neither supported its dismissal of PT's charge that simple averages would distort the outcome of its Cohen's *d* test, nor explained why simple averaging was preferable; and, Commerce appeared to assume that weighted averaging must be done by counting the number of transactions, as opposed to quantities, sold within every transaction. See *id.*

On remand, Commerce reconsiders whether its "calculation of the pooled standard deviation based on a simple average of the variances determined for the test and comparison groups was appropriate," and finds that it is. *Second Remand Results* at 4–17. Commerce explains that a simple average of the variances for each group accurately represents pricing behaviors within each group because it is the group pricing that matters, and not the individual pricing amongst all sales, for the purposes of its analysis. See *id.* at 15–17, 35–36. Thus, using a simple average of the variances within each group in the pooled standard deviation, as the denominator in the Cohen's *d* analysis, will not mask possible targeted dumping that only exists within one group. See *id.* Conversely, a weighted average, based either on the number of transactions, sales volume or value, would skew the results towards the group with greater transactions or sales volume or value (and thus dilute the results from the other group). See *id.* at 2, 15–17. Commerce, therefore explains that a simple average is preferable because the purpose of the analysis is to identify masked dumping within the test group. See *id.* at 8, 14–17. For the following reasons, the court sustains Commerce's decision to use a simple average to calculate the pooled standard deviation.

## BACKGROUND

On June 25, 2014, in response to a petition filed by Mid Continent, Commerce initiated an ADD investigation of certain steel nails from six countries, including Taiwan. See *Certain Steel Nails from India, the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam*, 79 Fed. Reg. 36,019 (Dep't Commerce June 25, 2014) (initiation of less-than-

fair-value investigations). Commerce selected Taiwanese exporters PT Enterprise Inc. et al.'s ("PT")<sup>1</sup> and its affiliated producer, Pro-Team, and Quick Advance, Inc. and its affiliated producer, Ko's Nails Inc., as mandatory respondents for the investigation. See *Certain Steel Nails from Taiwan*, 79 Fed. Reg. 78,053, 78,054 (Dep't Commerce Dec. 29, 2014) (preliminary determination of sales at less than fair value, postponement of final determination) ("*Prelim. Results*"); Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Steel Nails from Taiwan at 2, PD 225, bar code 3247845-01 (Dec. 17, 2014) ("*Prelim. Decision Memo*");<sup>2</sup> see also Section 777A of the of the Tariff Act of 1930, as amended 19 U.S.C. § 1677f-1(c)(2)(B) (2012).<sup>3</sup>

On December 29, 2014, Commerce issued its negative preliminary determination. See *Prelim. Results*, 79 Fed. Reg. at 78,053; see also *Prelim. Decision Memo* at 1. Commerce applied its differential pricing analysis and determined that, although 41.73 percent of PT's U.S. sales passed the Cohen's d test, a meaningful difference did not exist in the dumping margins that would result from using the standard average-to-average ("A-to-A") methodology and the alternate mixed methodology. See *Prelim. Decision Memo* at 12. Commerce accordingly applied the standard A-to-A methodology to all of PT's sales, and preliminarily determined that respondents' steel nails from Taiwan "are not being, or are not likely to be, sold in the United States at less than fair value." *Id.* at 1.<sup>4</sup> Commerce preliminarily assigned PT a

<sup>1</sup> PT Enterprise Inc., Pro-Team Coil Nail Enterprise Inc., Unicatch Industrial Co., Ltd., WTO International Co., Ltd., Zon Mon Co., Ltd., Hor Liang Industrial Corp., President Industrial Inc. and Liang Chyuan Industrial Co., Ltd.

<sup>2</sup> On October 16, 2015, Defendant submitted indices to the public and confidential administrative records underlying Commerce's *Final Results*. These indices are located on the docket at ECF No. 17. All further references in this opinion to administrative record documents are identified by the numbers assigned by Commerce in those indices and preceded by "PD" and "CD" to denote public or confidential documents.

