U.S. Customs and Border Protection

19 CFR PART 177

REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN BEVERAGE DISPENSER MACHINES

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 certain beverage dispenser machines.

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 certain beverage dispenser machines under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). 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. 57, No. 18, on May 10, 2023. 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EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after August 27, 2023.

FOR FURTHER INFORMATION CONTACT: Michael Thompson, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at michael.f.thompson@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 57, No. 18, on May 10, 2023, proposing to revoke one ruling letter pertaining to the tariff classification of certain beverage dispenser machines. 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") N047175, dated January 13, 2009, CBP classified certain beverage dispenser machines in heading 8481, HTSUS, specifically in statistical reporting number 8481.80.9050, HTSUSA, which provides for "Taps, cocks, valves and similar appliances, for pipes, boiler shells, tanks, vats or the like, including pressure-reducing valves and thermostatically controlled valves; parts thereof: Other appliances: Hand operated: Other: Other." CBP has reviewed NY N047175 and has determined the ruling letter to be in error. It is now CBP's position that the subject beverage dispenser machines are properly classified, in heading 8481, HTSUS, specifically in statistical reporting number 8481.80.9005, HTSUSA, which provides for "Taps, cocks, valves and similar appli-

ances, for pipes, boiler shells, tanks, vats or the like, including pressure-reducing valves and thermostatically controlled valves; parts thereof: Other appliances: Hand operated: Other: Solenoid valves."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N047175 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H317696, 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*.

Gregory Connor
for
Yuliya A. Gulis,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H317696
June 14, 2023
OT:RR:CTF:EMAIN H317696 MFT
CATEGORY: Classification
TARIFF NO.: 8481.80.90

MR. J. SCOTT MABERRY
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
2099 PENNSYLVANIA AVE NW, SUITE 100
WASHINGTON, D.C. 20006–6801

ATTN: Ms. Lisa Mays – Sheppard, Mullin, Richter & Hampton LLP

Re: Modification of NY N047175; Classification of beverage dispenser machines

DEAR MR. MABERRY AND MS. MAYS:

This letter is in response to your request, dated March 29, 2021, and filed on behalf of your client Welbilt, Inc., for the modification of New York Ruling Letter ("NY") N047175, issued on January 13, 2009, in which U.S. Customs and Border Protection (CBP) classified certain beverage dispenser machines under subheading 8481.80.90 of the Harmonized Tariff Schedule of the United States (HTSUS), and statistical reporting number 8481.80.9050, HTSUS Annotated (HTSUSA). You request that CBP reclassify the merchandise at issue under statistical reporting number 8481.80.9005, HTSUSA.

We have reviewed NY N047175 and determined that the ruling is in error. For the reasons set forth below, CBP is revoking NY N047175. In reaching this determination, CBP relied on materials included with your submission, supplemental information you provided on March 2, 2023, and information provided during your meeting with CBP, held on April 6, 2023.

Pursuant to Section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), 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), a notice of the proposed action was published in the Customs Bulletin, Vol. 57, No. 18, on May 10, 2023. No comments were received in response to this notice.

FACTS:

The subject request and NY N047175 concern three models of beverage dispenser machines: Model DI-1522, Model DI-2323, and Model DIL-2323. NY N047175 describes the beverage dispenser machines as "drop-in ice/beverage dispensers" and states:

> These free[-]standing dispensers are made of stainless steel and are designed to chill and dispense soda and non-carbonated beverages. The dispensers incorporate mixing valves that allow the components of a beverage to be mixed and ultimately dispensed on demand. They can be found in restaurants, supermarkets and cafeterias.

It is not disputed that the subject beverage dispenser machines "are essentially an arrangement of valves specifically designed to mix and/or

dispense beverages." [1] The beverage dispenser machines incorporate the following valves: solenoid valves that allow the beverages to be dispensed; spring check valves that attach to a tap water inlet, prevent carbon dioxide gas from entering a machine's water supply, and allow the machine to dispense plain water; and relief valves (for machines containing an internal carbonator) that assist with maintaining pressure within a carbon dioxide tank. The solenoid valves can be actuated using one of the following four methods:

1. Autofill Lever: A customer presses a lever to dispense a beverage. When the beverage contacts the lever, an electrical connection turns off the solenoid valve to prevent the customer's cup from overflowing.

2. Sanitary Lever: A customer presses a lever to dispense a beverage. The lever's shape prevents the lip of the customer's cup from touching the lever, thereby making the lever more sanitary.

3. Push Button (Self-Serve): A customer presses a button on a keypad to dispense a beverage, which actuates the solenoid.

4. Portion Control Button: A customer presses a button on a keypad to dispense a beverage. When the keypad is pressed, an electrical circuit actuates a solenoid with timed response programming. The solenoid valve is programmed to close only after a predetermined portion of a beverage is dispensed. Restaurants and other operators may program the portion control to allow the machine to dispense amounts appropriate for various cup sizes.

The technical process for dispensing a beverage begins when a customer pushes down on a lever or button on a beverage dispenser machine. The lever or button triggers an actuator of a solenoid dispensing valve, which in turn closes the switch of an electrical circuit. The electrical circuit sends 24 Volts of electricity to solenoids controlling the water and syrup lines in the beverage dispenser machines. The electricity causes the solenoids to open valves that allow the water and syrup to enter the flow control portion of the solenoid dispensing valve. The flow control portion of the solenoid dispensing valve is preset such that the resulting mixture contains the correct mix of water and syrup to achieve the specified beverage. As this process is underway, syrup is dispensed from a "bag-in-box" (BIB) syrup carton.

ISSUE:

Whether the subject beverage dispenser machines are properly described under statistical reporting number 8481.80.9005, HTSUSA, as solenoid valves, or under statistical reporting number 8481.80.9050, HTSUSA, as other valves.

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[1] NY N047175. That ruling further noted that the beverage dispenser machines do not contain a refrigeration unit, but instead rely on a supply of ice from an external source (i.e., a cold plate) to cool the beverages before dispensing. Consequently, "other refrigerating equipment" under heading 8418, HTSUS – including "soda fountain equipment" described in statistical reporting number 8418.69.0130, HTSUSA – are not under consideration.

LAW AND ANALYSIS:

Classification under the HTSUS is in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods will 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 will then be applied in order.

The HTSUS headings and subheadings under consideration are as follows:

8481	Taps, cocks, valves and similar appliances, for pipes, boiler shells, tanks, vats or the like, including pressure-reducing valves and thermostatically controlled valves; parts thereof:
8481.80	Other appliances:
8481.80.90	Other:
8481.80.9005	Solenoid valves
	* * * * *
	Other:
8481.80.9050	Other

Note 3 to Section XVI, HTSUS, provides as follows:

> Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.
>
> Note 5 to Section XVI, HTSUS, defines the expression "machine" as "any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of chapter 84 or 85."

It is not disputed that the subject beverage dispenser machines consist of "an arrangement of valves." Heading 8481, HTSUS, provides for "valves," and is thus an appropriate heading for the beverage dispenser machines under GRI 1. As such, this matter is governed by GRI 6, which provides as follows:

> 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 the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

Given that the subject merchandise consists of multiple valves that are fitted together to form a whole, the beverage dispenser machines constitute "composite machines" under Note 3 to Section XVI via GRI 6. As such, the subject beverage dispenser machines must be classified as if consisting only of that component, or as being that machine, which performs the principal function.

To be properly classified under statistical reporting number 8481.80.9005, HTSUSA, Note 3 to Section XVI requires that the solenoid valves perform the principal function of the beverage dispenser machines. The principal function

of these beverage dispenser machines is to mix and dispense ice and beverages, and we find that the solenoid valves are the components that perform this function. The solenoid valves control the water and syrup lines in the beverage dispensing machines, and their actuation by a customer directly causes the machine to release the beverages. No matter which method a customer uses to dispense a beverage – be it the autofill, sanitary lever, push button, or portion control method – the customer will inevitably interact with the actuator of the solenoid valve, which in turn will open valves releasing water and syrup. To be sure, other valves are present in the beverage dispenser machines and play important functions, such as preventing carbon dioxide from mixing with tap water and regulating pressure in a carbon dioxide tank. But these functions are secondary to the principal function of dispensing beverages, a function that the solenoid valves directly perform. Thus, statistical reporting number 8481.80.9050, HTSUSA, is inapposite.

Because the solenoid valves perform this principal function, we find that the beverage dispenser machines are to be classified as if consisting of solenoid valves, as described in statistical reporting number 8481.80.9005, HTSUSA.

HOLDING:

By application of GRIs 1 (Note 3 to Section XVI) and 6, HTSUS, the subject beverage dispenser machines are classified under heading 8481, HTSUS, specifically under statistical reporting number 8481.80.9005, HTSUSA, which provides for, Taps, cocks, valves and similar appliances, for pipes, boiler shells, tanks, vats or the like, including pressure-reducing valves and thermostatically controlled valves; parts thereof: Other appliances: Other: Solenoid valves." The general column one rate of duty is 2% ad valorem.

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

EFFECT ON OTHER RULINGS:

NY N047175, dated January 13, 2009, is hereby REVOKED.

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

Sincerely,

GREGORY CONNOR
for

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

WITHDRAWAL OF PROPOSED MODIFICATION OF TWO RULING LETTERS AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF MUSICAL CANDLE HOLDERS PACKAGED WITH WAX BIRTHDAY CANDLES

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

ACTION: Notice of withdrawal of proposed revocation of two ruling letters and proposed revocation of treatment relating to the classification of musical candle holders packaged with wax birthday candles.

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 withdrawing its proposal to modify two ruling letters pertaining to the tariff classification of musical candle holders packaged with wax birthday candles and to revoke any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed revocation was published in the Customs Bulletin, Vol. 56, No. 32 (August 17, 2022). One comment was received in response to that notice. CBP is withdrawing its proposed action.

EFFECTIVE DATE: This action is effective immediately.

FOR FURTHER INFORMATION CONTACT: Reema Bogin, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at reema.bogin@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 32, on August 17, 2022, proposing to revoke New York Ruling Letters ("NY") D84817 (December 9, 1998) and NY D85291 (December 24, 1998), pertaining to the tariff classification of musical candle holders packaged with wax birthday candles. Upon careful consideration of the comments that were submitted in response to the notice, CBP is withdrawing the aforementioned notice of proposed modification in order to further consider the classification of the subject musical candleholders packaged with wax birthday candles, including whether additional rulings not previously identified should be reconsidered.

ANDREW M LANGREICH
for
YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 23–86

Pirelli Tyre Co., Ltd., Pirelli Tyre S.p.A., and Pirelli Tire LLC, Plaintiffs, and Shandong New Continent Tire Co., Ltd., Plaintiff-Intervenor, v. United States, Defendant, and The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 20–00115

[Sustaining the U.S. Department of Commerce's remand results and final results in the antidumping duty administrative review of certain passenger vehicle and light truck tires from the People's Republic of China.]

Dated: June 9, 2023

Daniel L. Porter, *James P. Durling*, *James C. Beaty*, and *Ana M. Amador Gil*, Curtis, Mallet-Prevost, Colt & Mosle, LLP, of Washington, D.C., for Plaintiffs Pirelli Tyre Co., Ltd., Pirelli Tyre S.p.A., and Pirelli Tire LLC.

Ned H. Marshak, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, N.Y., and *Andrew T. Schutz*, *Brandon M. Petelin*, and *Jordan C. Kahn*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., for Plaintiff-Intervenor Shandong New Continent Tire Co., Ltd.

Sosun Bae, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of Counsel on the brief was *Ayat Mujais*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Nicholas J. Birch and *Roger B. Schagrin*, Schragrin Associates, of Washington, D.C., for Defendant-Intervenors United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC.

AMENDED OPINION AND ORDER

Choe-Groves, Judge:

This action arises from the results of the U.S. Department of Commerce ("Commerce") in the antidumping administrative review of certain passenger vehicle and light truck tires from the People's Republic of China ("China") for the period of August 1, 2017 through July 31, 2018 ("Period of Review 3"). Compl. at 1, ECF No. 6. Plaintiffs Pirelli Tyre Co., Ltd. ("Pirelli China"), Pirelli Tyre S.p.A., and Pirelli Tire LLC ("Pirelli USA") (collectively, "Plaintiffs" or "Pirelli") filed this action pursuant to 28 U.S.C. § 1581(c) contesting Commerce's final

results in *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China* ("*Final Results*"), 85 Fed. Reg. 22,396 (Dep't of Commerce Apr. 22, 2020) (final results of antidumping duty admin. review; 2017– 2018). *See id.* Plaintiffs bring this suit to challenge: (1) whether Commerce had statutory authority to issue a China-wide entity rate; (2) whether Commerce properly applied the applicable legal criteria for analyzing Plaintiffs' separate rate eligibility; and (3) Commerce's determination that Plaintiffs were controlled by the Chinese government through the ownership of China National Chemical Corporation ("Chem China"). *See id.* at 5–7.

Before the Court is Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record. Pls.' R. 56 Mot. J. Agency R. ("Plaintiffs' Motion" or "Pls.' Mot."), ECF Nos. 65, 66. Defendant United States ("Defendant") and Defendant-Intervenor the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("Defendant-Intervenor" or "Def.-Interv.") filed Defendant's Response to Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record and the Response Brief of Defendant-Intervenor. Def.-Interv.'s Resp. Br. ("Def.-Interv.'s Resp."), ECF Nos. 71, 72; Def.'s Resp. Pls.' R. 56.2 Mot. J. Agency R. ("Def.'s Resp."), ECF Nos. 74, 75. Plaintiffs filed Plaintiffs' Reply Brief in Support of Motion for Judgment on the Agency Record. Pls.' Reply Br. Supp. Mot. J. Agency R. ("Pls.' Reply"), ECF Nos. 79, 80.

Also before the Court are Defendant-Intervenor's Comments in Opposition to Remand Results. Def.-Interv.'s Cmts. Opp'n Remand Results ("Defendant-Intervenor's Comments" or "Def.-Interv.'s Cmts."), ECF Nos. 62, 63. Defendant-Intervenor opposes Commerce's redetermination on remand in the *Final Results of Redetermination Pursuant to Court Remand* ("*Remand Results*"), ECF Nos. 55–1, 56–1, determining that the sole mandatory respondent in Commerce's review, Shandong New Continent Tire Co., Ltd. ("New Continent"), reported sales information accurately and was not involved in fraud. *Id.* at 18–26. Defendant and Plaintiff-Intervenor New Continent filed Defendant's Response to Comments on Remand Redetermination and Plaintiff-Intervenor's Comments in Support of Remand Redetermination supporting the *Remand Results*. Def.'s Resp. Cmts. Remand Redetermination ("Defendant's Comments" or "Def.'s Cmts."), ECF Nos. 69, 70; Pl.-Interv.'s Cmts. Remand Results ("Plaintiff-Intervenor's Comments" or "Pl.-Interv.'s Cmts."), ECF Nos. 73, 76.

The Court entered an Opinion and Order on March 20, 2023 sustaining Commerce's *Remand Results* and *Final Results*. Slip Op. 23–38, ECF No. 88. Plaintiffs have filed Plaintiffs' Motion to Alter or Amend Judgment asking the Court to address arguments raised

based on provisions of Italian law. Pls.' Mot. Alter Amend J., ECF No. 90. The Court grants Plaintiffs' Motion to Alter or Amend Judgment and sets aside Slip Opinion 23–38, ECF No. 88, and the accompanying Judgment, ECF No. 89. This Amended Opinion and Order more thoroughly addresses Plaintiffs' arguments concerning Italian law. All other sections remain substantively unchanged from Slip Opinion 23–38. For the following reasons, the Court sustains Commerce's *Final Results* and *Remand Results*.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce's determination that New Continent provided accurate information during the administrative review was supported by substantial evidence;
2. Whether Plaintiffs have waived their challenge to Commerce's authority to impose a China-wide entity antidumping duty rate by not raising the issue in Plaintiffs' Motion;
3. Whether Commerce's determination that Pirelli failed to rebut the presumption of de facto government control was in accordance with the law and supported by substantial evidence; and
4. Whether provisions of Italian law concerning the independence of directors and the influence of shareholders rebut the presumption of de facto government control.

BACKGROUND

In June 2015, Commerce issued an antidumping duty order covering certain passenger vehicle and light truck tires from China. *See Antidumping Duty Investigation of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China*, 80 Fed. Reg. 34,893 (Dep't of Commerce Jun. 18, 2015) (final determination of sales at less than fair value and final affirmative determination of critical circumstances, in part). Commerce initiated an administrative review on October 4, 2018 of multiple companies, including Pirelli China. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 Fed. Reg. 50,077, 50,081 (Dep't of Commerce Oct. 4, 2018).

Pirelli China and Pirelli USA filed a separate rate application with Commerce. Pls.' Separate Rate App., PJA 3, CJA 1.[1] In its *Preliminary Results*, Commerce determined that Pirelli China had not demonstrated an absence of de jure and de facto government control and denied Pirelli's Separate Rate Application. *See Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China* ("*Prelim. Results*"), 84 Fed. Reg. 55,909, 55,912 (Dep't of Commerce Oct. 18, 2019) (preliminary results of antidumping duty admin. review and rescission, in part; 2017–2018), and accompanying Issues and Decisions Memorandum ("Preliminary IDM" or "Prelim. IDM") at 13, 15, PJA 13. Pirelli China was assigned the China-wide antidumping margin of 87.99 percent. Prelim. IDM at 13. Pirelli China and Pirelli USA filed an administrative case brief ("Pirelli's Administrative Case Brief") with Commerce requesting that Commerce reverse the *Preliminary Results* and grant Pirelli China separate rate status. Pls.' Admin. Case Br., PJA 15, CJA 10.

Commerce published on April 15, 2020 the *Final Results* and accompanying Issues and Decision Memorandum ("Final IDM"), PJA 17. In the *Final Results*, Commerce assigned mandatory respondent New Continent a zero percent weighted-average dumping margin, which was used as the basis for assigning dumping margins to non-individually examined respondents that qualified for separate rate status. *Final Results*, 85 Fed. Reg. at 22,397. Commerce also continued to determine that Pirelli China had not rebutted the presumption of de facto government control and was not entitled to a separate rate. *Id.* at 22,399; Final IDM at 13. Commerce determined that Pirelli China did not establish its "autonomy from the [Chinese] government in making decisions regarding the selection of management." Final IDM at 14–18.

Pirelli commenced this action on May 21, 2020. Summons, ECF No. 1; Compl. After initiating this case, Plaintiffs filed Plaintiffs' Unopposed Motion to Stay the Proceedings pending the final determination by the United States Court of Appeals for the Federal Circuit ("CAFC") in *China Manufacturers Alliance, LLC v. United States*, 1 F.4th 1028 (Fed. Cir. 2021). Pls.' Unopposed Mot. Stay Proceedings, ECF No. 23. The Court granted the motion and stayed the case. Order (Aug. 6, 2020), ECF No. 25.

On May 20, 2021, prior to the CAFC's decision in *China Manufacturers Alliance*, U.S. Customs and Border Protection ("Customs") notified Commerce that it had observed inconsistencies between the Section A Questionnaire Responses submitted by New Continent to

[1] Citations to the administrative record reflect the public joint appendix ("PJA") and confidential joint appendix ("CJA") tab numbers filed in this case, ECF Nos. 81, 82.

Commerce and the corresponding prices reported to Customs at the time of entry that resulted in an undervaluation of approximately $2.6 million. Def.'s Mot. Lift Stay Voluntary Remand ("Defendant's Remand Motion" or "Def.'s Remand Mot.") at Att. 1 ("Customs' Referral Letter"), ECF No. 29. Defendant requested that the Court remand the administrative review results to Commerce for further examination. *Id.* at 3–4. The Court remanded the case on September 20, 2021 to Commerce. *Pirelli Tyre Co. v. United States*, 45 CIT __, 539 F. Supp. 3d 1257 (2021).

Commerce published on October 27, 2021 a notice of remand proceedings and reopened the administrative record of the 2017–2018 antidumping administrative review. *Remand Results* at 3; *Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China* ("*Notice of Remand*"), 86 Fed. Reg. 59,367 (Dep't of Commerce Oct. 27, 2021) (notice of remand proceeding and reopening of 2017–2018 antidumping duty admin. review record). Commerce placed Customs' Referral Letter on the record and provided interested parties with an opportunity to submit factual information and comments. *Remand Results* at 3; *Notice of Remand*, 86 Fed. Reg. at 59,368. Commerce received comments from interested parties and solicited supplemental questionnaire responses from New Continent and NBR Wheels and Tires LLC. *Remand Results* at 3–4.

Commerce issued its *Remand Results* on April 28, 2022, in which Commerce determined that export price and constructed export price information reported by New Continent in the administrative review was accurate. *Id.* at 11–22. Commerce also determined that the record did not support that New Continent was affiliated with two other companies considered in the review. *Id.* at 22–23. Commerce did not adjust New Continent's antidumping margin, the rate for individually examined respondents, or Pirelli's separate rate status. *See id.* at 24. Plaintiffs filed their Rule 56.2 Motion for Judgment on the Agency Record on July 11, 2022. *See* Pls.' Mot. J. Agency R.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i), and 28 U.S.C. § 1581(c). The Court will hold unlawful any determination found to be unsupported by substantial evidence on the record or otherwise not in accordance with the law. 19 U.S.C. § 1516a(b)(1)(B)(i). The Court also reviews determinations made on remand for compliance with the Court's remand order. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT 727, 730, 992 F. Supp. 2d 1285, 1290 (2014), *aff'd*, 802 F.3d 1339 (Fed. Cir. 2015).

DISCUSSION

I. Remand Results

The Court remanded the *Final Results* to Commerce to address new information provided to Commerce by Customs regarding inaccuracies in the reported sales prices on imports of passenger vehicle tires from China during Period of Review 3. *Pirelli Tire Co.*, 45 CIT at __, 539 F. Supp. 3d at 1261–62. Specifically, Customs compared the Section A Questionnaire Responses provided by New Continent to Commerce in the underlying investigation with Customs' import records and found a potential undervaluation of approximately $2.6 million. *See Notice of Remand*, 86 Fed. Reg. at 59,368. This information raised concerns regarding the accuracy of New Continent's reporting to Commerce. *Id.*

On remand, Commerce issued supplemental questionnaires to New Continent and NBR Wheels and Tires LLC seeking clarification of information on the administrative record. *See Remand Results* at 4; Commerce's Supp. Questionnaire New Continent, PJA 27, CJA 18; Commerce's Second Supp. Questionnaire New Continent, PJA 30, CJA 21. In response, New Continent provided more than 20,000 pages of information. *Remand Results* at 45; New Continent's Supp. Questionnaire Resp., PJA 28, CJA 19; New Continent's Second Supp. Questionnaire Resp., PJA 31, CJA 22.

In the *Remand Results*, Commerce focused its analysis on the invoices submitted to Commerce rather than the invoices submitted to Customs in weighing the accuracy of the U.S. sales information provided by New Continent during the administrative review. *Remand Results* at 5–7, 15. Commerce considered the invoices provided to Customs relevant only to the extent that they prompted the remand. *Id.*at 20. Commerce analyzed information on the record pertaining to almost all of the transactions identified by Customs and determined that payment amounts were tied to the U.S. sales values reported by New Continent in the administrative review. *Id.* at 7–8, 19–20. Commerce was also able to match price and quantity data between invoices under consideration and corresponding invoices in New Continent's Section C database. Id. at 8. Based on its review of record evidence, Commerce determined that New Continent accurately reported export price and constructed export price sales during the administrative review. *Id.* at 8, 23–24. Commerce also determined that New Continent was not affiliated with the entities responsible for providing the allegedly inaccurate information to Customs. *Id.* at 10–11, 23–24.

Defendant-Intervenor asserts that Commerce failed to consider contradictory record evidence that called into question the accuracy of New Continent's reporting and failed to address the relevance of the alleged fraud on Customs. Def.-Interv.'s Cmts. at 18–23. Defendant and Plaintiff-Intervenor support Commerce's *Remand Results*. *See* Def.'s Cmts.; Pl.-Interv.'s Cmts.

Commerce analyzed documents relating to nearly all of the transactions identified by Customs and expressed that it was:

> able to tie the payment amounts to the U.S. sales value reported by New Continent in its U.S. sales database from the underlying review as well as New Continent's financial statements [for most of the sales]. More specifically, we compared the prices and quantities of the invoices under question to those same invoices in the section C database and were able to fully match the values.

Remand Results at 7–8. In its Supplemental Questionnaire Response, New Continent explained that for the majority of its submitted invoices, it was not possible to make a one-to-one link between the payment and the invoice because New Continent's accounting was based on a running debt and credit balance that was reconciled annually. New Continent's Supp. Questionnaire Resp. at 21–22. Defendant-Intervenor contends that Commerce must provide an explanation of its methodology for assigning payments to sales information in its analysis. Def.-Interv.'s Cmts. at 18–20.

Commerce's analysis did not rely solely on New Continent's Supplemental Questionnaire Response, and Commerce cited to record documents containing payment information for invoices and accounting subledgers. *Remand Results* at 19; *see also* New Continent's Sub. New Factual Info. at Exs. 18 (worksheet linking Section C database invoice values with invoice values submitted by New Continent), 19 (invoices contained in Section C database), PJA 23, CJA 15; New Continent's Supp. Questionnaire Resp. at Ex. S-9 ("New Continent's Payment Package"). Commerce also noted that its review during the remand covered significantly more transactions than were considered during Commerce's standard verification. *Remand Results* at 19–20. Commerce's remand analysis covered most of the invoices identified by Customs, and Commerce explained that it compared "prices and quantities of the invoices under question to those same invoices in the section C database." *Id.* at 7–8.

Defendant-Intervenor asserts that Commerce disregarded the argument that certain record information was inaccurate and contra-

dicted by other record documents. Def.-Interv.'s Cmts. at 20–21. Though Commerce did not directly address inconsistencies between specific documents, the *Remand Results* make clear that Commerce considered information covering most of the relevant transactions. *See Remand Results* at 19; *see also* New Continent's Sub. New Factual Info. at Exs. 18, 19; New Continent's Payment Package. Commerce focused on the accuracy of the information submitted in the administrative review in order to calculate the antidumping margin, not inconsistencies with information submitted to Customs. *Remand Results* at 20–21. Based on record evidence, Commerce determined that the U.S. price information reported to Commerce by New Continent was accurate. *Id.* at 21.

In its review, Commerce compared invoices submitted by New Continent during the administrative review and corresponding invoices submitted during the remand. *Id.* at 15. Commerce determined that relevant information, including sales price, quantity, and U.S. sales values, were consistent between the invoices. *Id.* Defendant-Intervenor contends that the record does not support Commerce's determination regarding New Continent's reproduction of invoices and includes examples of inconsistent information. Def.-Interv.'s Cmts. at 21–23. In comparing invoices submitted in both the administrative review and remand, Commerce determined that the consistency of the relevant information:

> supports New Continent's claim that while electronic versions of its sales documents cannot be reproduced exactly, the differences between the reproduced documents for this remand and the documents submitted during the administrative review are superficial. New Continent is an experienced exporter having participated in the underlying administrative review as a mandatory respondent. We note that in an ongoing administrative review or investigation, we would expect an experienced exporter like New Continent to provide original sales documentation, as it did during the underlying administrative review. However, New Continent was not aware of the [Customs] Referral until May 2021, nor involved in litigation for this administrative review until September 2021. Thus, we are not persuaded by the petitioner's claim that New Continent would have known that "Commerce would call upon it in a review to produce information such as original copies of invoices," because it is unclear how New Continent could have anticipated that Commerce would request for a remand to reexamine its U.S. sales information some seventeen months after previously uncontested final results, or that the Court would grant that request.

> Therefore, we find there is no evidentiary basis to conclude that the quantity and value information . . . have been modified.

Remand Results at 18.

Defendant-Intervenor contends that Commerce did not address a specific example raised during the remand in which multiple versions of an invoice were included on the record reflecting different information. Def.-Interv.'s Cmts. at 22. The *Remand Results* do not directly address this example; however, in relation to the number of transactions considered in Commerce's review, it is reasonable to conclude that potentially inconsistent details in a single set of invoices does not undermine the accuracy of the greater body of information reviewed by Commerce. It is clear from the *Remand Results* that Commerce considered a large volume of record submissions, including over 20,000 pages of documents from New Continent, and determined that any inconsistencies were minor and did not significantly impact the calculation of the antidumping duty. The Court agrees that Commerce's review of a voluminous number of record documents was reasonable and accounted for any potential inconsistencies in a few invoices.

Defendant-Intervenor argues that Commerce did not properly consider the issue of potential fraud in its determination. Def-Interv.'s Cmts. at 23–26. Defendant-Intervenor contends that the record contained evidence that New Continent was aware of the inaccurate information submitted to Customs because a certain nomenclature was used in both the challenged invoices and documents prepared by New Continent. *Id.* at 23. Commerce addressed this issue in the *Remand Results* by discussing New Continent's explanation that the numbers were inadvertently copied by a manager working with information provided by an affiliate in preparing the Section C database. *Remand Results* at 17–18. Commerce determined this explanation to be consistent with the steps taken by New Continent to ensure that material information in finalized invoices was not changed after issuance, which included sales managers creating a commercial invoice using Excel with information downloaded from a sales system. *Id.* Commerce also determined that New Continent's explanation was supported by Commerce's comparison of invoices between the administrative review and remand. Id. at 18.

The issue before Commerce on remand was whether the information submitted by New Continent in the administrative review was accurate, while the issue of fraudulent representations to Customs was within Customs' statutory authority. 19 U.S.C. § 1592. The Court

concludes that Commerce was reasonable in limiting its determination to the accuracy of New Continent's information submitted during the administrative review. *See Remand Results* at 11–22.

In the *Remand Results*, Commerce addressed whether New Continent was affiliated with the entities that made alleged misrepresentations to Customs. *Id.* at 22–23. Upon consideration of record documents, including declarations from a New Continent employee, Commerce determined that New Continent did not satisfy the requirements for affiliation under 19 U.S.C. § 1677(33) and 19 C.F.R. § 351.102(b)(3). *Id.* at 23. Commerce also determined that the record did not show that the considered entities had a relationship that might impact relevant decision making. *Id.* Commerce determined that New Continent was not affiliated with the considered entities. *Id.* at 23–24. No Party opposes this determination before the Court.

The arguments raised by Defendant-Intervenor are unavailing. Because Commerce conducted a review of the voluminous record evidence presented and verified the accuracy of the relevant information submitted by New Continent during the administrative review, the Court concludes that Commerce's determination that the information submitted by New Continent was accurate is supported by substantial record evidence.

II. Commerce's Authority to Issue a China-Wide Entity Rate

Defendant-Intervenor argues that Plaintiffs abandoned and waived Count I of their Complaint. Def.-Interv.'s Resp. at 7–8. In Count I of the Complaint, Pirelli argued that Commerce lacked the statutory authority to impose a China-wide entity antidumping duty rate. Compl. at 5. Pirelli did not renew this argument in its motion for judgment on the agency record and conceded that "the Federal Circuit has recently ruled that Commerce does in fact have the authority to apply a 'China-Wide Rate' under the statute." Pls.' Mot. J. Agency R. at 13–14 (citing *China Mfrs. All.*, 1 F.4th at 1039). Pirelli also does not address Defendant-Intervenor's waiver assertion in its reply. *See* Pls.' Reply. Because Pirelli failed to raise its argument regarding Commerce's authority to impose a China-wide entity rate in its opening brief and did not meaningfully assert the argument in its reply, the argument is waived. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("Our law is well established that arguments not raised in the opening brief are waived.").

III. Pirelli's Separate Rate Status

The Court previously considered Pirelli's separate rate status in an earlier administrative review that covered the period from January 27, 2015 to July 31, 2016 ("Period of Review 1"). *See Shandong*

Yongtai Grp. Co. v. United States(“*Shandong Yongtai I*”), 43 CIT __, __, 415 F. Supp. 3d 1303, 1315–18 (2019); *Shandong Yongtai Grp. Co. v. United States* (“*Shandong Yongtai II*”),44 CIT __, __, 487 F. Supp. 3d 1335, 1344–46 (2020); *Qingdao Sentury Tire Co. v. United States* (“*Qingdao Sentury I*”), 45 CIT __, __, 539 F. Supp. 3d 1278, 1282–85 (2021); *Qingdao Sentury Tire Co. v. United States* (“*Qingdao Sentury II*”), 46 CIT __, __, 577 F. Supp. 3d 1343, 1347–49 (2022). Pirelli China was established as a Sino-foreign joint venture between the Dutch subsidiary of Pirelli & C. S.p.A. (“Pirelli Italy”) and Hixih Group in 2005. *Shandong Yongtai I*, 43 CIT at __, 415 F. Supp. 3d at 1315–16. Chem China, a company owned by the Chinese government, acquired Pirelli S.p.A. in October 2015. *Id.* at __, 415 F. Supp. 3d at 1316. Following the acquisition, Pirelli Italy was delisted from the Milan Stock Exchange. *Id.*

Before this Court, Pirelli challenged Commerce’s determination that Pirelli was ineligible for separate rate status during Period of Review 1 for both the periods before and after Pirelli S.p.A.’s acquisition by Chem China. *See Shandong Yongtai II*,44 CIT at __, 487 F. Supp. 3d at 1344–46; *Qingdao Sentury II*, 46 CIT at __, 577 F. Supp. 3d at 1347–49. Commerce considered record documents, including Pirelli’s articles of association, purchase agreements, Board of Directors meeting minutes, resolutions, and company financial statements, and concluded that Chem China and the Silk Road Fund, both Chinese government-controlled entities, owned a majority of Pirelli China and exercised control through Pirelli’s Board of Directors and ownership structure. *Shandong Yongtai II*, 44 CIT at __, 487 F. Supp. 3d at 1346. Commerce determined that for the period following Pirelli S.p.A.’s acquisition by Chem China, Pirelli did not have autonomy from the Chinese government in its decision making and was unable to demonstrate a lack of de facto government control. *Id.* The Court sustained Commerce’s determination. *Id.*

It is unclear from the record whether Pirelli applied for separate rate status during Commerce’s administrative review for the period of August 1, 2016 through July 31, 2017 (“Period of Review 2”). *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 82 Fed. Reg. 35,754, 35,755 (Dep’t of Commerce Aug. 1, 2017). Relevant to this case, Pirelli applied for separate rate status for Period of Review 3, which covered August 1, 2017 through July 31, 2018. *See* Pls.’ Separate Rate App.

Pirelli’s Separate Rate Application reflected certain changes in Pirelli’s ownership and management structure between the end of

Period of Review 1 and the end of Period of Review 3. For example, Pirelli Italy relisted on the Milan Stock Exchange on October 4, 2017. *Id.* at 18. At the time of relisting, Chem China and the Silk Road Fund had decreased their combined indirect majority ownership in Pirelli Italy and Pirelli China to indirect minority ownership. *Id.* at 13–14, 18–19. Commensurate with the relisting on the Milan Stock Exchange, Pirelli ceased public management and coordination activities with its holding company, Marco Polo International Italy S.p.A. ("Marco Polo"), and all other companies, including Chem China. *Id.* at 19–20; Pls.' Separate Rate App. at Ex. 9.1 ("Pirelli Group's 2017 Annual Report") at 205, PJA 6, CJA 4; Pls.' Separate Rate App. at Ex. 11 ("Pirelli Italy's August 2017 Press Release"), PJA 8, CJA 6. Pirelli Italy also altered the composition of its Board of Directors to require a majority of directors to be designated as "independent." Pls.' Separate Rate App. at Ex. 10 ("Pirelli's 2017 Shareholders Agreement") § 4.2.2, PJA 8, CJA 6. Despite these changes to Pirelli's ownership and management structures, Commerce determined that Pirelli did not demonstrate "autonomy from the [Chinese] government in making decisions regarding the selection of management" and did not rebut the presumption of de facto government control. *Final Results*, 85 Fed. Reg. at 22,399; Final IDM at 13–18. Commerce denied Pirelli's Separate Rate Application. *Final Results*, 85 Fed. Reg. at 22,399.

Plaintiffs raise two primary arguments challenging Commerce's denial of Pirelli's Separate Rate Application. First, Plaintiffs contend that Commerce's determination was unlawful because Commerce failed to apply the proper standard of review for a company that is minority-owned by a government-controlled entity, failed to connect suspected government control to Pirelli's export activities, and did not apply relevant provisions of Italian law. Pls.' Br. at 12–22. Second, Plaintiffs argue that Commerce's determination that Pirelli failed to rebut the presumption of de facto government control was unsupported by record evidence because Commerce failed to appreciate that changes to Pirelli's ownership and management structure purportedly insulated Pirelli from external influences of Chinese government control. *Id.* at 23–49.

A. Legal Framework

Commerce has the authority to designate a country as a nonmarket economy pursuant to 19 U.S.C. § 1677(18). 19 U.S.C. § 1677(18). Commerce employs a rebuttable presumption that all companies within a nonmarket economy country are subject to government control and should be assigned a single, country-wide rate by default,

unless the exporter requests an individualized antidumping margin and demonstrates affirmatively that the exporter maintains both de facto and de jure independence from the government. *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). The burden of proving the absence of government control rests with the exporter. *Id.* at 1405–06. Exporters that are unable to demonstrate both de facto and de jure independence from government control do not qualify for a separate rate. *China Mfrs. All.*, 1 F.4th at 1032; *Transcom, Inc. v. United States*, 294 F.3d 1371, 1373 (Fed. Cir. 2002).

Commerce has identified three factors that it considers when determining whether an exporter enjoys independence from de jure government control: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT 1085, 1090 n.21, 925 F. Supp. 2d 1315, 1320 n.21 (2013) (citation omitted).

Commerce considers four factors in determining whether an exporter is free of de facto government control: (1) whether the export prices are set by or are subject to the approval of a government authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. *See id.*; Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries (Apr. 5, 2005) ("Policy Bulletin 05.1" or "Policy Bull. 05.1") at 2.

The CAFC has sustained Commerce's application of the rebuttable presumption of government control for nonmarket economies. *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1311 (Fed. Cir. 2017); *see also Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1009 (Fed. Cir. 2017). All four factors of the de facto test must be satisfied to rebut the presumption of government control. *See Yantai CMC Bearing Co. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1317, 1325–26 (2017). The de facto test is therefore conjunctive, and an exporter must satisfy all four factors to rebut the presumption of government control. *See Zhejiang Quzhou Lianzhou Refrigerants Co. v. United States*, 42 CIT __, __, 350 F. Supp. 3d 1308,

1321 (2018). Commerce determined in the *Final Results* that Pirelli failed to satisfy the third criterion of the de facto test, whether the respondent has autonomy from the government in making decisions regarding the selection of management. *Final Results*, 85 Fed. Reg. at 22,399; Final IDM at 13–18; *see also* Prelim. IDM at 13; Commerce's Prelim. Separate Rate Mem. ("Preliminary Separate Rate Memo" or "Prelim. Separate Rate Mem.") at 2–3, PJA 14, CJA 9.

B. Lawfulness of Commerce's Analysis

Plaintiffs contend that Commerce's analysis of Pirelli's separate rate eligibility was unlawful because Commerce failed to apply a lesser burden of proof for a minority foreign-owned company, failed to require actual, rather than potential control, and failed to link its findings to Pirelli's export activities. Pls.' Br. at 12–22. Specifically, Plaintiffs argue that Commerce's past practice and the precedent of this Court reflect that a lower burden of proof should be required in instances in which government-controlled entities hold only a minority interest in the respondent exporter. *Id.* at 14–15. Plaintiffs contend that Commerce failed to make this distinction in practice and held Pirelli to the higher standard applicable to a majority government-owned company. *Id.* Defendant-Intervenor contends that Plaintiffs are incorrect in their assertion that a lower burden of proof is applicable to rebut the presumption of government control when the government is a minority owner. Def.-Interv.'s Resp. at 10–17. Defendant-Intervenor also asserts that Plaintiffs' argument has been waived because Pirelli did not raise it before Commerce. *Id.* at 10–11. Defendant contends that the standard applied by Commerce in this case was not higher than the standard normally applied in instances of minority government ownership. Def.'s Resp. at 10–17.

Plaintiffs offer three cases in support of the position that Commerce may impose a higher burden of proof on exporters seeking a separate rate when a government-controlled entity has a direct or indirect majority interest in the exporter: *Zhejiang Quzhou Lianzhou Refrigerants Co. v. United States*, 42 CIT __, 350 F. Supp. 3d 1308 (2018), *Shandong Rongxin Import & Export Co. v. United States*, 43 CIT __, 415 F. Supp. 3d 1319 (2019), and *Yantai CMC Bearing Co. v. United States*, 41 CIT __, 203 F. Supp. 3d 1317 (2017). Pls.' Br. at 14–15. Plaintiffs ask the Court to recognize as a corollary to this rule that "minority ownership by a government-controlled entity, as is the case here, requires a lower burden of proof and it should be more likely that Commerce will grant a separate rate in those situations." *Id.* at 15 (emphasis in original).

In *Zhejiang Quzhou Lianzhou Refrigerants Company*, the Court recognized that though evidence of legal separation between an exporter and its government-controlled parent may rebut the presumption of de facto government control when the government holds a minority stake in the exporter, such separation would not rebut the presumption when the government holds a majority stake in the exporter "because of the ever-present potential for the government to exert de facto control over the exporter's operations and management selection, and the expectation that it would do so." *Zhejiang Quzhou Lianzhou Refrigerants Co.*, 42 CIT at __, 350 F. Supp. 3d at 1318. Similarly, in *Shandong Rongxin Import & Export Company*, the Court noted that "the presumption of de facto government control is quite strong for respondents with a government majority shareholder." *Shandong Rongxin Imp. & Exp. Co.*, 43 CIT at __, 415 F. Supp. 3d at 1323–25. Finally, in *Yantai CMC Bearing Company*, the Court observed that particular facts, such as majority ownership, may be sufficient to support a determination of de facto government control, but the fact alone does not make the presumption of control irrebuttable. *Yantai CMC Bearing Co.*, 41 CIT at __, 203 F. Supp. 3d at 1325–26.