<sup>3</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

<sup>4</sup> Commerce uses what it refers to as a differential pricing analysis to determine whether there is a pattern of prices for comparable merchandise which differed significantly and then considers whether those differences can be taken into account using an A-to-A, a transaction-to-transaction or an average-to-transaction methodology. See 19 U.S.C. § 1677f-1. Specifically, the statute provides:

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if—

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph [19 U.S.C. § 1677f-1(1)(A)(i) or (ii)].

weighted-average dumping margin of 0.00 percent. *See Prelim. Results*, 79 Fed. Reg. at 78,054.

On May 20, 2015, Commerce issued its final determination. *See Certain Steel Nails from Taiwan*, 80 Fed. Reg. 28,959 (Dep't Commerce May 20, 2015) (final determination of sales at less than fair value) (“*Final Results*”) and accompanying Issues and Decision Memorandum for the Affirmative Final Determination in the Less than Fair Value Investigation of Certain Steel Nails from Taiwan, May 13, 2015, ECF No. 17 (“*Final Decision Memo*”). As an initial matter, Commerce determined that it made ministerial errors which impacted the dumping margins it calculated in the *Prelim. Results*. *See Final Results*, 80 Fed. Reg. at 28,960. Additionally, Commerce made other adjustments, including changes to the margin calculation. *See Final Decision Memo* at 1; *Final Results*, 80 Fed. Reg. at 28,960; *Mid Continent I*, 41 CIT at \_\_, 219 F. Supp. 3d at 1331. Commerce determined that 42.27 percent of PT’s U.S. sales had passed the Cohen’s d test, and accordingly applied the mixed methodology, by which Commerce applies the average-to-transaction (“A-to-T”) method to PT’s sales that passed the Cohen’s d test and the A-to-A method to PT’s sales that did not pass the Cohen’s d test, to calculate a respondent’s weighted-average dumping margin. *See Final Decision Memo* at 19. Commerce determined that a meaningful difference existed between the resultant A-to-A margin and mixed methodology margin, so it applied the mixed methodology (A-to-T) to calculate PT’s weighted-average dumping margin. *See Final Decision Memo* at 15–17. Commerce subsequently assigned PT a weighted-average dumping margin of 2.24 percent. *See Final Results*, 80 Fed. Reg. at 28,961. The final determination resulted in an ADD order on subject nails from Taiwan. *See Certain Steel Nails from the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam*, 80 Fed. Reg. 39,994, 39,994–97 (Dep’t Commerce July 13, 2015) ([ADD] orders).<sup>5</sup>

19 U.S.C. § 1677f-1(d)(1)(B). In its analysis, Commerce creates a ratio where the numerator is the difference between the mean of the test group’s prices and the mean of the comparison group’s prices and the denominator is the “pooled” variance of the test and comparison groups. *See Mid Continent III*, 940 F.3d at 671. *Mid Continent III* found wanting Commerce’s explanation for its decision to use simple averaging to calculate the pooled variance as opposed to weighted averaging. *See id.* at 673–675.

<sup>5</sup> On September 4, 2015, Mid Continent Steel & Wire, Inc. (“Mid Continent”) challenged Commerce’s final determination. *See Compl.*, Sept. 4, 2015, ECF No. 9. On September 18, 2015, PT moved to intervene as a defendant-intervenor, *see Con. Mot. to Intervene as of Right*, Sept. 18, 2015, ECF No. 11, which the court granted. *See Order*, Sept. 21, 2015, ECF No. 15. Later, Mid Continent’s challenge was consolidated with a challenge by PT in Ct. No. 15–00220, a parallel proceeding involving the same parties, facts and record. *See Joint Status Report & Proposed Briefing Schedule* at 2, Nov. 16, 2015, ECF No. 18; *Order*, Nov. 16, 2015, ECF No. 19. All of the issues raised in either Mid Continent’s or PT’s original