The Court does not agree with Plaintiffs' assertion that there is a different standard of proof based on the degree of the government's ownership stake in a respondent exporter. Commerce employs a rebuttable presumption that all companies within a nonmarket economy country are subject to government control and should be assigned a single, country-wide entity rate by default, unless the exporter requests an individualized antidumping margin and demonstrates affirmatively that the exporter maintains both de facto and de jure independence from the government. 19 U.S.C. § 1677(18); *Sigma Corp.*, 117 F.3d at 1405. As an exporter from China, Pirelli had the burden of rebutting the presumption of Chinese government control. *Sigma Corp.*, 117 F.3d at 1405. The cases cited by Plaintiffs recognize that Commerce may consider evidence of majority government ownership as strong support for the presumption, but the cases do not alter the exporter's burden of proof.

In this case, Commerce acknowledged that Pirelli had a minority indirect ownership by government-controlled entities and explained that Commerce would consider additional facts relating to Pirelli's independence. Final IDM at 15. Commerce reviewed record evidence showing Pirelli's organization, ownership, and Board of Directors. *Id.* at 14–18. Commerce also addressed arguments raised by Pirelli based on Italian law, the degree of authority held by Pirelli's CEO, and the transfer and disposal of proprietary know-how. *Id.* at 15–17.

Because Plaintiffs had the burden of rebutting the presumption of government control through proffered evidence, and there is no indication that Commerce imposed a higher burden upon Pirelli nor legal support for a lesser burden to be imposed, the Court concludes that Commerce's application of the burden of proof was in accordance with the law.

Plaintiffs argue further that Commerce's determination was unlawful because it was based on the presumption of theoretical potential government control rather than evidence of actual government control, resulting in an unlawful irrebuttable presumption. Pls.' Br. at 16–19. Neither Defendant nor Defendant-Intervenor directly respond to the merits of Plaintiffs' argument regarding Commerce's theory of control. *But see* Def.'s Resp. at 15 n.6 (summarily arguing that if the argument is not deemed waived, it should be rejected). Defendant-Intervenor contends that Commerce properly considered the ability of government-controlled entities to influence Pirelli's management and operations in denying Pirelli's Separate Rate Application. Def.-Interv.'s Resp. at 12–17. Defendants argue that Plaintiffs are foreclosed from raising this issue before the Court because Pirelli failed to exhaust available administrative remedies by first raising the issue before Commerce. Def.'s Resp. at 13–15.

The Court first addresses Defendant's failure to exhaust argument. Congress has directed that this Court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The statute "indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies." *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017) (citing *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007)). Commerce's regulations specifically require that a party raise all arguments in a timely manner before the agency. *Corus Staal*, 502 F.3d at 1379 (citing 19 C.F.R. § 351.309(c)(2)). "[G]eneral policies underlying the exhaustion requirement— protecting administrative agency authority and promoting judicial efficiency"— would be vitiated if the court were to consider arguments raised for the first time in judicial proceedings. *See id.* (internal quotation and citation omitted); *see also Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States*, 41 CIT __, __, 277 F. Supp. 3d 1346, 1353 (2017). The exhaustion requirement is not absolute and the Court has recognized limited exceptions to the doctrine: (1) futility in raising the issue; (2) a subsequent court decision that may impact the agency's decision; (3) a pure question of law; or (4) when plaintiff had no reason to believe

the agency would not follow established precedent. *See Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1186 n.26, 240 F. Supp. 2d 1268, 1297 n.26 (2002) (citing authorities). Defendant asserts that Pirelli did not raise the issue of potential and actual control before Commerce and cannot assert any of the recognized exceptions to the exhaustion requirement. Def.'s Resp. at 13–15. Plaintiffs did not respond to Defendant's exhaustion argument. *See* Pls.' Reply at 5.

When considering the exhaustion requirement, the determinative question for the Court is whether Commerce was put on notice of the argument. *See Trust Chem. Co. v. United States*, 35 CIT 1012, 1023 n.27, 791 F. Supp. 2d 1257, 1268 n.27 (2011). Commerce gave no indication prior to the *Final Results* that its analysis would consider potential, rather than actual control. Despite this, Pirelli made numerous arguments in Pirelli's Administrative Case Brief addressing Pirelli China's independence from the actual control of Pirelli Italy and the minority owners. *See* Pls.' Admin. Case Br. at 32–43. Because Commerce should have been aware that Pirelli was arguing that actual control was absent, Plaintiffs' arguments are not now barred.

In antidumping proceedings involving a nonmarket economy, Commerce presumes that all respondents are government-controlled and subject to a single country-wide antidumping rate. *Diamond Sawblades Mfrs. Coal.*, 866 F.3d at 1311. The percentage of government ownership of a responding company is relevant to Commerce's analysis because majority ownership is viewed as actual control, regardless of whether such control is actually exercised. *See Can Tho Imp.-Exp. Joint Stock Co. v. United States*, 44 CIT __, __, 435 F. Supp. 3d 1300, 1305–06 (2020); *An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 42 CIT __, __, 284 F. Supp. 3d 1350, 1359 (2018). When a respondent company is minority government owned, potential control does not necessarily equate to actual control. *See Zhejiang Quzhou Lianzhou Refrigerants Co.*, 42 CIT at __, 350 F. Supp. 3d at 1318; *An Giang Fisheries Imp. & Exp. Joint Stock Co.*, 42 CIT at __, 284 F. Supp. 3d at 1359. In such situations, "Commerce has required additional indicia of control prior to concluding that a respondent company could not rebut the presumption of de facto government control where the government owns, either directly or indirectly, only a minority of shares in the respondent company." *An Giang Fisheries Imp. & Exp. Joint Stock Co.*, 42 CIT at __, 284 F. Supp. 3d at 1359.

In its determination, Commerce explained:

> When conducting a separate rate analysis for a company with less than a majority of [state owned enterprise] ownership, Commerce has considered whether the record contains additional indicia of control sufficient to demonstrate that the company

> lacks independence and therefore should receive the China-wide rate. Commerce's practice is to examine whether the government might also be able to exercise, or have the potential to exercise, control of a company's general operations through minority government ownership under certain factual scenarios.

Final IDM at 15. Though Commerce's use of the term "potential" in explaining its practice might arguably create some ambiguity in what degree of government control Commerce is considering, *see An Giang Fisheries Imp. & Exp. Joint Stock Co.*, 42 CIT at __, 284 F. Supp. 3d at 1359, Commerce recognized the need in a case of minority government ownership, such as this, for additional indicia of control. Final IDM at 15. This need is further supported by Commerce's subsequent consideration and discussion of Pirelli's ownership, the composition and independence of Pirelli's Board of Directors, common board members between Pirelli entities and government-controlled entities, statements in Pirelli's 2017 Annual Report, the authority of Pirelli's CEO, Marco Tronchetti Provera, and the transfer and/or disposal of proprietary know-how. *Id.* at 15–18. The Court concludes that it was reasonable for Commerce to consider the potential for control together with additional indicia, and its analysis was in accordance with the law.

Plaintiffs argue that Commerce's determination was not in accordance with the law because Commerce failed to link Pirelli's export activities or export functions with the separate rate analysis. Pls.' Br. at 19–21. Defendant argues that Commerce is not required to specifically discuss export activities or export functions in the context of the third factor of the de facto control analysis, which asks whether a respondent has autonomy in making decisions regarding the selection of its management. Def.'s Resp. at 15–17. Defendant-Intervenor similarly argues that the de facto control analysis does not require consideration of export activities or export functions in addition to the factors enumerated in Policy Bulletin 05.1. Def.-Interv.'s Resp. at 25–26.

Policy Bulletin 05.1 states that the purpose of Commerce's control analysis is "[t]o establish whether a firm is sufficiently independent from governmental control in its export activities to be eligible for separate rate status." Policy Bulletin 05.1 at 2. Separate rate status is granted "only if an exporter can demonstrate the absence of both de jure and de facto governmental control over its *export activities*." *Id.* (emphasis added). Policy Bulletin 05.1 further provides that:

> [Commerce] considers four factors in evaluating whether each respondent is subject to de facto governmental control *of its export functions*: 1) whether the export prices are set by, or subject to the approval of, a governmental authority; 2) whether the respondent has authority to negotiate and sign contracts and other agreements; 3) whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management; and 4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.

Id. at 2 (emphasis added).

Plaintiffs assert that "[t]he Court has consistently ruled that Commerce must give meaning to the words 'export activities' in Commerce's discussion of its separate rate test." Pls.' Br. at 19. The only case offered by Plaintiffs in support of this contention, however, is *Guizhou Tyre Co., Ltd. v. United States*, 46 CIT __, 557 F. Supp. 3d 1302 (2022), an ongoing litigation. *Id.* at 20. Plaintiffs have not cited any authority that would support a requirement in the third factor for Commerce to connect an exporter's autonomy in selecting management with specific export activities or export functions.

Separate rate status is granted if an exporter can demonstrate the absence of de facto governmental control according to the four-factor test. The Court notes that the first factor examines whether "export prices" are set by or are subject to government approval, and the fourth factor examines whether the respondent retains the proceeds of its "export sales" and makes independent financial decisions. Policy Bull. 05.1 at 2. In contrast, the Court observes that neither the second nor third factors mention export activities or export functions. *Id.* Specifically the third factor of the de facto control analysis relevant to this case— "3) whether the respondent has autonomy from the central, provincial and local governments in making decisions regarding the selection of its management"— does not mention export activities or export functions. *Id.* The Court declines to adopt the approach asserted by Plaintiffs and alter the third factor of the de facto control test to read an additional requirement for Commerce to assess whether respondent has autonomy from government control in respondent's export activities or export functions.

Plaintiffs argue also that Commerce's determination is unlawful because Commerce refused to consider provisions of Italian law on which Pirelli relied. Pls.' Br. at 44–46. Commerce rejected Pirelli's argument that Italian law requires that certain directors be indepen-

dent of shareholders, concluding that "[t]he [Italian Finance Code] is not on the record of this review. As such, we are not convinced that the majority of Pirelli [Italy's] board are 'independent directors' who are part of the legal structure aimed to protect the interests of the minority shareholders [of] Pirelli [Italy]." Final IDM at 15. Commerce used similar language in considering Pirelli's argument that Italian law required Pirelli Italy to acknowledge indirect control by Chem China in Pirelli's 2017 Annual Report:

> Neither the Italian Finance Code (Art. 93 TUF) or the dictates of Italian Finance Code (TUF D. Lgs. 58/1998) are on the record of this review. As such, we are not convinced that Pirelli [Italy] must report that it is controlled by Chem China mainly for accounting purposes pursuant to the Italian Finance Code (Art. 93 TUF) or the dictates of Italian Finance Code (TUF D. Lgs. 58/1998).

Id. at 16. In both instances, Commerce refused to consider Pirelli's arguments based on provisions of Italian law that were not included on the record.

Commerce has discretion in the manner in which it conducts its administrative proceedings. *See PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 760 (Fed. Cir. 2012); *see also Yantai Timken Co., Ltd. v. United States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1370 (2007) ("Commerce has broad discretion to establish its own rules governing administrative procedures . . ."). "Commerce's role in an administrative proceeding is to weigh the evidence established in the record." *Yantai CMC Bearing Co.*, 41 CIT at __, 203 F. Supp. 3d at 1324. The respondent bears the burden of creating the record for Commerce's review. *Id.* Pirelli did not provide to Commerce the relevant portions of Italian law on which its arguments relied. In this case, the Court concludes that Commerce's rejection of Pirelli's unsupported interpretations of Italian law was reasonable.

C. Whether Commerce's Determination was Supported by Substantial Evidence

Plaintiffs argue that Commerce's determination that Pirelli failed to rebut the presumption of de facto government control is not supported by substantial evidence. Pls.' Br. at 23–49. Specifically, Plaintiffs contend that Commerce's determination that the Pirelli Group's shareholder structure allowed the government-controlled minority owners to assert control over Pirelli China's operational activities was not supported by substantial evidence. Pls.' Br. at 25–31. Plaintiffs

argue that Commerce's determination that government-controlled minority shareholders were able to influence Pirelli China's export activities was unsupported by substantial evidence. *Id.* at 46–49. In addition, Plaintiffs argue that Commerce ignored contrary record evidence that Pirelli China's day-to-day operations were insulated from shareholder control. *Id.* at 32–44. Plaintiffs contend that Commerce unreasonably ignored provisions of Italian law in reaching its determination. *Id.* at 44–46.

Because China is a nonmarket economy, Commerce employs a rebuttable presumption that all companies operating in China are subject to government control unless an individual exporter can demonstrate its de facto and de jure independence from the government. 19 U.S.C. § 1677(18); *Sigma Corp.*, 117 F.3d at 1405. As discussed above, Commerce denied Pirelli separate rate status based on the third factor of the de facto government test and determined that Pirelli had not rebutted the presumption as to its autonomy from government control over the selection of management. Final IDM at 13–18.

Based on a review of Pirelli's Corporate Organization Chart in evidence, Commerce determined that under Pirelli's organizational structure for most of Period of Review 3, Chem China and the Silk Road Fund, two Chinese government-owned entities, jointly controlled 36.9 percent of Pirelli China. *Id.* at 14; Pls.' Separate Rate App. at Ex. 5 ("Pirelli's Corporate Organization Chart"), PJA 4, CJA 2. Because these state-owned entities accounted for only minority indirect ownership of Pirelli China, Commerce looked for additional indicia of government control. Final IDM at 15; *see An Giang Fisheries Imp. & Exp. Joint Stock Co.*, 42 CIT at __, 284 F. Supp. 3d at 1359.

Commerce examined Pirelli's Separate Rate Application on the record as additional indicia of government control and determined based on this evidence that Pirelli Italy was the indirect majority shareholder of Pirelli China and selected members of Pirelli China's Board of Directors. Final IDM at 15, 17; Pls.' Separate Rate App. at 23–24. Based on a review of Plaintiffs' separate rate application, Commerce also determined that during Period of Review 3, Pirelli Italy and Chem China shared a common chairperson. Final IDM at 15; Pls.' Separate Rate App. at Ex. 16D ("Pirelli Italy's Board of Directors and Key Managers Info."), PJA 10, CJA 8. Citing the Pirelli Group's 2017 Annual Report, Commerce determined that Chem China was the largest individual shareholder of Pirelli Italy and the only party to hold more than three percent of Pirelli Italy's shares. Final IDM at 15–16; Pirelli Group's 2017 Annual Report at 231. Despite Pirelli's argument that a majority of Pirelli Italy's Board of

Directors members held no office with Chem China or China National Tire & Rubber Corporation, Ltd. and that a minority of Pirelli Italy's Board of Directors members were Chinese nationals, Commerce determined that Pirelli's corporate documents demonstrated to the contrary that China National Tire & Rubber Corporation, Ltd. (a Chinese government-controlled entity) was involved in the selection of a majority of Pirelli Italy's Board of Director's members. Final IDM at 16–17; Pirelli's 2017 Shareholders Agreement § 4.2.2.

Pirelli contends that certain Board of Directors members were free from government influence because they were designated as "independent" under provisions of Italian corporate law, which Commerce noted were not submitted on the administrative record. Pls.' Br. at 28–31, 44; Final IDM at 17. Notwithstanding whether Plaintiffs should have been required to place the Italian law provisions on the record, the Court concludes that Commerce's rejection of Pirelli's argument that Pirelli Italy's directors should be deemed "independent" under Italian law was reasonable, particularly because such designation as "independent" under Italian law would not be dispositive in this case, and because Commerce sufficiently cited substantial evidence on the record such as the separate rate application, the 2017 Annual Report, and the 2017 corporate by-laws to support Commerce's determination that Pirelli Italy was still under Chinese-government control. For example, citing language in the Pirelli Group's 2017 Annual Report, Commerce determined that Pirelli Italy had not established its independence from government-controlled entities. *Id.* at16. Commerce quoted the 2017 Annual Report that stated: "[Pirelli Italy was] directly controlled by Marco Polo International Italy S.p.A. . . . and [was] in turn therefore indirectly controlled by [Chem China], a state-owned enterprise [] governed by Chinese law with registered office in Beijing, and which report[ed] to the Central Government of the People's Republic of China." *Id.* at 16 (quoting Pirelli Group's 2017 Annual Report at 300). The Pirelli Group's 2017 Annual Report also stated that Pirelli Italy was "indirectly controlled, pursuant to art. 93 [Italian Finance Code], by Chem China via [China National Tire & Rubber Corporation, Ltd.] and certain of its subsidiaries, including Marco Polo." *Id.* (quoting Pirelli Group's 2017 Annual Report at 205). The Court observes that because Pirelli's own 2017 Annual Report confirmed that Pirelli Italy was indirectly controlled by Chem China, a Chinese government-controlled entity, via China National Tire & Rubber Corporation, another Chinese government-controlled entity, Commerce's determination that Pirelli Italy was indirectly controlled by Chinese government entities is supported by substantial evidence.

Commerce rejected Plaintiffs' argument that Pirelli Italy's CEO, Marco Tronchetti Provera, had exclusive authority to select Pirelli Italy's management and was insulated from the influence of Board of Directors members. Final IDM at 17; Pls.' Br. at 34–37. Rather, Commerce determined based on a review of Pirelli's 2017 By-laws on the record that Pirelli Italy was managed by its Board of Directors and that Provera reported to the Board of Directors and derived his authority from the Board of Directors. Final IDM at 17; Pirelli's 2017 Shareholders' Agreement § 4.4 ("The Pirelli CEO and Executive Chairman shall be *delegated* the exclusive power and authority concerning the ordinary management of Pirelli and of the Pirelli Group"); Pls.' Separate Rate App. at Ex. 10B ("Pirelli's 2017 By-laws") § 10.1, PJA 8, CJA 6 ("The Company shall be managed by a Board of Directors composed of up to fifteen members who shall remain in office for three financial years and may be re-elected."); *see also* Pirelli's 2017 Shareholders' Agreement § 4.7. The Court also notes that based on Pirelli's Separate Rate Application and a Letter of Appointment of Pirelli China's Directors, Commerce determined that Pirelli Italy indirectly owned shares of Pirelli China and that Pirelli Italy had the ability to appoint members of Pirelli China's Board of Directors. Final IDM at 17; Pls.' Separate Rate App. at 24; Pls.' Separate Rate App. at Ex. 16A ("Pirelli's Letter of Appointment of Pirelli China's Directors"), PJA 9, CJA 7. The Court agrees that Commerce's determination was reasonable because these documents established that the Board of Directors could be appointed by entities within Chinese government control.

The Court concludes that substantial evidence supports Commerce's determination that Pirelli failed to rebut the presumption of de facto government control. The Court sustains Commerce's assignment of the China-wide entity rate to Pirelli.

IV. Italian Law

The Court amends its previous opinion to address Plaintiffs' arguments regarding provisions of Italian law. Plaintiffs have invoked USCIT Rule 44.1 to "present[] certain provisions of Italian Law on the record of this proceeding for judicial review." USCIT Rule 44.1 provides:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by

> a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

USCIT R. 44.1. This rule permits, but does not require, the Court to opine on the meaning of a foreign law when relevant to the resolution of a case. It is not a backdoor for parties to supplement the record that existed before the agency. Because the provisions of Italian law cited by Plaintiffs were not on the record before Commerce, interpretation of the provisions is not dispositive to this case. Even if Italian law had been on the record before Commerce, it would not have rebutted the presumption of de facto government control.

Plaintiffs argue that various provisions of the Codice Civile Italiano ("Italian Civil Code") and Testo Unico Delle Disposizioni in Materia Di Intermediazione Finanziaria ("Italian Consolidated Law on Financial Intermediation") and Commissione Nazionale per le Societa e la Borsa ("CONSOB") regulations required Pirelli Italy and its directors to be independent of major shareholders and other corporate controls. Pls.' Br. at 23–25, 28–29, 37– 41; Pls.' Mot. Alter Amend J. at 2–3. In support of their argument that Pirelli Italy ceased "management and coordination" by its Chinese state-owned shareholders, Plaintiffs contend that "management and coordination" under Italian law should be understood as "a concept that consists in giving a unitary operational direction to different companies, by applying a common financial policy and strategy and managing them as a unique enterprise, with a view to a better achievement of the goals pursued by the whole group." Pls.' Br. at 39. Plaintiffs further explain that:

> [t]his happens when there exists a constant flow of instructions relating to the management, the collection of financial resources, the financial statements, policies, etc., from the company exercising management and coordination activities to the company submitted to these management and coordination activities, i.e., in many multinational companies. From a practical perspective, these instructions should be reflected in all decisions of the company that receives them, including in both the board of directors and shareholders' meeting resolutions, which must be properly grounded and explain the reasons and interests that led to that decision.

Id. Plaintiffs base this definition on Article 2497 of the Italian Civil Code and specifically focus on Articles 2497-ter and 2497-sexies. *Id.* Article 2497-ter of the Italian Civil Code reads:

> Any decisions made by a company that is subject to management and coordination activities, if influenced by said activities, must be analytically justified and clear indication must be provided of the reasons and interests which were weighed up when making said decisions. The report required by Article 2428 shall take these decisions into adequate consideration.

Art. 2497-ter C.c. (It.). Article 2497-sexies reads:

> For the purposes of the provisions contained in this section, unless proven otherwise, it is assumed that companies are managed and coordinated by the company or entity that is obliged to consolidate their financial statements or that in any case controls them pursuant to Article 2359.

Art. 2497-sexies C.c. (It.).

Article 2497-sexies creates a legal presumption that coordination and control are exercised by a company that is obligated to consolidate the financial statements of another company or may control another company pursuant to Article 2359 of the Italian Civil Code. *Id.* Article 2359 provides three situations in which companies are considered controlled: 1) companies in which another company controls a majority of votes able to be exercised in an ordinary shareholders' meeting, 2) companies in which another company has sufficient votes to exercise a dominant influence in an ordinary shareholders' meeting, and 3) companies that are under the dominant influence of another company pursuant to a contractual relationship. Art. 2359 C.c. (It.); *see also* Testo Unico Delle Disposizioni in Materia Di Intermediazione Finanziaria ("Consolidated Law on Financial Intermediation") Decreto Legislativo 24 Febbraio 1998, No. 58, art. 92 (It.) (expanding the types of companies considered controlled). As discussed above, Plaintiffs' claims that Pirelli Italy was not managed or controlled by other entities is contradicted by other statements on the record conceding that Chem China had indirect control over Pirelli Italy. *See* Pirelli Group's 2017 Annual Report at 205. The record also evidences that China National Tire & Rubber Corporation, Ltd. was involved in the selection of a majority of Pirelli Italy's Board of Director's members and that Chem China and the Silk Road Fund were Pirelli Italy's largest individual shareholders. *See* Pirelli's 2017 Shareholders Agreement § 4.2.2; Pls.' Separate Rate App. at Ex. 5; Pirelli Group's 2017 Annual Report at 231. These facts, demonstrated by record evidence, are more persuasive than Plaintiff's argument that Italian law created a presumption that Pirelli Italy was not subject to control during the Period of Review.

Plaintiffs contend that Italian law also imposed constraints intended to protect the interests of minority shareholders and the market in general. Pls.' Br. at 40. Specifically, Plaintiffs cite to Article 113-ter of the Italian Consolidated Law on Financial Intermediation as imposing public disclosure requirements and granting to CONSOB "broad powers of control" over publicly listed companies, "including the power to request information, to verify the transparency of data meant for disclosure to the market, to conduct inspections and to impose sanctions in the event of failure to honor the obligations imposed." *Id.* Plaintiffs assert that this legal framework extends to related party transactions "to ensure transparency and substantive and procedural properness of transactions with related parties conducted directly by the listed company or through its subsidiaries." *Id.* at 40–41.

Plaintiffs posit that Article 113-ter of the Italian Consolidated Law on Financial Intermediation:

> provides for specific obligations on the part of listed issuers to make disclosures to the public and grants to CONSOB broad powers of control over such entities, including the power to request information, to verify the transparency of data meant for disclosure to the market, to conduct inspections and to impose sanctions in the event of failure to honor the obligations imposed.

Id. at 40.

Article 113-ter requires publicly traded companies to issue a prospectus containing sufficient information to enable potential investors to make an informed choice on an investment regarding the nature and risks of investing in a company. Italian Consolidated Law on Financial Intermediation arts. 98-ter, 113-ter. Under Article 113-ter, disclosures are filed with CONSOB, which establishes the method and technical requirements for disclosure. *Id.* art. 113-ter. Plaintiffs also cite to CONSOB Regulation 17221 as imposing transparency requirements on corporate transactions. Pls.' Br. at 40–41; *see* CONSOB Regolamento 10 marzo 2010, no. 17221, G.U. Mar. 25, 2010, n. 70, arts 4, 7, 8, *amended by* delibera n. 22144 def 22 dicembre 2021. Though Article 113-ter and CONSOB Regulation 17221 impose standards that promote transparency, they do not impose any type of requirement or limitation on influence by a government-controlled shareholder. *See id.* Plaintiffs' obligation to meet these Italian corporate law requirements as a publicly traded company does not rebut the presumption of government control.

Plaintiffs also argue that Pirelli Italy's Board of Directors was insulated from influence by the Chinese state-controlled shareholders because several directors were required to be "independent" under Italian law. Plaintiffs cite to Articles 147-ter and 148 of the Italian Consolidated Law on Financial Intermediation in support of their argument. Pls.' Br. at 4, 24, 30. Article 147-ter of the Italian Consolidated Law on Financial Intermediation concerns the election and composition of boards of directors and provides, in relevant part:

> In addition to what is provided for in paragraph 3, at least one of the members of the Board of Directors, or two if the Board of Directors is composed of more than seven members, should satisfy the independence requirements established for members of the board of auditors in Article 148(3) and, if provided for in the Articles of Association, the additional requirements established in codes of conduct drawn up by regulated stock exchange companies or by trade associations. This paragraph shall not apply to the boards of directors of companies organized under the one-tier system, which shall continue to be subject to the second paragraph of Article 2409 septiesdecies of the Civil Code. The independent director who, following his or her nomination, loses those requisites of independence should immediately inform the Board of Directors about this and, in any case falls from his/her office.

Italian Consolidated Law on Financial Intermediation art. 147-ter(4). Article 148(3) enumerates the following categories of individuals that do not qualify as independent:

> a) persons who are in the conditions referred to in Article 2382 of the Civil Code;
>
> b) spouses, relatives and the like up to the fourth degree of kinship of the directors of the company, spouses, relatives and the like up to the fourth degree of kinship of the directors of the companies it controls, the companies it is controlled by and those subject to common control;
>
> c) persons who are linked to the company, the companies it controls, the companies it is controlled by and those subject to common control or to directors of the company or persons referred to in paragraph b) by self-employment or employee relationships or by other relationships of an economic or professional nature that might compromise their independence.

Id. art. 148(3).

Plaintiffs' argument that Italian law requires individuals designated as "independent" to not be linked to Pirelli or its parent companies misses the mark. The relevant question for Commerce was whether Plaintiffs successfully rebutted the presumption of Chinese government control, not control by another company. The provisions of Italian law cited by Plaintiffs would not prevent a government-controlled shareholder from appointing an individual that was independent of both the shareholder and Pirelli but still beholden to the interests or control of the Chinese government. The mere fact that members of Pirelli Italy's board of directors were designated as independent under Italian law is not enough to demonstrate an absence of Chinese government control, particularly in light of record evidence that Chem China had indirect control over Pirelli Italy, that China National Tire & Rubber Corporation, Ltd. was involved in the selection of a majority of Pirelli Italy's Board of Director's members, and that Chem China and the Silk Road Fund were Pirelli Italy's largest individual shareholders. For these reasons, the relevant provisions of Italian law do not rebut the presumption of de facto government control.

CONCLUSION

For the foregoing reasons, the Court concludes that Commerce's determination that New Continent provided accurate information during the administrative review was supported by substantial record evidence. The Court also concludes that Commerce's assignment of the China-wide entity rate to Pirelli was in accordance with the law and supported by substantial record evidence.

It is hereby:

ORDERED that Plaintiffs' Motion to Alter or Amend Judgment, ECF No. 90, is granted; and it is further

ORDERED that Slip Opinion 23–38, ECF No. 88, and the accompanying Judgement, ECF No. 89, are set aside.

The Court sustains the *Final Results* and *Remand Results*. In accordance with this opinion, judgment will be entered.

Dated: June 9, 2023
New York, New York

/s/ Jennifer Choe-Groves

JENNIFER CHOE-GROVES, JUDGE

Slip Op. 23–87

HYUNDAI STEEL COMPANY, Plaintiff, AJU BESTEEL CO., LTD., NEXTEEL CO., LTD., and HUSTEEL CO., LTD., Consolidated Plaintiffs, and HUSTEEL CO., LTD., NEXTEEL CO., LTD., and SEAH STEEL CORPORATION, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and VALLOUREC STAR, L.P., WELDED TUBE USA INC., and UNITED STATES STEEL CORPORATION, Defendant-Intervenors.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 22–00138

[Sustaining in part and remanding in part the final results of the administrative review by the U.S. Department of Commerce in the countervailing duty investigation of certain oil country tubular goods from the Republic of Korea.]

Dated: June 9, 2023

Jarrod M. Goldfeder, Trade Pacific PLLC, of Washington, D.C. argued for Plaintiff Hyundai Steel Company and Consolidated Plaintiff AJU Besteel Co., Ltd. With him on the brief was *Robert G. Gosselink*.

Brady W. Mills, *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, and *Eugene Degnan*, Morris, Manning & Martin, LLP, of Washington, D.C., for Consolidated Plaintiff and Plaintiff-Intervenor Husteel Co., Ltd.

Henry D. Almond, Arnold & Porter Kaye Scholer LLP, of Washington, D.C., argued for Consolidated Plaintiff and Plaintiff-Intervenor NEXTEEL Co., Ltd. With him on the brief were *J. David Park*, *Daniel R. Wilson*, and *Kang Woo Lee*.

Jeffrey M. Winton, *Amrietha Nellan*, *Ruby Rodriguez*, *Jooyoun Jeong*, *Michael J. Chapman*, and *Vi Mai*, Winton & Chapman PLLC, of Washington, D.C., for Plaintiff-Intervenor SeAH Steel Corporation.

Hardeep K. Josan, Trial Attorney, 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 *Claudia Burke*, Assistant Director. Of counsel on the brief was *Mykhaylo Gryzlov*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Roger B. Schagrin, *Benjamin J. Bay*, *Christopher T. Cloutier*, *Elizabeth J. Drake*, *Jeffrey D. Gerrish*, *Joseph A. Laroski, Jr.*, *Kelsey M. Rule*, *Luke A. Meisner*, *Michelle R. Avrutin*, *Nicholas J. Birch*, *Saad Y. Chalchal*, and *William A. Fennell*, Schagrin Associates, of Washington, D.C., for Defendant-Intervenors Vallourec Star, L.P. and Welded Tube USA Inc.

James E. Ransdell, IV, *Thomas M. Beline*, *Myles S. Getlan*, *Nicole Brunda*, and *Sarah E. Shulman*, Cassidy Levy Kent (USA), LLP, of Washington, D.C., argued for Defendant-Intervenor United States Steel Corporation.

OPINION AND ORDER

Choe-Groves, Judge:

This action arises from the results of the U.S. Department of Commerce ("Commerce") in the antidumping administrative review of Oil Country Tubular Goods ("OCTG") from the Republic of Korea ("Korea") for September 1, 2019 through August 31, 2020 ("Period of Review"). Summons, ECF No. 1; Compl., ECF No. 8. Plaintiff Hyun-

dai Steel Company ("Plaintiff" or "Hyundai Steel") filed this action pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(iii) contesting Commerce's final results in *Certain Oil Country Tubular Goods From the Republic of Korea* ("*Final Results*"), 87 Fed. Reg. 20,815 (Dep't of Commerce Apr. 8, 2022) (final results of antidumping duty administrative review and final determination of no shipments; 2019–2020), and accompanying Issues and Decisions Memorandum ("Final IDM"), ECF No. 41–5.

Before the Court is Plaintiff's Rule 56.2 Motion for Judgment on the Agency Record ("Plaintiff's Motion"). Pl.'s R. 56.2 Mot. J. Agency R., ECF Nos. 55, 59; Pl.'s Mem. Supp. R. 56.2 Mot. Pl. J. Agency R. ("Pl.'s Br."), ECF Nos. 55–2, 59–2. Consolidated Plaintiff and Plaintiff-Intervenor Husteel Co., Ltd. ("Husteel") filed Husteel's Motion for Judgment on the Agency Record and Brief in Support of its Motion for Judgment on the Agency Record incorporating and supporting the arguments raised in Plaintiff's Motion. Husteel's Mot. J. Agency R., ECF No. 54; Husteel's Br. Supp. Mot. J. Agency R. ("Husteel's Br."), ECF No. 54–2. Plaintiff-Intervenor SeAH Steel Corporation ("SeAH"), Consolidated Plaintiff and Plaintiff-Intervenor NEXTEEL Co., Ltd. ("NEXTEEL"), and Consolidated Plaintiff AJU Besteel Co., Ltd. ("AJU Besteel") filed SeAH's Motion for Judgment on the Agency Record, NEXTEEL's Rule 56.2 Motion for Judgment Upon the Agency Record, and AJU Besteel's Rule 56.2 Motion for Judgment Upon the Agency Record, each incorporating and expanding upon arguments raised in Plaintiff's Motion. SeAH's Mot. J. Agency Record, ECF No. 56; SeAH's Br. Supp. Rule 56.2 Mot. J. Agency R. ("SeAH's Br."), ECF No. 56–1; NEXTEEL's Mot. J. Agency R., ECF No. 57; NEXTEEL's Mem. Supp. NEXTEEL's R. 56.2 Mot. J. Agency R. ("NEXTEEL's Br."), ECF No. 57–2; AJU Besteel's R. 56.2 Mot. J. Agency R., ECF No. 58; AJU Besteel's Mem. Supp. R. 56.2 Mot. J. Agency R. ("AJU Besteel's Br."), ECF No. 58–2.

Defendant United States ("Defendant") filed Defendant's Response in Opposition to Motions for Judgment Upon the Administrative Record. Def.'s Resp. Opp'n Mot. J. Admin. R. ("Def.'s Resp."), ECF No. 60. Defendant-Intervenors United States Steel Corporation, Vallourec Star, L.P., and Welded Tube USA, Inc. (collectively, "Defendant-Intervenors") filed Response Brief of Defendant-Intervenors in Opposition to Rule 56.2 Motions for Judgment on the Agency Record. Def.-Intervs.' Resp. Br. Opp'n R. 56.2 Mots. J. Agency R. ("Def.-Intervs.' Resp."), ECF No. 61. Plaintiff, Husteel, AJU Besteel, and NEXTEEL filed replies. Husteel's Reply Br. Supp. Mot. J. Agency R. ("Husteel's Reply"), ECF No. 62; Pl.'s Reply Def.'s Def.-Intervs.' Resp. Br. Opp'n Pl.'s R. 56.2 Mot. J. Agency R. ("Pl.'s Reply"),

ECF Nos. 63, 64; AJU Besteel's Reply Br. Supp. R. 56.2 Mot. J. Agency R. ("AJU Besteel's Reply"), ECF No. 65; NEXTEEL's Reply Br. Supp. R. 56.2 Mot. J. Agency R. ("NEXTEEL's Reply"), ECF No. 66.

For the following reasons, the Court sustains in part and remands in part Commerce's *Final Results*.

ISSUES PRESENTED

The Court reviews the following issues:

1. Whether Commerce's use of SeAH's business proprietary information was in accordance with law;
2. Whether Commerce's calculations of constructed value, constructed value profit cap, and constructed export price were supported by substantial evidence;
3. Whether Commerce's adjustments to Hyundai Steel USA's general and administrative expense ratio were supported by substantial evidence;
4. Whether Commerce's use of neutral facts available and adjustment to Plaintiff's reported further manufacturing yield loss were supported by substantial evidence;
5. Whether the weighted-average dumping margin for non-examined respondents should be remanded to allow for recalculation consistent with potential changes to SeAH's weighted-average dumping margin; and
6. Whether NEXTEEL is barred from relief in this action because NEXTEEL failed to raise its arguments before the administrative agency.

BACKGROUND

Commerce published an antidumping duty order covering OCTG from Korea on September 10, 2014. *Certain Oil Country Tubular Goods From India, the Republic of Korea, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam*, 79 Fed. Reg. 53,691 (Dep't of Commerce Sept. 10, 2014) (antidumping duty orders; and certain oil country tubular goods from the Socialist Republic of Vietnam: amended final determination of sales at less than fair value). Commerce invited interested parties to request an administrative review for the period of September 1, 2019 through August 31, 2020. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 85 Fed. Reg. 54,349 (Dep't of Commerce Sept. 1, 2020). United States Steel

Corporation, Maverick Tube Corporation, Tenaris Bay City, Inc., and IPSCO Tubulars Inc. requested review of 33 producers and exporters of the subject goods. *See* Commerce's Decision Mem. Prelim. Results 2019–2020 Admin. Rev. Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea ("Prelim. DM") at 1–2, PR 248.[1] Hyundai Steel, SeAH, NEXTEEL, Husteel, AJU Besteel, and ILJIN Steel Corporation requested examinations of themselves. *Id.* at 2; NEXTEEL's Request Admin. Rev., PR 1; Pl.'s Request Admin. Rev., PR 4; AJU Besteel's Request Admin. Rev., PR 5. Commerce initiated an administrative review on October 30, 2020. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 68,840 (Dep't of Commerce Oct. 30, 2020); Prelim. DM at 1–2. Commerce selected Hyundai Steel and SeAH as mandatory respondents for individual examination. Commerce's Resp. Selection Mem. (Dec. 18, 2020), PR 30.

Commerce released preliminary results of the administrative review on September 29, 2021. *Certain Oil Country Tubular Goods From the Republic of Korea* ("*Preliminary Results*"), 86 Fed. Reg. 54,928 (Dep't of Commerce Oct. 5, 2021) (preliminary results of antidumping duty administrative review and preliminary determination of no shipments; 2019–2020); Prelim. DM. Commerce determined preliminary weighted-average dumping margins of 19.38 percent for Plaintiff, 3.85 percent for SeAH, and 11.62 percent for non-examined companies. *Preliminary Results*, 86 Fed. Reg. at 54,929. In the *Preliminary Results*, Commerce calculated Plaintiff's constructed value profit and selling expenses using the business proprietary information of SeAH regarding SeAH's third-country sales of OCTG to Kuwait. Prelim. DM. at 30–31. Commerce published the *Final Results* on April 8, 2022, in which Commerce calculated weighted-average dumping margins of 19.54 percent for Plaintiff, 3.85 percent for SeAH, and 11.70 percent for non-examined companies. *Final Results*, 87 Fed. Reg. at 20,816. Commerce continued to calculate Plaintiff's constructed value profit and selling expenses using SeAH's combined constructed value profit and selling expenses for third-country market sales in Kuwait. Final IDM at 37. Commerce also used SeAH's third-country sales data to calculate constructed export price profit. *Id.* at 44–47.

Plaintiff and Consolidated Plaintiffs initiated four separate actions against Defendant challenging aspects of the *Final Results*. Compl.; Summons; *AJU Besteel Co., Ltd. v. United States*, Court No. 22–00139; *Nexteel Co., Ltd. v. United States*, Court No. 22–00140;

[1] Citations to the administrative record reflect the public record ("PR") numbers filed in this case, ECF No. 68.

Husteel Co., Ltd. v. United States, Court No. 22 00143. The Court consolidated the four cases into to this action. Order (June 28, 2022), ECF No. 43. The Court held oral argument on the pending motions for judgment on the agency record on March 22, 2023. Docket Entry, ECF No. 72.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final results of an administrative review of an antidumping duty order. The Court will hold unlawful any determination found to be unsupported by substantial record evidence or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

STATUTORY FRAMEWORK

Commerce imposes antidumping duties on foreign goods if "(1) it determines that the merchandise 'is being, or is likely to be, sold in the United States at less than its fair value,' and (2) the International Trade Commission determines that the sale of the merchandise at less than fair value materially injures, threatens, or impedes the establishment of an industry in the United States." *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017) (quoting 19 U.S.C. § 1673(1)). Antidumping duties are calculated as the difference between the normal value of subject merchandise and the export price or the constructed export price of the subject merchandise. *See* 19 U.S.C. § 1673.

Normal value is ordinarily determined using the sales price of the subject merchandise in the seller's home market. 19 U.S.C. § 1677b(a)(1)(B)(i). If Commerce determines that normal value cannot be calculated reliably using home market or third-country sales, Commerce may use the subject merchandise's constructed value as an alternative to normal value. *Id.* § 1677b(a)(4). The method for calculating constructed value is defined by statute. *Id.* § 1677b(e). When calculating constructed value, Commerce must utilize the respondent's actual selling, general, and administrative expenses, and profits in the respondent's home market or a third-country market. *Id.* § 1677b(e)(2)(A). If Commerce cannot rely on those data, it may look to:

> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,

> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
>
> (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.

Id. § 1677b(e)(2)(B).

Commerce must also calculate export price or constructed export price.

Export price is:

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, [subject to certain adjustments].

Id. § 1677a(a). Constructed export price is:

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, [subject to certain adjustments].

Id. § 1677a(b). The price used to calculate export price and constructed export price is reduced by commissions, selling expenses, further manufacturing expenses, and the profit allocated to these expenses. *Id.* § 1677a(d).