On March 23, 2017, the U.S. Court of International Trade (“CIT”) sustained Commerce’s determination including its decision to use a simple average to calculate the pooled standard deviation. *See Mid Continent I*, 41 CIT at \_\_, 219 F. Supp. 3d at 1340–43. On October 3, 2019, the Court of Appeals vacated and remanded in part the CIT’s judgment sustaining Commerce’s decision. *See Mid Continent III*, 940 F.3d at 675. The Court of Appeals disagreed with PT’s challenge to Commerce’s use of zeroing and Commerce’s requirement to have a Cohen’s  $d$  coefficient of at least 0.8, and thus sustained this court’s ruling upholding Commerce on those issues. *See Mid Continent III*, 940 F.3d at 672. However, the Court of Appeals instructed the CIT to remand to Commerce to provide additional reasoning in support of its decision to use a simple average to calculate the pooled standard deviation. *See id.* at 673–75. On December 3, 2019, the CIT remanded to Commerce to provide further explanation in accordance with the Court of Appeals’ directive. *See Order*, Dec. 3, 2019, ECF No. 132.

On March 3, 2020, Commerce released its draft remand redetermination and invited the parties to comment. *See Draft Results of Redetermination Pursuant to Court Order [Mid Continent III]*, PRRs 3–5, bar codes 3949998–01–03 (Mar. 3, 2020).<sup>6</sup> On March 19, 2020, PT and Mid Continent submitted comments to Commerce. *See Second Remand Results* at 3. On April 9, 2020, Commerce gave the parties an opportunity to submit factual information to rebut, clarify or correct the information contained in the comments submitted on March 19, 2020. *See id.* On May 4, 2020, Mid Continent submitted new factual information in response to PT’s comments. *See id.* On June 16, 2020, Commerce published its *Second Remand Results*. *See generally id.* It continues to find that it was justified in using a simple average of the variances to calculate the pooled standard deviation. *See generally id.*<sup>7</sup>

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complaints have been resolved before this court, and the Court of Appeals, but for the issue of whether Commerce’s decision to use a simple average (as opposed to weighted average) to calculate the pooled standard deviation was reasonable. *See generally Mid Continent I*, 41 CIT \_\_, 219 F. Supp. 3d 1326; *Mid Continent II*, 41 CIT \_\_, 273 F. Supp. 3d 1161; *Mid Continent III*, 940 F.3d 662.

<sup>6</sup> On June 23, 2020, Defendant submitted indices to the public and confidential administrative records underlying Commerce’s *Second Remand Results*. These indices are located on the docket at ECF Nos. 147–2 and 147–3, respectively. All further references in this opinion to administrative record documents are identified by the numbers assigned by Commerce in those indices and preceded by “PRR” and “CRR” to denote public or confidential documents.

<sup>7</sup> PT filed comments on the *Second Remand Results* on July 28, 2020, *see* Pl. [PT]’s Cmts. on Remand Results, July 28, 2020, ECF No. 150, and Mid Continent and Commerce each filed a reply to PT’s comments on the remand results. *See* Pl. & Consol. Def.-Intervenor [Mid Continent]’s Rely to Cmts. on Remand Results, Sept. 10, 2020, ECF No. 154; Def.’s Resp. to Cmts. on Remand Results, Sept. 10, 2020, ECF No. 155. Later, PT made a motion to file additional comments, *see* Mot. for Leave to File Add. Cmts., Sept. 16, 2020, ECF No. 156,



## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i), and 28 U.S.C. § 1581(c) (2012),<sup>8</sup> which grant the court authority to review actions contesting the final determination in an investigation of an ADD order. The court will uphold Commerce’s determination unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]” 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed ‘for compliance with the court’s remand order.’” *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT \_\_, \_\_, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

## DISCUSSION

In the results of its second remand redetermination, Commerce again decides to calculate a simple average of the variances in its Cohen’s d analysis, because in the present context it is more accurate to assign the test and comparison groups equal weight. *See Second Remand Results*. PT contends that a simple average is inconsistent with the statute and unreasonable as applied to this case, while the use of a weighted average is consistent with the statute, reasonable and produces a more accurate result. *See* Pl. [PT]’s Cmts. on Remand Results, July 28, 2020, ECF No. 150 (“PT’s Br.”). For the following reasons, Commerce’s decision is sustained.