DISCUSSION

I. Business Proprietary Information

In calculating Plaintiff's dumping margin, Commerce used SeAH's business proprietary information concerning third-country sales. Final IDM at 37. Plaintiff contends that Commerce's reliance on SeAH's business proprietary information prevented Hyundai Steel from presenting effective arguments during the administrative proceedings because Plaintiff's business representatives were unable to review the proprietary data considered by Commerce. Pl.'s Br. at 18–20. Plaintiff concedes that its counsel had access to SeAH's business proprietary information under an administrative protective order, but argues that Plaintiff's business executives, not its counsel, were best situated to confirm "that the data being used to calculate the [constructed value] profit and selling expense ratios were complete, accurate, reasonable, representative, or reliable." *Id.* at 19. Plaintiff asserts that "the margin calculation methodologies used by Commerce in any proceeding should not differ or be dependent on whether a respondent is represented by counsel." *Id.*

Defendant argues that Commerce is not prohibited by statute or regulation from considering business proprietary information. Def.'s Resp. at 17. Defendant also contends that the administrative protective order system provides parties to an administrative proceeding with an opportunity to access protected information through counsel and experts while protecting the interests of the business proprietary information's owners. *Id.*

Commerce's regulations provide for documents to be filed in both "business proprietary" and "public" versions. 19 C.F.R. §§ 351.303(b), 351.304. Business proprietary information may be made available only to individuals authorized to review submissions under an administrative protective order, such as counsel and experts. *Id.* §§ 351.303(b)(4), 351.304(a)–(b). The public version includes redactions of information designated as business proprietary. *Id.* §§ 351.303(b)(4)(iv), 351.304(c). This system allows a party access to another party's business proprietary information while limiting the risk of unnecessary disclosure to a business competitor.

During the administrative proceeding, SeAH's business proprietary information was subject to an administrative protective order. *See* Final IDM at 37. Plaintiff argues that the public versions of Commerce's preliminary constructed value profit memorandum and preliminary analysis memorandum for SeAH did not provide sufficient detail for Plaintiff's review. Pl.'s Br. at 18–19. Plaintiff's counsel and

consultants received access to SeAH's business proprietary information through the administrative protective order. Final IDM at 37; Admin. Protective Order Service List at 6, PR 321; *see also* Pl.'s Br. at 19. There exists no statutory or regulatory requirement that Commerce allow a party access to business proprietary information other than through counsel or that Commerce limit its use of business proprietary information to only information reviewed by opposing parties. Imposing such a requirement would negate the purpose of the administrative protective order system and would hinder the ability of Commerce to perform its statutory directive while protecting proprietary information from business competitors. Plaintiff was not impaired in its ability to present its arguments before the administrative agency by its internal business representatives not having access to the business proprietary information because Plaintiff's counsel and consultants were able to review and use the relevant information. Therefore, Commerce's use of SeAH's business proprietary information was not arbitrary and was in accordance with law.

II. Third-Country Sales Data

In the *Final Results*, Commerce used SeAH's third-country market sales data of OCTG to Kuwait during the Period of Review to calculate Plaintiff's constructed value profit and selling expenses and constructed export price profits. Final IDM at 39–40, 47. Commerce also used SeAH's third-country sales data as the "facts available" profit cap. *Id.* at 42–43.

Plaintiff asserts multiple challenges to the use of SeAH's third-country market data. Specifically, Plaintiff argues that in adopting SeAH's third-country sales data for calculating constructed value, Commerce incorrectly read into the applicable statute a preference that constructed value profit should reflect production and sales of "foreign like products" and unreasonably used data that did not represent Plaintiff's actual experience during the Period of Review. Pl.'s Br. at 8, 11–17. Plaintiff argues that Commerce's use of SeAH's data "as a reasonable profit cap on a facts available basis" was inconsistent with the statutory objective to identify a profit cap that best reflects a respondent's profit on sales in the foreign country. *Id.* at 20–29 (quoting Final IDM at 43). Plaintiff also challenges the use of SeAH's third-country data in Commerce's calculation of constructed export price profit as inconsistent with applicable statutory requirements and based on a misunderstanding of record evidence. *Id.* at 29–35.

Defendant requests that the Court remand the issue of constructed export price profit to allow Commerce an opportunity to reexamine the administrative record. Def.'s Resp. at 32–34.

The Court has considerable discretion in deciding whether to grant a request for remand by the Government. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *Home Prods. Int'l, Inc. v. United States*, 633 F.3d 1369, 1378 (Fed. Cir. 2011). If the agency's concern is substantial and legitimate, a remand may be appropriate. *SKF USA Inc.*, 254 F.3d at 1029. This Court has concluded that an agency's concerns are substantial and legitimate if: (1) the agency has provided a compelling justification for its remand request, (2) the need for finality does not outweigh the agency's justification, and (3) the scope of the remand request is appropriate. *See, e.g.*, *Sea Shepherd N.Z. v. United States*, 44 CIT __, __, 469 F. Supp. 3d 1330, 1335–36 (2020) (internal quotations omitted) (citing *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 29 CIT 1516, 1522–26, 412 F. Supp. 2d 1330, 1336–39 (2005)).

Defendant requests remand to resolve what it characterizes as "a substantial and legitimate concern in reaching an accurate determination." Def.'s Resp. at 34. Remand of Commerce's determination regarding the calculation of constructed export price will allow Commerce to reassess its use of SeAH's third-country data in the context of constructed value and the profit cap. Commerce has an obligation to calculate dumping margins as accurately as possible. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). The Court concludes that Defendant has provided a compelling justification for its remand request, the need for finality does not outweigh the agency's justification, and the scope of Defendant's remand request is appropriate. The Court remands the calculations of constructed value, constructed value profit cap, and constructed export price to allow Commerce an opportunity to reconsider the issues and reexamine the administrative record.

III. General and Administrative Expense Ratio

In the *Final Results*, Commerce adjusted Hyundai Steel's reported general and administrative expenses for Hyundai Steel's affiliate Hyundai Steel USA to account for the cost of rejected pipe sold to unaffiliated customers. Final IDM at 52–55; *see also* Commerce's Final Antidumping Analysis Hyundai Steel Mem. at Att. 1, PR 306. Plaintiff argues that Commerce's general and administrative expense ratio adjustment was unsupported by record evidence, which demonstrated that the rejected pipes related to Hyundai Steel USA's production operations as a type of non-subject product and that Plaintiff

calculated its proposed general and administrative expense ratio in accordance with Hyundai Steel USA's normal accounting practices. Pl.'s Br. at 35–37. Defendant contends that Commerce's adjustment was reasonable. Def.'s Resp. at 27–30.

In calculating costs as part of constructed value, "Commerce must include selling, general, and administrative expenses." *Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1161, 1166 (2017) (citing 19 U.S.C. § 1677b(e)(2)). General and administrative expenses are not defined in the statute, but "are generally understood to mean expenses which relate to the activities of the company as a whole rather than to the production process." *Id.* (internal quotations and citation omitted). "[T]he numerator of the [general and administrative] expense ratio is the respondent's expenses attributable to general operations of the company and the denominator is the respondent's company-wide [cost of goods sold]." *Id.*Commerce is afforded "significant deference" in the calculation of general and administrative expenses because "it is a determination 'involv[ing] complex economic and accounting decisions of a technical nature.'" *Id.* (quoting *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996)).

In the *Final Results*, Commerce adjusted Hyundai Steel's reported general and administrative expense ratio for Hyundai Steel USA by increasing the numerator and decreasing the denominator to account for the cost of pipes rejected by Hyundai Steel USA and sold to a non-affiliated company for processing into scrap. Final IDM at 52; Commerce's Final Antidumping Analysis Hyundai Steel Mem. at Att. 1. Commerce determined that the scrap material was "a type of non-subject product that [Hyundai Steel USA] produced from imported OCTG and sold during the [Period of Review]." Final IDM at 52. The scrap entered the United States as prime merchandise but was rejected because of damage identified during inspections performed before or after processing. *Id.* ; *see* Pl.'s Section E Resp. (Feb. 25, 2021) at E-9, PR 82; Pl.'s Supp. Section E Resp. (Sept. 3, 2021) at SE-2, PR 237. The rejected pipes were collected by Hyundai Steel USA over several months and were sold only as scrap. Final IDM at 52; *see* Pl.'s Supp. Section E Resp. at SE-2; Pl.'s Admin. Rebuttal Br. (Nov. 22, 2021) at 27, PR 291.

Commerce determined that the scrap derived from rejected OCTG pipes was not sold as a distinct product and "that [Hyundai Steel USA's] classification of the scrap as a type of non-subject product [did] not reasonably reflect the production costs of the merchandise under consideration or the other products included within [cost of goods sold]." Final IDM at 52–53. Commerce also determined that:

> The costs associated with the rejected pipes were necessarily covered by [Hyundai Steel USA] generally; that is, by all the other products [Hyundai Steel USA] further manufactured and sold. Therefore, consistent with the *Preliminary Results*, we have continued to revise [Hyundai Steel USA's general and administrative] [e]xpense ratio calculation to include in the numerator the [cost of goods sold] of rejected pipes sold to an unaffiliated customer for complete processing into scrap metal ([“Scrap cost of goods sold”]) and exclude from the denominator the “Scrap [cost of goods sold]” amount. However, we have reduced the “Scrap [cost of goods sold]” amount by the scrap sales revenue and the cost of pipes rejected during further manufacturing for these final results.

Id. at 53.

Plaintiff argues that Commerce's methodology is unsupported because it ignores that Hyundai Steel USA is a manufacturing entity, despite using other parties to perform all actual manufacturing. Pl.'s Br. at 37. Plaintiff asserts that as a manufacturing entity, Hyundai Steel USA generated scrap that was a production cost of merchandise included in Hyundai Steel USA's cost of goods sold and not a general cost. *Id.* It is Plaintiff's position that because of the specialized nature of prime OCTG, once a defect was identified and the pipe was no longer suitable for its specialized purpose, the rejected pipe ceased to be OCTG and was transformed into non-subject merchandise. Pl.'s Reply at 16; *see* Pl.'s Section D Resp. (Feb. 22, 2021) at D-26–D-27, PR 81. Plaintiff contends that though the rejected pipe was not suitable as prime OCTG, it was theoretically usable in other applications as non-prime merchandise. Pl.'s Reply at 17. Plaintiff argues that the decision of the purchaser to use the rejected pipe as scrap should not impact how Hyundai Steel considered the materials in its internal records. *Id.*; *see* Pl.'s Supp. Section E Resp. at SE-3.

The Court observes that the record supports Commerce's determination that Hyundai Steel USA did not sell the rejected pipe as anything other than scrap. *See* Pl.'s Section E Resp. at E-9; Pl.'s Supp. Section E Resp. at SE-2; Pl.'s Admin. Rebuttal Br. at 27. Commerce determined that Hyundai Steel USA functioned as a selling entity for OCTG during the Period of Review and contracted with the unaffiliated processors to perform certain processing on imported OCTG before the goods were sold to customers. Final IDM at 53. The rejected pipes entered the United States as prime OCTG, but because of

discovered defects, were instead sold as scrap. *Id.* at 52. As Commerce noted, the record evidence reflects only that the rejected pipes were sold for processing into scrap metal and does not demonstrate that Plaintiff sold any rejected pipes as non-subject merchandise. *Id.* at 52–53; *see* Pl.'s Supp. Section E Resp. at SE-2; Pl.'s Admin. Rebuttal Br. at 27–28. The Court concludes that Commerce's determinations that the rejected pipe was not a distinct non-subject product and that the cost associated with the rejected pipe was covered generally by Hyundai Steel USA were reasonable and supported by substantial evidence. The Court sustains Commerce's adjustment to the general and administrative expense ratio.

IV. Further Manufacturing Yield Loss

Pursuant to 19 U.S.C. § 1677e(a)(1), Commerce applied a neutral facts otherwise available adjustment to Hyundai Steel USA's reported further manufacturing costs to account for Hyundai Steel USA's yield loss based on the costs of rejected pipes. Final IDM at 65–66. Plaintiff argues that Commerce's use of facts otherwise available is contradicted by record evidence demonstrating that Plaintiff reported pre-unit manufacturing costs based on manufacturing fees divided by theoretical weight. Pl.'s Br. at 38. Plaintiff contends further that because yield costs were already reflected in its reported data, Commerce's adjustment distorted the actual costs of production. *Id.* at 40–41. Defendant argues that Commerce did not err in applying an adjustment for further manufacturing yield loss because Plaintiff's reported values did not account for the value of scrap materials. Def.'s Resp. at 30–32.

Commerce summarized Plaintiff's explanation of yield loss during Plaintiff's further manufacturing process as:

> In its [Section E Questionnaire Response], regarding yield loss, Hyundai Steel explained that [Hyundai Steel USA] pays processors to heat-treat, upset, and/or thread imported OCTG, which is the only processing performed on the imported OCTG in the United States prior to sale to the first unaffiliated customer. Thus, Hyundai Steel stated that [Hyundai Steel USA] does not incur actual costs for yield loss, and it is not claiming a scrap offset.
>
> Further, Hyundai Steel explained that the calculation of [Hyundai Steel USA's] reported processing cost per [metric ton] was based on the product-specific amounts for: (1) the total fees paid to the processors that related to sales of the processed product during the [Period of Review]; and (2) the total quantities actually invoiced to unaffiliated customers for sales of the processed

> product during the [Period of Review]. According to Hyundai Steel, the allocation of the total fees paid by [Hyundai Steel USA] for the processed products that were sold during the [Period of Review] over the total actual quantity of sales of processed products during the period automatically captures all of the "yield losses" that might arise from differences between the quantities that the processor reported processing and the quantities that [Hyundai Steel USA] actually delivered to customers.

Final IDM at 65–66. In the Supplemental Section E Questionnaire, Commerce directed Plaintiff to provide an explanation for how any yield loss that was incurred on entered pipe was accounted for as part of further manufacturing expenses or any other variable. *See* Pl.'s Supp. Section E Resp. at SE-4. Plaintiff responded:

> Hyundai Steel did not account for yield loss for [U.S. further manufacturing expenses] given the nature of the processing and accounting. In the ordinary course of business, [Hyundai Steel USA] does not manage the actual length and actual quantity of subject merchandise when it is imported into the United States. Also, the outside processors do not provide information regarding actual lengths and actual quantities before processing. In any event, the costs incurred, recorded, and reported to the Department are yielded costs since the costs incurred were based on the theoretical sizes.

Id. at SE-4–SE-5. Commerce determined that Plaintiff "did not fully explain whether the scrap generated during the further manufacturing processes is kept by the processors or returned to [Hyundai Steel USA]; nor did it explain how the value of the generated scrap is reflected in the invoices received from its processors." Final IDM at 66. Because this information was not on the record, Commerce applied neutral facts available to adjust Plaintiff's reported further manufacturing costs to account for yield loss based on the cost of rejected pipes as a percentage of the total Period of Review further manufacturing costs. *Id.*

When Commerce determines that necessary information is missing from the administrative record, it must rely on facts otherwise available to fill in the gap in the record. 19 U.S.C. § 1677e(a). Commerce may apply facts available in two circumstances. First, Commerce may apply neutral facts available when information is absent from the administrative record, regardless of the reason for the absence. *Id.* § 1677e(a)(1). Second, Commerce may apply adverse facts available when a party's act or omission negatively impacts the administrative

record or impedes the proceeding. *Id.* § 1677e(a)(2). In this case, Commerce determined that the information missing from the record did not necessarily result from Plaintiff's inadequate record-keeping or failure to cooperate to the best of its ability. Final IDM at 66.

Plaintiff argues that Commerce's determination to use neutral facts available was contradicted by evidence on the record that demonstrated that Plaintiff accounted for further manufacturing yield loss. Pl.'s Br. at 38–39. Plaintiff contends that because it reported theoretical weight for products at the time of importation prior to further manufacturing, theoretical weights and further manufacturing costs were not affected by subsequent yield losses during the further manufacturing process. *Id.* at 39–40. Plaintiff also argues that in making an adjustment to Plaintiff's reported further manufacturing yield loss, Commerce introduced inaccuracy and added a processing fee that was not actually incurred. *Id.* at 40.

The Court agrees with Commerce's determination that Plaintiff's argument does not address Commerce's reason for using neutral facts available and adjusting the reported further manufacturing yield loss. Commerce cited evidence showing that Hyundai Steel USA contracted with third-parties to perform further processing on imported pipes. Final IDM at 65; Pl.'s Section E Resp. at E-6. Commerce determined that the record did not explain how scrap generated through this further processing impacted the fees related to the further manufacturing process. Final IDM at 66. Commerce determined that Plaintiff's use of theoretical weights at the time of import did not eliminate the need for Plaintiff to account for the value of pipe lost during further processing. *Id.* The Court concludes that Commerce's use of neutral facts available was reasonable and supported by the record. The Court sustains Commerce's adjustment to Plaintiff's reported further manufacturing yield loss.

V. Separate Rate for Non-Examined Companies

Consolidated Plaintiff AJU Besteel argues that if the weighted-average dumping margin for Plaintiff is recalculated, the Court should also require Commerce to revise the separate weighted-average dumping margin assigned to respondents that were non-examined companies. AJU Besteel's Br. at 7–8. The separate rate is "the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under [19 U.S.C. § 1677e]." 19 U.S.C. § 1673d(c)(5)(A). Because the separate rate is based on the rates calculated for Plaintiff and SeAH, any change to Plaintiff's individual

weighted-average dumping margin on remand will impact the rate assigned to non-examined companies. The Court remands the separate rate calculation for further consideration, if needed, depending on Commerce's determination regarding Plaintiff's weighted-average dumping margin calculation on remand.

VI. NEXTEEL's Ability to Receive Relief

Defendant-Intervenors argue that NEXTEEL should not be allowed to obtain relief through this case because NEXTEEL failed to raise its arguments before Commerce. Def.-Intervs.' Resp. at 18–20. NEXTEEL counters that it is not precluded from seeking relief in this case because the issues on appeal were raised before Commerce by other parties and that it is entitled to relief as a party with standing. NEXTEEL's Reply at 1–7.

A party is generally prohibited from raising arguments with the Court that were not first raised with the administrative agency. *See Rhone Poulenc, Inc.*, 899 F.2d at 1191; *Dillinger France S.A. v. United States*, 42 CIT __, __, 350 F. Supp. 3d 1349, 1371–72 (2018); *see also* 28 U.S.C. § 2637(d) ("In any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."). Commerce's regulations specifically require that a party raise all arguments in a timely manner before the agency. *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (citing 19 C.F.R. § 351.309(c)(2)). "[G]eneral policies underlying the exhaustion requirement—protecting administrative agency authority and promoting judicial efficiency"—would be vitiated if the court were to consider arguments raised for the first time in judicial proceedings. *See id.* (internal quotation and citation omitted); *see also Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States*, 41 CIT __, __, 277 F. Supp. 3d 1346, 1353 (2017). The Court has recognized limited exceptions to the exhaustion requirement. *See Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1186 n.26, 240 F. Supp. 2d 1268, 1297 n.26 (2002) (listing common exceptions and citing authorities). The Court has previously excused a party's failure to raise an argument before the agency when "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); *see also Natural Res. Def. Council, Inc. v. U.S.E.P.A.*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) ("[C]ourts have waived exhaustion if the agency has had an opportunity to consider the identical issues presented to the court . . . but which were raised by other parties, or if the agency's decision, or a dissenting opinion, indicates that the agency had the opportunity to

consider the very argument pressed by the petitioner on judicial review." (internal quotations and citations omitted)).

During the administrative proceeding, NEXTEEL submitted a letter in support of and incorporating by reference the arguments of Plaintiff and SeAH. NEXTEEL's Letter Supp. Respondents' Rebuttal Br. at 3, PR 289. The arguments against Commerce's calculation of constructed value, profit cap, and constructed export price raised before this Court were raised by Plaintiff in the administrative proceeding. *See* Pl.'s Admin. Case Br., PR 281. NEXTEEL is not precluded from receiving relief in this case because Commerce was on notice of the arguments raised in this appeal during the administrative proceeding, NEXTEEL participated in the administrative proceedings as a non-mandatory respondent, and NEXTEEL expressed its position with regard to the arguments raised by Plaintiff and SeAH.[2]

CONCLUSION

In summary, the Court remands Commerce's constructed value, constructed value profit cap, and constructed export price profit calculations and Commerce's calculation of the weighted-average dumping margin applicable to non-examined companies. The Court sustains Commerce's adjustment to Hyundai Steel USA's general and administrative expense ratio, adjustment to Hyundai Steel's reported further manufacturing yield loss, and use of SeAH's business proprietary information. The Court concludes that NEXTEEL is not precluded from pursuing its claims for relief in this case.

Accordingly, it is hereby

ORDERED that the *Final Results* are remanded to Commerce for further proceedings consistent with this opinion; and it is further

ORDERED that this action shall proceed according to the following schedule:

1. Commerce shall file the remand determination on or before August 15, 2023;
2. Commerce shall file the remand administrative record index on or before August 29, 2023;
3. Comments in opposition to the remand determination shall be filed on or before September 12, 2023;

[2] Even though the Court concludes that NEXTEEL's attempt to incorporate the arguments of other parties was sufficient to satisfy the exhaustion requirement in this case, the Court cautions the Parties to articulate their administrative arguments clearly in order to avoid similar disputes in the future.

4. Comments in support of the remand determination shall be filed on or before September 26, 2023;
5. The joint appendix shall be filed on or before October 10, 2023.

Dated: June 9, 2023
New York, New York

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

Slip Op. 23–88

IKADAN SYSTEM USA, INC., and WEIHAI GAOSAI METAL PRODUCT CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and HOG SLAT, INC., Defendant-Intervenor.

Before: Leo M. Gordon, Judge
Court No. 21–00592

[CBP's *Remand Results* sustained.]

Dated: June 13, 2023

Richard P. Ferrin, Faegre Drinker Biddle & Reath LLP, of Washington, D.C., argued for Plaintiffs Ikadan System USA, Inc., and Weihai Gaosai Metal Product Co., Ltd. With him on the brief were *Douglas J. Heffner* and *William Randolph Rucker*.

Ashley Akers, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, Washington, D.C., argued for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel was *Shae Weathersbee*, Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection, Washington, D.C.

Zachary Simmons, Steptoe & Johnson LLP, of Washington, D.C., argued for Defendant-Intervenor Hog-Slat, Inc. With him on the brief was *Gregory S. McCue*.

OPINION

Gordon, Judge:

This action involves a challenge by Plaintiffs Ikadan System USA, Inc. and Weihai Gaosai Metal Product Co., Ltd. ("Ikadan" and "Gaosai" respectively) to an affirmative determination of evasion by U.S. Customs and Border Protection ("Customs" or "CBP") under the Enforce and Protect Act, 19 U.S.C. § 1517 (2018)[1] ("EAPA"). *See Notice of Determination as to Evasion in EAPA Consol. Case No. 7474*, (CBP Office of Trade Remedy & Law Enforcement Directorate ("TRLED") June 21, 2021), PR[2] 46, CR 123 ("*Initial Determination*"); *Final Administrative Review Determination in EAPA Consol. Case No. 7474*, (CBP Office of Trade Regulations & Rulings ("OR&R") Oct. 26, 2021),

[1] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all references to the U.S. Code are to the 2018 edition unless otherwise specified. The Enforce and Protect Act was enacted as part of the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 421, 130 Stat. 122, 161 (2016).

[2] "PR" refers to a document contained in the public administrative record. *See* ECF No. 25. "CR" refers to a document contained in the confidential administrative record. *See* ECF No. 26. "RPR" refers to a document contained in the public administrative record filed in support of CBP's *Remand Results*. *See* ECF No. 57.

PR 80 ("*Final Determination*"); Remand Redetermination in EAPA Consol. Case No. 7474, ECF No. 52 ("*Remand Results*").[3]

Before the court, Plaintiffs maintain that CBP's determinations rest on unlawful interpretations of EAPA and unreasonable findings of fact by CBP.[4] *See* Pls.' Mot. for J. on the Agency R., ECF No. 44[5] ("Pls.' Br."); Pls.' Supp. Br. for Mot. for J. on the Agency R., ECF No. 60 ("Pls.' Supp. Br."); *see also* Def.'s Resp. Pls.' Mot. for J. on the Agency R., ECF No. 64 ("Def.'s Resp."); Def.-Intervenor's Resp. Pls.' Mot. for J. on the Agency R., ECF No. 66; Pls.' Reply, ECF No. 68. The court has jurisdiction pursuant to 19 U.S.C. § 1517(g) and 28 U.S.C. § 1581(c). For the reasons set forth below, the court sustains CBP's *Remand Results*.

I. Background

A. Determinations Under EAPA

Under EAPA, Customs makes a determination of evasion when an importer is

> entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.

Id. § 1517(a)(5)(A).

In reaching a determination as to what constitutes "covered merchandise," *i.e.*, "merchandise that is subject to ... an antidumping [or] countervailing duty order," Customs shall refer the matter to the U.S.

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[3] Following Plaintiffs' initial motion for judgment on the agency record under USCIT Rule 56.2 challenging the *Final Determination*, Defendant moved for a remand to place on the administrative record a relevant scope ruling by the U.S. Department of Commerce. *See* Consent Motion for Remand, ECF No. 50; Order (Aug. 18, 2022), ECF No. 51 (granting remand request).

[4] Under EAPA, Plaintiffs may challenge CBP's evasion determination after the completion of the administrative review by OR&R. *See* 19 U.S.C. § 1517(g)(1). Here, the *Final Determination* affirmed CBP's *Initial Determination* in its entirety. *See Final Determination* at 10. Accordingly, Plaintiffs' Complaint and their briefing address CBP's findings and conclusions from the *Initial* and *Final Determinations*. *See* Complaint at 9–11, ECF No. 2; Pls.' Br. 1. Subsection (g) of the statute permits judicial review of both initial and final determinations, and the court has previously observed that its "review of Customs' determination as to evasion may encompass interim [*i.e.*, building-block] decisions subsumed into the final determination." *Vietnam Finewood Co. v. United States*, 44 CIT ___, ___, 466 F. Supp. 3d 1273, 1284 (2020); *see* 19 U.S.C. § 1517(g).

[5] All citations to the parties' briefs and the agency record are to their confidential versions unless otherwise noted.

Department of Commerce ("Commerce") if CBP is "*unable* to determine whether the merchandise at issue is covered merchandise." *Id.* § 1517(a)(3), (b)(4)(A) (emphasis added). Commerce shall then determine whether the merchandise is covered under an antidumping or countervailing duty order. *Id.* § 1517(b)(4)(B) ("After receiving a referral ... the administering authority shall determine whether the merchandise is covered merchandise and promptly transmit that determination to [CBP].").

Under § 1517(c), CBP (TRLED) makes an initial determination of evasion based on the record before it. Following this determination, a party found to have entered covered merchandise through evasion may file an appeal with CBP (OR&R) for *de novo* review under subsection (f) ("administrative review"). After completion of the administrative review, an importer may seek judicial review. *Id.* § 1517(g).

Subsection (d) of the statute sets forth the enforcement measures that flow from CBP's initial determination. *Id.* § 1517(c)–(d). Subsection (e) empowers CBP to take additional interim measures if it determines within 90 days of the initiation of investigation that "there is a reasonable suspicion that such covered merchandise was entered into the customs territory of the United States through evasion." *Id.* § 1517(e). These interim measures include "suspend[ing] the liquidation of each unliquidated entry of such covered merchandise that entered on or after the date of the initiation of the investigation" and taking "such additional measures as [Customs] determines necessary to protect the revenue of the United States, including requiring a single transaction bond or additional security or the posting of a cash deposit with respect to such covered merchandise." *Id.* § 1517(e)(3).

B. CBP's Determination of Evasion

Plaintiffs are importers of pig farrowing crates and pig farrowing flooring systems, of which steel tribar floors are a component. In early 2020, Defendant-Intervenor Hog Slat, Inc. ("Hog Slat") filed an allegation with Customs contending that Plaintiffs' entries containing steel tribar floors evaded certain antidumping duty ("AD") and countervailing duty ("CVD") orders issued by Commerce. *See Initial Determination* at 2; *see also Certain Steel Grating from the People's Republic of China*, 75 Fed. Reg 43,143 (Dep't of Commerce July 23, 2010) (AD order); *Certain Steel Grating from the People's Republic of China*, 75 Fed. Reg. 43,144 (Dep't of Commerce July 23, 2010) (CVD order) (together, the "*AD/CVD Steel Orders*").

The *AD/CVD Steel Orders* cover:

> certain steel grating, consisting of two or more pieces of steel, including load-bearing pieces and cross pieces, joined by any assembly process, regardless of: (1) size or shape; (2) method of manufacture; (3) metallurgy (carbon, alloy, or stainless); (4) the profile of the bars; and (5) whether or not they are galvanized, painted, coated, clad or plated. Steel grating is also commonly referred to as "bar grating," although the components may consist of steel other than bars, such as hot-rolled sheet, plate, or wire rod.

75 Fed. Reg. at 43,143, 43,144.

In June 2021, TRLED initially determined that "[s]ubstantial evidence demonstrate[d] that the Importers [Gaosai and Ikadan] entered certain steel grating [in the form of tribar floors] from the People's Republic of China ... into the United States [during the period of investigation ("POI")[6]], and failed to declare [their] merchandise ... as subject to the [*AD/CVD Steel Orders*]." *Initial Determination* at 2.

Contrary to Ikadan's assertions that "no tribar floors were imported during the POI," TRLED found that several entries made by Ikadan contained steel tribar floors, and that "the image of a fully assembled farrowing crate unit ... along with purchase order details submitted to the Manufacturer, clearly indicate that the tribar floors are part of the crate unit." *Id.* at 7. Gaosai claimed that only a few of its entries contained steel tribar floors, but TRLED found that a greater number of entries than Gaosai reported "contained either farrowing crates or tribar floors." *Id.* Further, as to the entries identified by Gaosai, "the commercial invoices and packing lists for [those] entries disclosed the descriptions as 'farrowing crates,' with no indication of whether the shipments contained tribar flooring." *Id.* Nonetheless, Gaosai "indicated that all farrowing crates ... imported were designed to include tribar floors." *Id.* at 7–8.

TRLED acknowledged that it "is not required to initiate a scope referral" to Commerce unless CBP "is unable to determine whether the imported merchandise properly falls within the scope of the relevant AD/CVD order." *Id.* at 8 n.58 (citing 19 C.F.R. § 165.15(a)). Here, TRLED determined that it was not necessary to make such a referral. Therefore, based on the record before it, TRLED "found that the tribar floors portion of the imported farrowing crate systems" was

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[6] "[T]he entries covered by the investigation are those entered for consumption, or withdrawn from warehouse for consumption, from May 26, 2019, through the pendency of [the] investigation." *Initial Determination* at 3–4 (citing 19 C.F.R. § 165.2).

covered by the *AD/CVD Steel Orders*. *Id.* at 8 ("[T]ribar floors are an essential part of the farrowing crate systems being imported into the United States, [and the importers list] them under the description 'parts for farrowing crates' rather than separately listing the tribar floors and declaring them as subject to the AD/CVD orders.").

In light of its evasion determination, TRLED suspended (or continued to suspend) liquidation for Plaintiffs' entries covered by the EAPA investigation and stated its intention to change "entries previously extended and ... all future [subject] entries" from type 01 (not subject to AD/CVD cash deposits for steel grating) to type 03 (subject to cash deposits). *See Initial Determination* at 6–9.

Upon Plaintiffs' request, pursuant to their rights under EAPA, OR&R conducted a *de novo* administrative review of the record and affirmed TRLED's determination. *Final Determination* at 8, 10 ("[T]he purpose of this *de novo* review is to analyze the [Initial] Determination and the accompanying administrative record to determine whether substantial evidence of evasion exists."). OR&R concluded that "[a] review of the administrative record and ... requests for administrative review clearly indicate that tribar floors were entered as type '01' entries and, therefore, the applicable AD/CV duties owed on steel grating were not paid." *Id.* at 8. "So long as the tribar floors are considered covered merchandise under the applicable AD/CV duty orders," Ikadan and Gaosai should have entered their merchandise as type 03 entries and paid the applicable duties. *Id.*Thus, OR&R found that "all entries of tribar floors that have been suspended or extended as a result of this EAPA investigation, regardless of the date of entry," were covered merchandise. *Id.* at 10. Accordingly, CBP concluded that Plaintiffs' failure to enter their merchandise as type 03 entries constituted evasion.

Concurrent with CBP's evasion investigation, Commerce initiated a scope review of the *Orders*, discussed *infra* Section I.C. For Customs, Commerce's review here did not limit CBP's ability to make an independent covered merchandise determination or impose interim measures, such as suspending liquidation of entries subject to the EAPA investigation. *Final Determination* at 9 ("CBP found that it was able to determine that tribar floors are covered merchandise based upon the contents of the record without a scope referral to Commerce."). In reaching an affirmative determination, OR&R relied, as had TRLED initially, on CBP's own interpretation of the *AD/CVD Steel Orders* to find that Plaintiffs' merchandise was "covered merchandise." *Id.* ("Specifically, CBP found, based upon the evidence in the administrative record, that the way the tribar floors are constructed would place them within the scope of the AD/CV duty orders and that no exclu-

sions apply to the tribar floors.”). OR&R determined that the “retroactive application of AD/CV duties to the entries subject to the EAPA investigation is permitted under the statute and implementing regulations .... Here, the [Tribar Steel Flooring] was already subject to a lawful suspension and extension of liquidation when Commerce began its independent scope [review].” *Id.*

C. Remand to Consider Commerce’s Scope Ruling

Commerce issued a scope ruling as to the following products imported by Plaintiffs: “(1) a farrowing flooring system that is partly made of galvanized steel tribar truss flooring and partly made of a ductile cast-iron floor; (2) a pig farrowing crate with the farrowing flooring system described in item (1); and (3) a pig farrowing crate without any flooring.” *See Certain Steel Grating from the People’s Republic of China: Scope Ruling on Pig Farrowing Crates and Farrowing Floor Systems*, (Dep’t of Commerce May 11, 2021), RPR 7 (“Scope Ruling”). Contrary to the Plaintiffs’ position that their merchandise was not “covered” for purposes of CBP’s evasion determination, Commerce concluded that “the decking of the tribar truss flooring under consideration in this proceeding is covered by the scope of the [*AD/CVD Steel Orders*], *even when it is imported with other parts of the farrowing flooring system or the pig farrowing crate* under consideration here.” *Id.* at 15 (emphasis added). Commerce stated, however, “that the other parts and components of the tribar truss flooring that are under consideration, the cast-iron flooring, and the other components of the pig farrowing crate under consideration are outside of the scope of the [*AD/CVD Steel Orders*].” *Id.*

CBP did not consider Commerce’s Scope Ruling in the *Initial* and *Final Determinations* because the record in the EAPA investigation had closed before Commerce issued its Ruling. *See Remand Results* at 2. Given the relevance of the Scope Ruling to Plaintiffs’ challenge, Defendant moved for a remand to allow CBP “to place on the record and consider [Commerce’s scope ruling] that certain products imported by plaintiffs are subject to the [*AD/CVD Steel Orders*].” *See* Consent Motion for Remand at 1, ECF No. 50.

In the *Remand Results*, CBP maintained its affirmative determination of evasion as to Plaintiffs’ entries based on its own investigation, citing Commerce’s Scope Ruling as additional support for its findings. *Remand Results* at 5. Customs stated that the Scope Ruling “was not needed for CBP to factually find that the tribar flooring portions are subject to the AD/CVD Orders,” but that the “Ruling confirms these findings and has now been added to the administrative record.” *Id.* at 4. Based on the record before it, including Commerce’s Scope Ruling,

CBP continued to find that Plaintiffs "engaged in evasion by entering Chinese-origin [steel grating] declared as type '01' entries, not subject to AD/CVD Orders, in their consumption entries." *Id.* ("Such designation as a type '01' at the time of entry was materially false in that it failed to indicate that the CSG was merchandise covered by the relevant AD and CVD Orders. The false designation also led to the non-collection of AD and CVD deposits.").

II. Standard of Review

In reviewing a determination of evasion under EAPA, the court shall first "examine ... whether [CBP] fully complied with all procedures under subsections (c) [initial determinations] and (f) [final determinations based on administrative review]," and then determine "whether any determination, finding or conclusion is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 19 U.S.C. § 1517(g)(1)–(2).

To determine whether an agency's decision is "arbitrary, capricious, or an abuse of discretion," the court "look[s] for a reasoned analysis or explanation for [the] decision." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The agency must nonetheless articulate a "rational connection between the facts found and the choice made." Id. (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). The court "will, however, 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp. Inc. v. Ark.-Best Freight System,* 419 U.S. 281, 286 (1974)).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Customs' interpretation of EAPA. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) ("[An agency's] interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

III. Discussion

A. Culpability Under 19 U.S.C. § 1517(a)(5)(A)

As a threshold matter, Plaintiffs raise a legal question, specifically arguing that "[t]he plain meaning of the term 'evasion' in EAPA

requires at least some level of culpability." Pls.' Br. 2; 22. In reaching its determinations, however, CBP made no finding as to Plaintiffs' culpability (*e.g.*, negligence, gross negligence, fraud, or other degree of blameworthiness or fault). Rather, CBP relied on the simple fact that Plaintiffs had misclassified their entries as not subject to AD/CVD duties in determining that Plaintiffs had engaged in evasion. *See, e.g.*, *Final Determination* at 10 ("The administrative record contains substantial evidence that entries of covered merchandise were made by the Importers during the period of investigation and were not declared as subject to the AD/CV duty orders. This constitutes evasion as defined by EAPA."); Def.'s Resp. 22 (arguing that CBP correctly declined to read culpability requirement into EAPA statute); *see also* Oral Argument at 02:07:00–56 (Apr. 17, 2023), ECF No. 76 (expressly clarifying that CBP interprets EAPA as strict liability statute). Thus, the precise question before the court is whether EAPA's definition of "evasion" contains a requirement that CBP find that importers acted culpably in making material false statements or omissions before determining whether the importers engaged in evasion.

Under *Chevron*, "[w]hen a court reviews an agency's construction of the statute which it administers," the court must first determine whether the statutory language is clear or ambiguous. 467 U.S. at 842. If "Congress has directly spoken to the precise question at issue," and its intent is clear, then "that is the end of the matter." *Id.* at 842–43 ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843; *see also City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) ("Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.").

Plaintiffs believe that this question should be resolved under the first step of *Chevron—i.e.*, the plain language of the definition. For Plaintiffs, "to read the EAPA statute as carrying no culpability requirement ignores the fact that any false statement or 'omission' must be 'material.'" Pls.' Br. 22 (quoting *Diamond Tools Tech. LLC v. United States*, 45 CIT ___, ___, 545 F. Supp. 3d 1324, 1353 (2021) ("*Diamond Tools I*")); Oral Argument at 02:03:07–40 (emphasizing that inclusion of word "material" creates intent requirement in definition of evasion). Defendant counters that, by its plain terms, the statutory definition of evasion does not require CBP to find that importers acted culpably when evading AD or CVD orders. Def.'s

Resp. 21–22. Defendant also urges the court to consider EAPA in light of the language of 19 U.S.C. § 1592, CBP's civil penalty statute, emphasizing that "when Congress intends for the motivations behind a party's actions to impact the penalty for improper importation, it says as much in the statutory language." *Id.*

The court concludes that the question at issue here is not resolved under *Chevron* step one because the plain language of the statutory definition of evasion does not express clear Congressional intent to establish a culpability requirement. Plaintiffs have not pointed to any authority or broader statutory context defining the specific words on which they rely to indicate culpability. § 1517(a)(5)(A); *see generally* Pls.' Br. "Unless otherwise defined, 'words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Diamond v. Diehr*, 450 U.S. 175, 182 (1981) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Here, the general meaning of a "false" statement or representation is one that is "Untrue ... Deceitful ... Not genuine; inauthentic ... Wrong; erroneous." *Black's Law Dictionary* (11th ed. 2019). "What is false can be so *by intent, by accident, or by mistake*." *Id.* (emphasis added). "Omission" is defined as "[a] failure to do something; esp., a neglect of duty ... [t]he act of leaving something out ... [t]he state of having been left out or of not having been done ... [s]omething that is left out, left undone, or otherwise neglected." *Id.* Finally, "material" indicates something "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential." *Id.* Thus, nothing in the definition requires that a materially false statement or omission be made with a particular state of mind.

Plaintiffs' reliance on the court's observations in *Diamond Tools* regarding culpability under EAPA is misplaced. There, the court concluded that CBP had failed to justify its finding that the plaintiff-importer had "entered covered merchandise by means of a material and false statement or a material omission." 45 CIT at ___, 545 F. Supp. 3d at 1351; *see also Diamond Tools Tech. LLC v. United States*, 46 CIT ___, ___, 609 F. Supp. 3d 1378, 1387–88 (2022) ("*Diamond Tools II*") (remanding to CBP for second time). The relevant antidumping duty order that the plaintiff evaded covered diamond sawblades and parts thereof from China and Korea. *Diamond Tools I*, 45 CIT at ___, 545 F. Supp. 3d at 1328. Specifically, the plaintiff had reported the country of origin of its subject imports as Thailand rather than China, in reliance on express guidance from Commerce permitting importers to label their merchandise as originating in the country where its component parts were assembled. *See Diamond Tools II*, 46 CIT at ___, 609 F. Supp. 3d at 1387–88. Commerce later

changed its position as to the proper scope of the relevant AD order—partially in response to a scope referral by CBP pursuant to § 1517(b)(4)(A)—and determined that the plaintiff's merchandise was covered by the order based on the Chinese origin of its component parts. *Diamond Tools I*, 45 CIT at ___, 545 F. Supp. 3d at 1330. CBP then concluded that the new scope applied to all of the plaintiff's entries covered by the EAPA investigation, including those made prior to Commerce's change in position. *Id.* at ___, 545 F. Supp. 3d at 1331.