In its second remand redetermination, Commerce again examines whether PT’s sales reflect a “pattern of export prices” for “comparable merchandise that differ[ed] significantly among purchasers, regions, or periods of time” and whether the differences can be “taken into account” using an A-to-A or A-to-T methodology. *See Second Remand Results* at 5. Commerce determines whether there is a pattern of export prices using a test known as Cohen’s d, which tests differences among subsets within a complete set of data. *See id.*; *Mid Continent III*, 940 F.3d at 671. The subsets here are called the test group and the comparison group. *See Mid Continent III*, 940 F.3d at 671. The Cohen’s d test requires Commerce to create a ratio in which the numerator is the difference between the mean of the test group’s prices

which the court granted. *See* Order, Oct. 8, 2020, ECF No. 164. PT filed additional comments on October 15, 2020, *see* Pl. [PT]’s Add. Cmts. on Remand Results, Oct. 15, 2020, ECF No. 165 (“PT’s Add. Cmts.”), and *Mid Continent* and Commerce each filed a reply to the additional comments. *See* Def. [U.S.]’s Reply to Cmts. on Remand Results, Oct. 22, 2020, ECF No. 166; Pl. & Def.-Intervenor [Mid Continent]’s Reply to Cmts. on Remand Results, Oct. 22, 2020, ECF No. 167.

<sup>8</sup> Further citations to Title 28 of the U.S. Code are to the 2012 edition.

and the mean of the comparison group's prices. See *Mid Continent III*, 940 F.3d at 671. The denominator is the "pooled" variance of the test and comparison groups. See *Mid Continent III*, 940 F.3d at 671. Although the pooled variance could either be a weighted average or a simple average, Commerce chooses in its analysis to use a simple average. See *Second Remand Results* at 15–16; see also Final Decision Memo at 28–29. Ultimately, Commerce divides the difference in the mean by the pooled variance to determine the Cohen's d coefficient. See *Mid Continent III*, 940 F.3d at 671. If the Cohen's d coefficient is 0.8 or greater, Commerce will deem the test group's pricing significantly different from the comparison group's pricing for purposes of meeting the "pattern" condition. See *Mid Continent III*, 940 F.3d at 671.

In the *Second Remand Results*, Commerce further explains that it uses a simple average, rather than a weighted average, for the pooled standard deviation to calculate an average of the comparison and test group's pricing behaviors that equally reflects both groups:

[T]he purpose of Commerce's Cohen's d test is to determine whether U.S. prices differ significantly among purchasers, regions, or time periods – i.e., do prices to each purchaser, region, or time period differ significantly from all other prices of the comparable merchandise. Although these are all prices in the U.S. market made by the respondent, this analysis requires that these prices be subdivided into separate distinct groups to consider separately whether the respondent's pricing behavior for sales to one specific group differs from its pricing behavior for all other sales. In other words, these prices, all of which are used to evaluate: 1) a respondent's pricing behavior in the U.S. market; and 2) whether the respondent is dumping, are now considered to represent two distinct pricing behaviors which may differ significantly. For the purpose of this particular analysis, Commerce finds that these two distinct pricing behaviors are separate and equally rational, and each is manifested in the individual prices within each group.

*Second Remand Results* at 8–9, 32. Commerce reasons that the appropriate yardstick by which to gauge the difference in the means between the groups is a simple average of each group's standard deviation, rather than one that weights the deviation based on the individual sales. See *id.* at 9–10. Commerce explains, given the objective of comparing pricing behavior of two distinct groups of sales, weight-averaging by sales volume or value (or number of transactions), would inappropriately move the pooled standard deviation toward the pricing behavior of either the test or comparison group.

See *Second Remand Results* at 7–9, 14–16, 32. Thus, in its *Second Remand Results*, Commerce continues to find that using a simple average is preferable to a weighted average, and Commerce further addresses the specific points for which the Court of Appeals ordered further explanation. See generally *id.*

In using a simple average, Commerce acknowledges that the Cohen's *d* literature supports the use of a weighted average, but further explains that the literature varies depending on the given context. See *Second Remand Results* at 32–33 (invoking the literature produced by Cohen, Ellis and Coe); *Mid Continent III*, 940 F.3d at 673–74 (the Court of Appeals found Commerce's argument to be deficient because "Commerce said that it was simply using a widely accepted statistical test; yet it did not acknowledge that the only cited literature source for the relevant aspect of the test itself calls for the use of weighted averages."). In this context, Commerce examines a company's pricing behavior within a group of sales, and therefore, the effect of the standard deviation within that group should not be diluted by the effect of the standard deviation within another group.<sup>9</sup> See *Second Remand Results* at 33–36. Commerce explains that the pricing behaviors categorized by purchaser, region or time period are "equally genuine," and thus deserve equal weight. See *id.* at 32. Commerce's analysis of the literature and the varying alternatives to calculate a pooled standard deviation implicates the Court of Appeals' second and third concerns regarding whether the simple average or the weighted average will skew the results and why a simple average is more accurate than a weighted average.<sup>10</sup> See *Mid Continent III*, 940 F.3d at 674.

Commerce also confronts the examples PT provided to the Court of Appeals, and the Court of Appeals referenced in its holding, which PT argues prove that simple averaging to get the pooled variance distorts the results of the Cohen's *d* test. See *Second Remand Results* at 10–14; *Mid Continent III*, 940 F.3d at 674. As a preliminary matter, Commerce claims, as it did in the Final Decision Memo, that PT relies upon a flawed assumption in the use of its examples. Namely, Commerce claims that PT's examples rest on the assumption that the

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<sup>9</sup> Further, Commerce states that the relevant literature deals with sampled data, thus PT's emphasis on "statistical significance and inferences, including sample size" as taken from the literature is misplaced in this context because Commerce is not conducting any sampling, but rather is "calculate[ing] means and variances of the U.S. prices [which] are the actual values of the entire population of U.S. sales." See *Second Remand Results* at 37–38.

<sup>10</sup> Further, Commerce explains that contrary to PT's contentions, the term "skew" as used in statistical analysis is not relevant here because Commerce is not sampling data, it is using all available data. See *Second Remand Results* at 38. Commerce simply uses "skew" in a generic sense to discuss the appropriate weight to be given to each subset of data relevant to calculating the variances. See *id.*

standard deviation will increase with the group size.<sup>11</sup> The Court of Appeals noted that Commerce’s determination that the assumption PT was purportedly making—that standard deviation will increase with the group size—is not always true was unsupported and, in any event, did not substitute for an explanation of why using the weighted-average methodology would distort the results. *See Mid Continent III*, 940 F.3d at 674. PT refutes Commerce’s characterization of its argument and states unequivocally “that PT’s proposed methodology has nothing to do with ‘the assumption that the standard deviation increases as the size of the group increases.’” PT’s Br. at 34. Indeed, PT provides other examples to illustrate its point that Commerce’s characterization of its argument is incorrect and that its approach is reasonable while Commerce’s is not. *See* PT’s Br. at Ex. 1. Thus, PT and Commerce agree that the standard deviation does not necessarily increase as the sample size increases. *See Second Remand Results* at 11–12; PT’s Br. at 34.

Nonetheless, PT’s examples do not demonstrate that Commerce’s approach is unreasonable. PT claims its examples show that using a simple average is objectively unreasonable, but it offers no explanation in support of its assertion, other than pointing out that the use of a simple average results in a dumping margin for PT, while the use of a weighted average produces a de minimis rate. *See* PT’s Br. at 3, 8–12. In response to the Court of Appeals concerns, Commerce explains how its approach effectuates its statutory objective. Commerce further states that PT’s argument that Commerce’s choice of methodology may produce different results does not on its own demonstrate that Commerce’s chosen methodology is unreasonable. *See Fujitsu Gen. v. United States*, 88 F.3d 1034, 1043 (Fed. Cir. 1996) (“To survive judicial scrutiny, an agency’s construction need not be the only reasonable interpretation or even the most reasonable interpretation.”).