The court disagreed, and found—twice—that CBP had failed to show what false statements or omissions the plaintiff had made as to the country of origin of merchandise entered prior to the scope change. *See id.* at ___, 545 F. Supp. 3d at 1354 ("Neither the [original decision by Commerce] nor the [original AD order] prohibited [the plaintiff] from manufacturing Chinese-origin cores and segments in Thailand and labelling the finished diamond sawblades as Thai-origin. To the contrary, the way in which [the plaintiff] labeled its imports was expressly contemplated and sanctioned by Commerce's [then-in-effect decision]."); *Diamond Tools II*, 46 CIT at ___, 609 F. Supp. 3d at 1388–89 ("[F]illing out the forms in a way that tracked explicitly Commerce's [decision] does not constitute a material and false statement or omission. In fact, not only did the importer expressly and *verbatim* follow the terms of the [original antidumping order], there was, in fact, no other possible interpretation of the scope of this Order."). Ultimately, the court there held that CBP had acted unreasonably in determining that the plaintiff had made material false statements or omissions within the meaning of EAPA, given that the plaintiff had complied with express agency guidance. Accordingly, *Diamond Tools* does not resolve the legal question of statutory interpretation presented in this action.

Given the above, the court concludes that the definition of evasion is silent as to culpability, and to the second step of the *Chevron* inquiry: "whether the agency's answer [to the question at issue] is based on a permissible construction of the statute." 467 U.S. at 843 (footnote omitted). A "permissible" interpretation is one that is "reasonable"—even if it is not "the only possible interpretation or ... the one a court might think best." *Holder v. Martinez Gutierrez*, 566 U.S. 583, 591 (2012); *see also Globe Metallurgical Inc. v. United States*, 34 CIT 1153, 1155–56 (2010) (where language does not show "clear Congressional intent," implementing agency "has a measure of *Chevron* step-two, gap-filling discretion").

Plaintiffs do not address *Chevron* step two beyond the bare assertion that CBP's construction of the evasion definition is "impermis-

sible." Pls.' Br. 21. Plaintiffs also fail to address the broader context of the definition in the language of § 1517 itself. Indeed, Plaintiffs' only reference to the larger statutory scheme is an attempt to draw a parallel between § 1517 and CBP's civil penalty statute, 19 U.S.C. § 1592. *See* Pls.' Br. 26; Pls.' Reply 17. Specifically, Plaintiffs point to the parties' obligations in civil penalty actions: *i.e.*, where "Customs has the burden merely to show that a materially false statement or omission occurred; once it has done so, the defendant must affirmatively demonstrate it exercised reasonable care under the circumstances." Pls.' Br. 26 (citing *United States v. Ford Motor Co.*, 463 F.3d 1267, 1279 (Fed. Cir. 2006)).

EAPA read as a whole supports CBP's strict liability interpretation of the definition of evasion. First, following the general definition of evasion, the statute contains an explicit exception for clerical errors that provides that "the term 'evasion' does not include entering covered merchandise ... by means of [documents or statements that are false or omissive] as a result of a clerical error" unless "the clerical error is part of a pattern of *negligent* conduct." 19 U.S.C. § 1517(a)(5)(B) (emphasis added). "[W]here Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). The inclusion of language assessing an importer's state of mind in one subsection of the definition shows that Congress could have incorporated the same wording in the general definition, if it had intended culpability as a prerequisite for an affirmative determination of evasion. It did not.

Likewise, the contrast between § 1517 and § 1592 only serves to underscore the reasonableness of Defendant's construction, not to contradict it. Section 1592—unlike § 1517—explicitly incorporates three levels of culpability (negligence, gross negligence, and civil fraud). Furthermore, § 1592 is accompanied by a provision granting Customs subpoena power. *See* 19 U.S.C. § 1595; Oral Argument at 01:14:25–15:15 (distinguishing § 1517 from § 1592 based on Customs' subpoena power in civil penalty context). Under EAPA, Customs has no subpoena power, but must nonetheless incentivize importer cooperation with its requests for information. It is well-established that "[s]trict liability maximizes deterrence and eases enforcement difficulties." *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 134 (2002). A determination of evasion when a party has, for whatever reason, made materially false statements or omissions in the course of entering covered merchandise deters future acts of evasion.

EAPA itself expressly sets forth that CBP is free to pursue other enforcement actions, including under § 1592, where "appropriate." 19 U.S.C. § 1517(d)(1)(E)(i). This further supports CBP's interpretation, which Plaintiffs fail to address. Subsection (d)(1)(E)(i) implies that penalties based on *culpable* conduct may be warranted in some, but not all, circumstances involving evasion. It therefore follows that not all circumstances supporting a determination of evasion will involve culpable conduct.

Finally, Plaintiffs assert that they did not evade the *AD/CVD Steel Orders* because they had a "good faith disagreement" with CBP about the scope of the *Orders*. *See* Pls.' Br. 25 ("Even assuming CBP has met its burden of establishing a 'material' act or omission in this case (we assert it has not), Ikadan and Gaosai have affirmatively rebutted such a finding and demonstrated that any scope issue in this case is merely an honest, good faith disagreement between the Plaintiffs and CBP, not 'evasion.'"). Essentially, this argument is an application of Plaintiffs' preferred interpretation of the definition of evasion: specifically, that non-culpable (i.e., good faith) conduct cannot be found to constitute evasion. Because Plaintiffs have failed to show that the plain language of the definition establishes a culpability requirement, or that CBP's interpretation of the definition is impermissible, this argument also fails.

B. CBP's Determination as to Covered Merchandise

Plaintiffs next challenge CBP's determination that their merchandise—pig farrowing crates and floor systems—was "covered merchandise" within the meaning of the *AD/CVD Steel Orders*. *See* Pls.' Supp. Br. 3–5. Plaintiffs argue that, "[t]o withstand Court review, CBP must justify its finding that Plaintiffs' products are 'covered merchandise,' applying the same legal framework that the Court would use in direct review of a scope determination by Commerce"—*i.e.*, that the determination be supported by substantial evidence and in accordance with law. Pls.' Supp. Br. 5; Pls.' Br. 6–7.

Prior to the remand and the placement of Commerce's Scope Ruling on the administrative record, Plaintiffs conceded that they were "not aware of any caselaw addressing the standard of review for CBP in its interpretation of AD/CVD Orders that were created and are administered by Commerce." Pls.' Br. 6. Nonetheless, Plaintiffs contend that Customs erred both when it made its initial covered merchandise determination (without a referral to Commerce), *and* in the *Remand Results*, when it included Commerce's Scope Ruling on the record. Pls.' Supp. Br. 5 ("CBP is attempting to have it both ways—independent enough under the EAPA statute to be able to make its

own scope determinations without Commerce's aid, yet hiding behind Commerce by insisting that it ... is not required to defend its scope determinations when it relies on a scope determination by Commerce in a separate proceeding."). Plaintiffs argue that the court "must determine whether *all* aspects of CBP's determination," including its covered merchandise determination, "are supported by substantial evidence." *Id.*

Defendant, on the other hand, urges the court to reject Plaintiffs' proposed application of the standard that governs *Commerce's* interpretation of its AD and CVD orders to CBP's covered merchandise determination. Def.'s Resp. 27. Throughout its brief, Defendant emphasizes that CBP has the authority to make covered merchandise determinations, and that here, its determination was in accord with Commerce's Scope Ruling. *See id.* at 14–19 ("Commerce's scope determination thus confirmed what CBP found: plaintiffs' products containing steel grating components are covered by the scope of the Orders and, thus, plaintiffs failed to pay applicable duties when the products entered the United States and evasion occurred."). Further, Defendant argues that the court, in the process of reviewing CBP's covered merchandise determination for arbitrariness, should not undertake a review of Commerce's Scope Ruling court on its merits. *Id.* at 27 ("[P]laintiffs acknowledge, they could have appealed, but chose not to appeal, Commerce's scope determination under 19 U.S.C. § 1516a .... With § 1517 limiting this Court's review to whether CBP's evasion determination is arbitrary, capricious, or not in accordance with the law, and a statutory provision that – plaintiffs concede – would allow them to challenge a scope ruling before this Court, plaintiffs' assertions fail.").

As an initial matter, Plaintiffs misunderstand the standard governing the court's review of Customs' determinations. Under EAPA, the court shall review "whether any determination, finding, or conclusion [made by CBP in its initial determination and in the administrative review] is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1517(g)(2)(B). Arbitrariness review is distinct from reasonableness review, *i.e.*, review for "substantial evidence." 3 Charles H. Koch, Jr. & Richard Murphy, *Administrative Law and Practice* §§ 9.24, 9.25 (3d ed. 2023).

"[I]n terms of critical attitude, the reasonableness and arbitrariness standards point judicial review in emotionally opposite directions." *Administrative Law and Practice*, § 9.25[2]. Specifically, reasonableness review "requires the court to reach the *positive* conclusion that the agency's decision is reasonable before it may accept that decision," while arbitrariness review "requires only that the court reach the

negative conclusion that the agency's decision is not arbitrary in order to accept that decision." *Id.* ("Thus, in order to uphold the agency under the reasonableness standard, the court must to some extent approve of the agency's determination, even if it does not reach the point of agreement. But, in order to uphold the agency under the arbitrariness standard, the court need only reach the point at which it can conclude that the agency's decision is not *intolerable.*" (emphasis added)).

Plaintiffs have failed to show that CBP's covered merchandise determination is arbitrary and capricious. Given the broad language of the *AD/CVD Steel Orders*, the evidence in the record describing the subject merchandise, and the additional support of Commerce's Scope Ruling, Customs has established the necessary "rational connection between the facts found and the choice made" to support its conclusion on the merits. *Burlington Truck Lines*, 371 U.S. at 168. Here, Customs reviewed the parts and production process associated with the subject merchandise, and concluded that, because Plaintiffs' tribar floors consisted "of two or more pieces of steel joined together by welding," they were covered by the *AD/CVD Steel Orders*—which, in turn, encompass "certain steel grating, consisting of two or more pieces of steel ... joined by any assembly process." *Initial Determination* at 8; *see also Final Determination* at 9 (summarizing initial findings). CBP also determined that the scope of the *AD/CVD Steel Orders* did "not include any exclusions [as to] the tribar floors." *Initial Determination* at 8.

Plaintiffs' arguments to the contrary are a misguided attempt to reframe the standard of review and would require Customs to withstand a higher level of scrutiny than that set forth in EAPA. Additionally, Plaintiffs mischaracterize how CBP exercised its authority to make the covered merchandise determination here. In their initial brief supporting their motion for judgment on the agency record, filed prior to the remand and issuance of the *Remand Results*, Plaintiffs seemingly challenged CBP's authority to make that determination at all. *See* Pls.' Br. 23 ("[T]he statutory scheme of EAPA, viewed as a whole, cannot be construed as allowing CBP to issue its own scope determinations under the guise of preventing 'evasion' of AD/CVD orders."); *see also id.* at 8 ("EAPA does not grant CBP the authority to develop its own set of criteria in determining whether a particular product falls within the scope of an AD/CVD order established by Commerce."). Plaintiffs further asserted that, because "only Commerce can interpret and clarify the scope of an antidumping duty order," the court should not grant any deference to CBP's interpreta-

tion of the scope of the *AD/CVD Steel Orders*. *Id.* at 7 (quoting *United Steel & Fasteners, Inc. v. United States*, 947 F.3d 794, 803 (Fed. Cir. 2020)).

As noted, Plaintiffs sought (and eventually obtained) a scope ruling from Commerce as to Plaintiffs' subject merchandise. In its Scope Ruling, Commerce determined that the tribar floor portions of Plaintiffs' entries were within the scope of the *AD/CVD Steel Orders*. *Remand Results* at 3 (tribar floors are within scope "despite their inclusion with other farrowing crate and/or flooring system components"). Once CBP placed Commerce's Scope Ruling on the record, Plaintiffs abandoned their earlier emphasis on Commerce's sole authority to interpret the *AD/CVD Steel Orders*, arguing instead that CBP should *not* rely on Commerce's Scope Ruling. *See* Pls.' Supp. Br. 2 ("Plaintiffs ... submitted their comments on CBP's Draft Remand Redetermination, demonstrating in detail why Commerce's Scope Ruling does not provide substantial evidence in support of CBP's conclusion that Plaintiffs' pig farrowing crates and farrowing flooring systems are within the scope of the [*AD/CVD Steel Orders*]."). Plaintiffs also contended that "even if CBP had made a scope referral [to Commerce], there is nothing in the EAPA statute or CBP's regulations that requires CBP to follow Commerce's scope determination, when CBP makes its EAPA determination." Pls.' Supp. Br. 5.

The court does not agree with Plaintiffs. By reaching its conclusion that Plaintiffs' merchandise is covered by the *AD/CVD Steel Orders*, CBP was not making a "scope determination" in Commerce's stead; it was acting pursuant to EAPA's directive to initiate an investigation based on CBP's determination "that the information provided in the allegation ... reasonably suggests that covered merchandise has been entered into the customs territory of the United States through evasion." 19 U.S.C. § 1517(b)(1). Specifically, Customs shall either reach a covered merchandise determination itself, as it did here, or refer the matter to either Commerce if it is *unable* to reach the determination independently. *Id.* § 1517(b)(4). Indeed, despite their arguments to the contrary, Plaintiffs acknowledged in their briefing that "the text and structure of EAPA requires CBP to determine what is 'covered merchandise.'" *See* Pls.' Br. 40.

Further—and even setting aside the inconsistency of Plaintiffs' arguments—it is important to note that CBP did not "follow" or rely on Commerce's Scope Ruling in this matter. Rather, CBP treated the Ruling as additional information on the record that supported CBP's *independent* covered merchandise determination. *Remand Results* at 2 ("[U]pon reconsideration and in the interest of completeness of the record, [Customs] is considering the Scope Ruling on remand."). This

was in accord with CBP's position throughout the administrative proceedings below: that Commerce's interpretation was not a prerequisite for CBP to reach its own covered merchandise determination under EAPA. *See, e.g., Final Determination* at 9 ("[S]uch a scope referral to Commerce was not needed and CBP acted within its authority in determining that the tribar floors are within the scope of the [*AD/CVD Steel Orders*].").

Finally, Plaintiffs concede that they have not actually challenged Commerce's Scope Ruling on its merits. Pls.' Supp. Br. 6 ("Although Plaintiffs could have challenged [the Scope Ruling] under [19 U.S.C. § 1516a], ... Section 1517 concerns an entirely different statute (EAPA), with an entirely different set of consequences."). Thus, the Scope Ruling is before the court only as additional record evidence buttressing

CBP's ultimate covered merchandise determination. *Cf. State Farm*, 463 U.S. at 43 (agency action may be arbitrary and capricious where agency "offered an explanation for its decision that runs counter to the evidence before" it). Given CBP's determinations, the court discerns no "clear error of judgment" on the part of the agency. *Bowman*, 419 U.S. at 285 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). Therefore, the court sustains Customs' determination that Plaintiffs' entries containing steel tribar floors were covered by the *AD/CVD Steel Orders*.

C. Plaintiffs' Challenges to CBP's Suspension of Liquidation and Assignment of Cash Deposits

Plaintiffs' final arguments are framed as another challenge to CBP's evasion determination contending that Customs applied its "covered merchandise" determination too broadly. Pls.' Br. 27. Nonetheless, their objections primarily target the suspension of liquidation and the assignment of AD/CVD cash deposits via required rate advances. *See id.* ("CBP arbitrarily and capriciously suspended liquidation and assigned AD/CVD cash deposits in an overbroad manner to Plaintiffs' imports that contain no tribar ...."); *see also* 19 U.S.C. § 1517 (d)–(e) (suspension of liquidation and rate advances are available to CBP as interim measures or as effects flowing from evasion determination itself). These arguments essentially challenge the interim measures that CBP took pursuant to subsection (e) of EAPA, and the ultimate effect of its evasion determination under subsection (d). *See* Notice of Initiation of Investigation and Interim Measures, EAPA Consol. Case No. 7474, (Sept. 18, 2020), PR 15; *Final Determination* at 3 (discussing interim measures); Notice of Action as to Ikadan (CF-29) (July 7, 2021), ECF No. 36–5; Notice of Action as to Gaosai (CF-29) (July 27, 2021), ECF No. 36–6; *see also* Pls.' Br. 27–41.

Plaintiffs first contend that, under the statute, "CBP is required to not only make a determination of 'evasion,' but the agency must also identify the 'covered merchandise' that is subject to an AD or CVD order and was entered into the United States through the 'evasion.'" Pls.' Br. 40. For Plaintiffs, because the statute permits CBP to suspend liquidation of entries of covered merchandise under § 1517(d) or continue to suspend liquidation of entries already suspended as an interim measure under § 1517(e), CBP must "determine the universe of unliquidated merchandise already imported that constitutes 'covered merchandise' and apply the suspension of liquidation to those entries and nothing that falls outside the universe of 'covered merchandise.'" Pls.' Br. 40–41. Plaintiffs further maintain that, contrary to these requirements, "CBP simply issued CF-29 notices that listed entries covered, without any detail as to what items were and were not covered or the amount of the rate advances." Pls.' Br. 27.

In support of their arguments, Plaintiffs describe the evidence in the record that they believe demonstrates that certain of their entries subject to the EAPA investigation do not contain *any* tribar flooring. Pls.' Br. 33–37 ("CBP ignored detailed information that Ikadan and Gaosai provided to help CBP identify precisely those entries and line items that contained tribar, and identify the correct values of those items so that rate advances based on the AD/CVD cash deposit rates could be properly calculated."). Of particular importance to Plaintiffs is the fact—which the Government does not dispute—that CBP undertook *some* review of each individual entry early in the investigation, when assessing which entries contained covered tribar floors. *See* Pls.' Reply 23 ("It was CBP that chose to review all of the entries and, *in its EAPA Determination*, judge which ones were and were not covered."); *see also* Def.'s Resp. 31 ("Hog Slat's allegation – resulting in the initiation of this investigation – asserted that all of plaintiffs' entries contained subject merchandise ... . Notwithstanding this, CBP tailored its actual evasion determination to only those entries for which record evidence indicated, in CBP's estimation, the inclusion of subject merchandise.").

Defendant contends that Plaintiffs' challenge to CBP's implementation of its covered merchandise determination is beyond the scope of the court's review under EAPA. Specifically, Defendant argues that the court cannot reach challenges to the suspension of liquidation or assignment of cash deposits because subsection (g) of EAPA only permits judicial review as to "CBP's *determination that evasion occurred*– not the final duty rates applied to a given entry at liquidation (which has not yet occurred)." Def.'s Resp. 28. The proper recourse for Plaintiffs' challenge, according to Defendant, is via a protest under 19

U.S.C. § 1514. *Id.* at 29 ("[Plaintiffs] can submit argument and documentation to CBP before the duties are assigned (but after review of the actual evasion determination in this Court are completed), protest CBP's assignment of duties ..., and, if necessary, appeal the results of that protest to this Court [under 28 U.S.C. § 1581(a)].").[7]

The court agrees with Defendant. Plaintiffs' challenges to CBP's suspension of liquidation and assignment of cash deposits ask the court to reach beyond the scope of EAPA's judicial review. The statutory text explicitly establishes the court's authority to examine "a determination under subsection (c) or review under subsection (f)." 19 U.S.C. § 1517(g)(2). The following subparagraphs of the section further provide that the court shall determine "whether the Commissioner fully complied with all procedures under subsections (c) and (f)" and "whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 1517(g)(2)(A)–(B). It is well-established that "Congress ordinarily adheres to a hierarchical scheme in subdividing statutory sections," where subparagraphs denominated by capital letters (here, A and B) fall within paragraphs denominated by numerals (here, 2). *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (citing to Congressional legislative drafting manuals). Therefore, the subparagraph language referring to "any determination, finding, or conclusion" in § 1517(g)(2)(B) must be read within the context of the paragraph language preceding it: *i.e.*, "[i]n determining whether a determination under subsection (c) or review under subsection (f) is conducted in accordance with those subsections."

Plaintiffs have not pointed to any language in the EAPA statute permitting the court to assess the reasonableness, or indeed the lawfulness, of CBP's actions taken pursuant to subsection (d) or (e). Based on its reading of the statute as a whole, the court declines to stray beyond the bounds of judicial review established by subsection (g).

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[7] As Defendant points out, Plaintiffs can pursue an alternate remedy by protesting CBP's implementation of its evasion determination under § 1514, and seeking judicial review under 28 U.S.C. § 1581(a). Because of EAPA's limitation of the court's review, discussed *supra*, the court does not reach Plaintiffs' undeveloped argument that pursuing the protest route "could erase any unlawful duty but could not compensate for the injury of Plaintiffs having to post cash deposits." Pls.' Supp. Br. 9–10. As a general matter, however, the court notes that the payment of cash deposits is not a cognizable injury. *See, e.g.*, *Valeo N. Am., Inc. v. United States*, 41 CIT ___, ___, 277 F. Supp. 3d 1361, 1366 (2017) (holding that payment of cash deposits is "ordinary consequence of the statutory scheme," not harm preventable by issuance of temporary restraining order (quoting *MacMillan Bloedel Ltd. v. United States*, 16 CIT 331, 333 (1992))).