Finally, although the Court of Appeals found that Commerce’s view—that simple averaging was more predictable, while weighted averaging can conceal manipulation—appeared to be based on the assumption that weight averaging must be done by counting the number of transactions, as opposed to quantities, *see Mid Continent III*, 940 F.3d at 674, Commerce now explains that that distinction is

<sup>11</sup> Commerce states that “[t]he Department disagrees with Respondents’ argument that using a simple average rather than a weighted average, by number of observations, undervalues the pooled standard deviation, which thereby distorts the results of the Cohen’s d test. Respondents’ conclusion is based on its assumptions that the number of observations and the variance of the U.S. prices to the test groups will both be smaller than the number of observations and the variance of the U.S. prices to the comparison groups.” *See* Final Decision Memo at 29.

immaterial. See *Second Remand Results* at 15–16. Commerce states that no matter how it weights the smaller group, either by volume, value or number of transactions, using a weighted average “would improperly give preference to one pricing behavior over another.”<sup>12</sup> See *id.* at 16.

Before the court, PT supplies various examples as to why, in its view, weighted-averaging leads to reasonable results and a simple average does not. See PT’s Br. at 8–16. Defendant argues that PT’s examples and arguments relying on these examples are barred by the doctrine of exhaustion. See *Second Remand Results* at 18–25. “[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.” 28 U.S.C. § 2637(d). Where the doctrine of exhaustion applies, and a party fails to exhaust its remedies by not raising a particular issue(s) in the case brief to the agency, those issues cannot be considered by the court. See *id.*; *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (citations omitted). The purpose of exhaustion is to afford the agency an opportunity to consider an interested party’s concerns before the courts review the agency determination for reasonableness. See *Jacobi Carbons AB v. United States*, 41 CIT \_\_, \_\_, 222 F. Supp. 3d 1159, 1170 (2017).

Much of the information to which Defendant objects further illustrates arguments that PT already made.<sup>13</sup> To the extent that these examples provide further illustrations of PT’s examples provided to the Court of Appeals and considered by Commerce, they are not barred by the doctrine of exhaustion. See *Apex Frozen Foods Private Ltd. v. United States*, 41 CIT \_\_, \_\_, 208 F. Supp. 1398, 1404 (2017) (“*Apex*”) (finding that plaintiffs “fully developed and squarely addressed” the relevant issue in prior litigation with the government). To the extent that PT seeks to illustrate insights beyond those illustrated in the examples previously supplied, those arguments are barred by the doctrine of exhaustion.

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<sup>12</sup> Commerce further states that this preference would “vary wildly for the same purchaser, region or time period for different products.” See *Second Remand Results* at 16.

<sup>13</sup> PT justifies its submission as a response to Commerce’s argument that PT’s examples are “cherry-picked” and as further evidence that Commerce’s use of the simple average is unreasonable. See *Consol. Pl. [PT’s] Add. Cmts. on Redetermination* at 1–2, Oct. 15, 2020, ECF No. 165. Commerce first raised the point that the examples were cherry-picked in its draft results for the second remand redetermination, see *Draft Results of Redetermination Pursuant to Ct. Order* at 12, PRRs 3–5, bar codes 3949998–01–03 (Mar. 30, 2020), and therefore Defendant argues PT could have raised its additional information in response to the draft results. See *Zehejiang Mach. Imp. & Exp. Corp. v. United States*, 44 CIT \_\_, \_\_, Slip Op. 20–122 at 26–30 (Aug. 21, 2020) (finding that plaintiff failed to exhaust its remedies on a particular issue where Commerce raised the issue in its preliminary results and plaintiff failed to respond).

Nonetheless, as further examples they do no more than reveal that the results of a simple average and weighted average pooled standard deviation are different. *See* PT's Br. at 17–18 (presenting and explaining Table 1, which shows the number of times that the simple average and weighted average produced different results). Although PT repeatedly concludes that the weighted average results are reasonable, while the simple average results are not, it offers no analysis of why its pronouncements are accurate. *See, e.g.*, PT's Br. at 19 (“examples of [simple average] results being more reasonable than [weighted average] results, if they exist at all, are much harder to find”); *see also, e.g., id.* at 23 (“for certain scenarios Commerce’s [simple average] methodology does not work”). The one point that PT appears to make with these visuals is that the test group may have a similar price spread as the comparison group in cases where the test group nonetheless passes the Cohen’s *d* test using a simple average. *See* PT's Br. at Exs. 2, 3 & 4. Implicit in this point is a view that the test group should have a different spread from the comparison group in order to have a passing score for Cohen’s *d*. It is unclear to the court why PT’s implicit assumption should be true. The very point that Commerce makes to support its use of a simple average is that the test group and the comparison group are two distinct groups and the price variances within them need to be considered independently. The statute tasks Commerce with determining whether there are U.S. prices that differ significantly among purchasers, regions or periods of time; and therefore, Commerce examines the pricing behaviors for those distinct groups. *See Second Remand Results* at 8–9, 32; Def.’s Resp. to Cmts. on Remand Redetermination at 15–16, Sept. 10, 2020, ECF No. 155 (“Def.’s Resp.”). The court fails to see how the existence of similar price spreads among sales within the two groups necessarily means that the overall pricing behaviors of the two groups are the same.

For similar reasons PT’s arguments regarding analysis of variance or “ANOVA” fail to persuade the court that Commerce’s approach is unreasonable. Again, in its comments before this court PT includes arguments that Defendant claims PT failed to exhaust before the agency. *See* PT's Br. at 34–39. PT argues that the statistical principles upon which the Cohen literature relied support the use of a weighted average for the pooled standard deviation. *See id.* at 34–36. More specifically PT argues that the statistical concept ANOVA “establishes universal relationships between the spread of a batch of data . . . and the spreads within subgroups of that batch.” *See id.* at 35.

Thus PT contends ANOVA supports the use of weighted average. *See id.* at 34–36. Defendant argues that PT failed to exhaust its argument regarding ANOVA before Commerce and therefore should not be allowed to raise the issue before the court. *See* Def.’s Resp. at 23–25. Although, PT did not use the phrase analysis of variance or ANOVA in its comments on the draft remand redetermination, it did argue Commerce’s approach did not comport with the statistical principles underlying the Cohen’s d analysis. *See* Pl. [PT]’s Cmts. on Draft Redetermination at 16–19 & Ex. 2, PRR 9, bar code 3955836–01 (Mar. 19, 2020).

But again, even allowing PT to make the more detailed argument in this court does not convince the court that Commerce’s approach is unreasonable. Commerce considered the arguments for using a weighted average, including the literature cited by PT explaining that statistical principles supported the use of a weighted average. *See generally Second Remand Results*; *see also Fujitsu*, 88 F.3d at 1039 (noting the deference due to Commerce’s expertise for determinations involving “complex economic and accounting decisions of a technical nature”). Commerce concluded that, given the task before it as provided in the statute, it would rely on the simple average because

in the context of the Cohen’s d test, the U.S. prices to each purchaser, region or time period separately and equally represent the respondent’s pricing behavior, which itself is determined by the respondent’s rational economic goal of maximizing the benefits accruing to the respondent.

*Second Remand Results* at 36. Therefore, PTs arguments concerning ANOVA as support for the use of a weighted average have been addressed by Commerce. For the foregoing reasons, Commerce’s choice to use a simple average for the pooled standard deviation is reasonable.

## CONCLUSION

For the foregoing reasons, it is

**ORDERED** that Commerce’s *Second Remand Results* is sustained. Judgment will enter accordingly.

Dated: January 8, 2021

New York, New York

*/s/ Claire R. Kelly*

CLAIRE R. KELLY, JUDGE





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