IV. Conclusion

For the foregoing reasons, the court sustains the *Final Determination* and *Remand Results* determining that Plaintiffs' entries covered by EAPA Consol. Case No. 7474 evaded the *AD/CVD Steel Orders*. Judgment will enter accordingly.

Dated: June 13, 2023
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 23–89

CENTER FOR BIOLOGICAL DIVERSITY, ANIMAL WELFARE INSTITUTE, and NATURAL RESOURCES DEFENSE COUNCIL, INC., Plaintiffs, v. DEB HAALAND, in her official capacity as Secretary of the U.S. Department of the Interior, and U.S. DEPARTMENT OF THE INTERIOR, Defendants.

Before: Gary S. Katzmann, Judge
Court No. 22–00339

[Parties' Joint Stipulation of Voluntary Dismissal with Prejudice was filed under USCIT Rule 41(a)(1)(A)(ii). The case is dismissed.]

Dated: June 14, 2023

Sarah Uhlemann, and *Tanya M. Sanerib*, Center for Biological Diversity, of Seattle, WA, argued for Plaintiffs Center for Biological Diversity, Animal Welfare Institute, and Natural Resources Defense Council, Inc.

Agatha Koprowski, Trial Attorney, U.S. Department of Justice, of Washington, D.C., argued for Defendants Deb Haaland, in her official capacity as Secretary of the U.S. Department of the Interior and U.S. Department of the Interior. With her on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director.

OPINION

Katzmann, Judge:

The vaquita (*Phocoena sinus*), the world's smallest porpoise, is on the verge of disappearing from the Earth. As this court noted in 2020 in other litigation centering on the endangered vaquita, "[t]he vaquita is an evolutionarily distinct animal with no close relatives, whose loss would represent a disproportionate loss of biodiversity, unique evolutionary history, and the potential for future evolution." *Nat. Res. Def. Council, Inc. v. Ross* ("*NRDC IV*"), 44 CIT __, __, 456 F. Supp. 3d 1292, 1294 (2020). Three years later, only ten to thirteen vaquita are estimated to remain in their endemic range of the Upper Gulf of California, located in the waters of Mexico.[1] The primary threat to their survival continues to be gillnet fishing, particularly of the totoaba fish (*Totoaba macdonaldi*), that incidentally entraps and drowns these five-foot-long pandas of the sea. Mexico has formally outlawed gillnet fishing of the totoaba, but illegal fishing activity in the Upper Gulf nonetheless continues. The vaquita's situation remains dire.

The court notes that on March 9, 2020, the United States banned the "importation from Mexico of all shrimp, curvina, sierra, chano,

[1] Armando Jaramillo-Legorreta et al., *Survey Report for Vaquita Research 2023* at 1 (2023), https://iucn-csg.org/wp-content/uploads/2023/06/Vaquita-Survey-2023-Main-Report.pdf.

anchovy, herrings, sardines, mackerels croaker, and pilchard fish and fish products . . . caught with gillnets inside the vaquita's range" pursuant to the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1371. *See Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act — Notification of Revocation of Comparability Findings and Implementation of Import Restrictions; Certification of Admissibility for Certain Fish Products From Mexico*, 85 Fed. Reg. 13626, 13627–28 (Dep't Com. Mar. 9, 2020); *see also NRDC IV*, 456 F. Supp. 3d at 1298. That statute — the MMPA — aims to protect marine mammals by setting forth standards applicable to both domestic commercial fisheries and foreign fisheries, like those in Mexico, that wish to export their products to the United States. *See* 16 U.S.C. § 1371(a)(2).

The embargo announced on March 9, 2020, by the United States followed years of litigation before this court between the environmental organizations in the instant action — Plaintiffs Natural Resources Defense Council, Inc. ("NRDC"), the Center for Biological Diversity (the "Center"), and the Animal Welfare Institute ("AWI") — and the United States.[2] In that litigation, the court issued a preliminary injunction on July 26, 2018, requiring the United States "to ban the importation from Mexico of all shrimp, curvina, sierra, and chano fish and their products caught with gillnets inside the vaquita's range." *NRDC II*, 331 F. Supp. 3d at 1383. Per Plaintiffs, that injunction prompted Mexico to issue regulations that, had they been enforced, would have potentially reduced vaquita bycatch. *See* Status Conference at 10:14, June 7, 2023, ECF No. 18. Plaintiffs, however, assert that enforcement has been lacking and that without urgent action that roots out illegal gillnet fishing in the Upper Gulf, the vaquita may soon disappear from the planet forever.

Seeking urgent action, Plaintiffs the Center, AWI, and NRDC brought this suit in 2022 against Defendants Secretary of the Interior, Deb Haaland, and the U.S. Department of the Interior (the "Interior"). Plaintiffs' Complaint alleged an unlawful delay by Defendants in responding to a 2014 letter requesting that the Secretary certify Mexico, under the Pelly Amendment to the Fishermen's Protective Act of 1967 for trade and taking of totoaba that "diminishes the effectiveness" of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). *See* Compl. ¶ 82, Dec. 14, 2022, ECF No. 4. The letter alleged that actions by

[2] *See Nat. Res. Def. Council, Inc. v. Ross*, 42 CIT __, 331 F. Supp. 3d 1338 (2018); *Nat. Res. Def. Council, Inc. v. Ross* ("*NRDC II*"), 42 CIT __, 331 F. Supp. 3d 1381 (2018); *Nat. Res. Def. Council, Inc. v. Ross*, 42 CIT __, 348 F. Supp. 3d 1306 (2018); *Nat. Res. Def. Council, Inc. v. Ross*, 774 F. App'x 646 (Fed. Cir. 2019); *NRDC IV*, 456 F. Supp. 3d 1292.

Mexican nationals violated the treaty's prohibition on totoaba trade and contributed to the extinction of the vaquita and totoaba species. *See id.* ¶¶ 83–84. As detailed below, upon certification from the Secretary, the President may prohibit the importation of any product from the offending country for any duration in a manner consistent with other international trade obligations. *See* 22 U.S.C. § 1978(a)(2). Congress has authorized the President to embargo, or threaten the embargo of, offending nations with the intention of encouraging foreign compliance with CITES and other instruments of international environmental law. *See infra* pp. 5–6.

The parties entered into settlement discussions and reached a conditional settlement on April 6, 2023. *See* Settlement Agreement ("SA"), Apr. 6, 2023, ECF No. 12–1. On May 18, 2023, the Secretary certified to the President that "nationals of Mexico are engaging in taking and trade of the totoaba fish . . . and the related incidental take of vaquita . . . that diminishes the effectiveness of [CITES]." Letters from Sec'y Deb Haaland, Dep't of the Interior, to Kamala Harris, Pres. of the S., and Kevin McCarthy, Speaker of the H.R., at 1 (May 26, 2023), https://www.doi.gov/sites/doi.gov/files/congressional-notification-letter-esb46–011731.pdf.

The parties accordingly filed a joint stipulation of dismissal with prejudice under USCIT Rule 41(a)(1)(A)(ii) on June 2, 2023. *See* Joint Stipulation of Voluntary Dismissal with Prejudice ("Notice of Dismissal"), June 2, 2023, ECF No. 17. With the certification to the President sought by the Complaint having been accomplished, the Complaint is dismissed by operation of the parties' Notice of Dismissal.

BACKGROUND

I. Legal Background

CITES is a multilateral treaty that protects endangered wildlife from international trade. *See* CITES, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975). The parties to CITES — including the United States, Mexico, and 182 other states — recognize that "wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth," and that "international co-operation is essential for the protection of [these] species . . . against over-exploitation through international trade," with a "[c]onvic[tion] of the urgency of taking appropriate measures to this end." *Id.*, pmbl. The treaty classifies endangered animal and plant wildlife into one of three Appendices, and different protections are associated with each

Appendix. *See id.* arts. I(b)(ii)–(iii), II. Appendix I offers the most stringent protection of the three. It includes “all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.” *Id.* art. II(1).

One way that Congress has authorized the Executive Branch to enforce the terms of CITES is through the Pelly Amendment to the Fishermen’s Protective Act of 1967 (the “Pelly Amendment”). *See* Pelly Amendment, Pub. L. 92–219, 85 Stat. 786 (1971), *amended by* Act of Sept. 18, 1978, Pub. L. 95–376, 92 Stat. 714 (codified as amended at 22 U.S.C. § 1978). The Pelly Amendment accordingly requires that:

> When . . . the Secretary of the Interior, in consultation with the Secretary of State, finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President.

22 U.S.C. § 1978(a)(2). Upon certification from the Secretary, the President “may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of any products from the offending country for any duration as the President determines appropriate,” so long as the President’s restrictions on “any products” are sanctioned by the World Trade Organization or other multilateral trade agreements. *Id.* § 1978(a)(5). The Secretary of the Interior must also “periodically monitor the activities of foreign nationals that may affect . . . international programs,” “promptly investigate any activity by foreign nationals that, in the opinion of the Secretary, may be cause for certification,” and “promptly conclude; and reach a decision with respect to; any investigation commenced.” *Id.* § 1978(a)(3). CITES is unambiguously an “international program for endangered or threatened species.” *See id.* § 1978(h)(4); H.R. Rep. No. 95–1029, at 10–11 (1978).

Acknowledging that the threat of embargo can be “quietly persuading” to a foreign trading partner, the House Report accompanying the 1978 amendment to the Pelly Amendment emphasized that the act of certification was an effective tool in the Presidential toolbox to encourage foreign compliance with international environmental law. H.R. Rep. No. 95–1029, at 9. The legislation’s initial scope in 1971 was limited to “international fishery conservation program[s].” *See* Pelly Amendment § 8(a), 85 Stat. at 786. But, intending to expand

"the success the United States has achieved in the conservation of whales to the conservation of endangered and threatened species," the House Report made clear that the 1978 amendment would "give the United States some leverage in reducing the alarming international trade in endangered and threatened species."[3] H.R. Rep. No. 95–1029, at 9; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 238, 240–41 (1986). The House Report further stated that "although the Endangered Species Convention represents a major step forward in the effort to reduce the rate of species extinction worldwide, it cannot, by itself, eliminate the international traffic in endangered species," and that the Pelly Amendment "would strengthen the Endangered Species Convention by providing the President with the authority to encourage other nations to comply with the Convention." H.R. Rep. No. 95–1029, at 11. The Pelly Amendment was and remains key, therefore, to the United States' effective enforcement of CITES's provisions.

II. Plaintiffs' Complaint

On September 29, 2014, the Center sent a letter to the Secretary requesting that the Secretary certify Mexico pursuant to the Pelly Amendment because Mexican nationals in the Gulf of California were engaging in the "taking" and "trade" of endangered totoaba that "diminishes the effectiveness" of CITES (the "Petition"). SA ¶ 3. The Center notified the Secretary of its intent to sue for Interior's failure to timely respond to the "Petition" on January 5, 2017. *Id.* ¶ 5. Interior responded to that notice in April 2017, stating that it anticipated concluding its Pelly Amendment investigation within the next four to five months. *Id.* ¶ 6. Interior did not conclude the investigation

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[3] Congress specifically noted that in 1974, the United States had initiated actions under the Pelly Amendment upon Commerce's certification that Japan and Russia were violating whaling quotas established by the International Whaling Commission ("IWC"). H.R. Rep. No. 95–1029, at 9. The threat of potential embargo against both nations was "generally regarded as convincing the Japanese and Russians to adhere to future IWC quotas," and President Ford did not impose embargoes on the fishery products of either nation after both nations agreed to abide by the decisions of the IWC in 1974. *Id.* at 9. Congress concluded that "[t]he 1974–75 actions dramatically demonstrate the value of the Pelly amendment to the United States in the conduct of international fishery negotiations," *id.*, and hoped to apply the same pressure for the conservation of endangered and threatened species.

or substantively respond to the "Petition" in that timeframe or at any time before the filing of this action. *Id.* ¶ 7.[4]

Plaintiffs then filed this action in the U.S. Court of International Trade on December 14, 2022. *See* Compl. Plaintiffs requested (1) declaratory judgment that Defendants' failure to respond to the "Petition" constituted agency action unlawfully withheld or unreasonably delayed under the APA, 5 U.S.C. § 706(1); (2) an order enjoining Defendants from further delay in responding substantively to the "Petition" and requiring a response within thirty days; and (3) costs and attorneys' fees. Compl. at 24.

DISCUSSION

As has been noted, the critically endangered vaquita inhabits only one region of the ocean — the Upper Gulf of California in Northeast Mexico — and faces one primary threat. *Id.* ¶¶ 42, 45. Gillnets, which are a type of fishing gear that hangs vertically in the water and captures large quantities of fish, also incidentally entrap and drown marine mammals and other wildlife. *Id.* ¶ 45. The vaquita's population decline has long been attributed to entanglement in gillnet gear set in fisheries located in the Upper Gulf, including in the illegal fishing of the totoaba. *Id.* ¶ 46. Totoaba inhabit the Gulf of California and parts of its annual spawning habitat overlap with the vaquita's habitat in the Upper Gulf. *Id.* ¶ 47. But because the totoaba's swim bladder is in high demand in parts of China for its purported medicinal properties and can sell on the black market for prices reaching $46,000 to $100,000 per kilogram by some reports, the totoaba itself has been subject to drastic overfishing, and its population has declined. *Id.* ¶¶ 48–49. Mexico outlawed totoaba fishing in 1975, but illegal fishing of the totoaba persists to this day. *Id.* ¶¶ 46, 48–49. The United States has listed both the vaquita and totoaba as endangered under the Endangered Species Act. *See Endangered Fish or Wildlife; Cochito*, 50 Fed. Reg. 1056 (Dep't Com. Jan. 9, 1985) (codified at 50 C.F.R. § 17.11(h)); *Totoaba; Listing as an Endangered Species*, 44 Fed. Reg. 29478 (Dep't Com. May 21, 1979) (codified at 50 C.F.R. § 17.11(h)).

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[4] The indefinite delay prompted Plaintiffs Center and AWI to file a complaint in the U.S. District Court for the District of Columbia alleging that Defendants' failure to respond to the "Petition" constituted agency action unlawfully withheld or unreasonably delayed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1). *Id.* ¶ 8. Defendants filed a motion to dismiss for lack of subject matter jurisdiction. Mot. to Dismiss at 6–10, *Ctr. for Bio. Diversity v. Bernhardt*, No. 1:20-cv-01532 (D.D.C. Aug. 24, 2020), ECF No. 9 ("The Center's claim of unreasonable delay on its petition for Pelly Amendment certification may proceed only in the CIT." (citation omitted)). The plaintiffs filed a notice of voluntary dismissal without prejudice under Federal Rule of Civil Procedure 41(a)(1)(A)(i). *See* Notice of Voluntary Dismissal, *Bio. Diversity*, No. 1:20-cv-01532, ECF No. 11.

I. Efforts to Save the Vaquita in the CITES Framework

In 1979, the United Kingdom filed a proposal with the CITES Secretariat to include the vaquita in Appendix I. *See* U.K., *Proposals Concerning the Cetacea*, Conf. of the Parties to CITES, Second Meeting, Doc. 2.27 (Mar. 1979), https://www.speciesplus.net/api/v1/documents/1132. At that time, there were "no estimates of [population] numbers, but the population is very localized and will be relatively small." *Id.* at 1044. The proposal explained that "[t]he exploitation of totoaba by gill nets dates from at least the late forties. . . . One day's catch is known to have been ten porpoises in the early seventies, and available information suggests an annual incidental kill of tens to hundreds." *Id.* at 1046 (citations omitted). The proposal underscored the "wide concern for [the vaquita's] survival." *Id.* at 1047. The CITES parties subsequently adopted the proposal and have included the vaquita in Appendix I since then. *See* CITES, *Appendices I, II and III* at 14 (May 21, 2023), https://cites.org/sites/default/files/eng/app /2023/E-Appendices-2023–05–21.pdf. The totoaba was also included in Appendix I in 1977 after the Mexican government banned totoaba fishing in 1975 due to population decline. *See id.* at 55; *see also* U.S., *Proposal for Amendments to Appendices I and II* at 261, Conf. of the Parties to CITES (Feb. 11, 1976), https://www.speciesplus.net/api/v1/documents/7725.

But despite the protections enabled by CITES, the population of the imperiled vaquita has continued to dwindle in intervening decades. And as illegal totoaba fishing has seemingly intensified in the Upper Gulf, *see* Compl. ¶¶ 53–58, international pressure on Mexico has escalated to prioritize the vaquita's survival and enforce its totoaba fishing ban. In 2022, the CITES Secretariat, the body administering CITES's committees and initiatives, concluded in no uncertain terms that a prior directive to Mexico by the CITES parties that it "effectively prevent fishers and vessels from entering the vaquita refuge area ha[d] not been implemented." CITES, *Totoaba (Totoaba macdonaldi): Report of the Secretariat to the 74th Meeting of the Standing Committee* ¶ 33, Lyon, France, SC74 Doc. 28.5 (Mar. 7–11, 2022).

The United States publicly raised at that meeting of the CITES Standing Committee that it "did not believe that CITES was being implemented effectively by Mexico, and . . . proposed that the Standing Committee recommend the suspension of commercial trade in specimens of CITES-listed species exported or re-exported from Mexico until measurable progress is made by Mexico in implementing the recommendations proposed by the Secretariat." CITES, *Summary Record of the 74th Meeting of Standing Committee* at 57, Lyon, France, SC74 (Mar. 7–11, 2022). Among other monitoring and com-

pliance directives, the Standing Committee "requested Mexico to strengthen measures to ensure that a 'zero tolerance policy' is strictly applied" and "encouraged Mexico to further scale up and expand maritime surveillance and patrol activities in the vaquita refuge and zero-tolerance area." *Id.* at 58. Subsequent actions by the CITES Standing Committee and Secretariat have increased the pressure on Mexico and resulted in a more concrete compliance plan.[5] But Mexico's progress in implementing that plan has yet to be reviewed, and serious international concern about the plight of the vaquita persists.[6]

II. Interior's Certification and the Parties' Settlement

Following settlement negotiations, the parties to this litigation executed a Settlement Agreement on April 6, 2023. *See* SA. Paragraph 11 of the Settlement Agreement required Defendants (1) to "conclude, and reach a decision with respect to, Interior's Pelly Amendment investigation by either certifying or not certifying that nationals of Mexico are engaging in trade or taking which diminishes the effectiveness of CITES" on or before May 19, 2023; and (2) to "provide, on behalf of the Secretary, a substantive response to the 'Petition' in writing and conveyed via electronic mail within 15 days of the decision." *Id.* ¶ 11. The parties requested that the court stay the litigation to allow Defendants time to satisfy Paragraph 11, *see* Joint Mot. for Stay at 1, Apr. 7, 2023, ECF No. 12, and Plaintiffs "agree[d]

[5] In November 2022, the Standing Committee requested that Mexico submit a "compliance action plan" that, if deemed inadequate by the Secretariat, would result in a recommendation to all parties to suspend all commercial wildlife trade with Mexico. CITES, *Summary Record of the 75th Meeting of Standing Committee* at 16–17, Panama City, Panama, SC75 (Nov. 13, 2022). The initial plan was deemed inadequate and the trade suspension recommendation was noticed on March 27, 2023; it was withdrawn on April 13, 2023, when an adequate plan was submitted. *See* CITES Secretariat, *Notification to the Parties*, No. 2023/046 (Apr. 13, 2023), https://cites.org/sites/default/files/notifications/E-Notif-2023–046.pdf.

[6] On a different track, the U.S. Trade Representative announced in February 2022 that the United States was requesting Environment Consultations with the Government of Mexico under the United States–Mexico–Canada Agreement ("USMCA") on "the protection of the critically endangered vaquita porpoise . . . , the prevention of illegal fishing, and trafficking of totoaba fish." Press Release, U.S. Trade Rep., USTR Announces USMCA Environment Consultations with Mexico (Feb. 10, 2022), https://ustr.gov/about-us/policy-offices/press-office/pressreleases/2022/february/ustr-announces-usmca-environment-consultations-mexico. Article 24.29.2 of the USMCA allows any state party to "request consultations with any other Party . . . regarding any matter arising under" Chapter 24 of the treaty, which contains provisions meant to, among other objectives, "promote high levels of environmental protection and effective enforcement of environmental laws." *See* Agreement Between the United States of America, the United Mexican States, and Canada, arts. 24.2.2, 24.29.2, July 1, 2020, Off. of the U.S. Trade Rep., https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canadaagreement/agreement-between (last visited June 7, 2023). Indeed, the United States determined that "available evidence raises concerns that Mexico may not be meeting a number of its USMCA environment commitments." U.S. Trade Rep., *supra*.

to join with the United States in stipulating to the dismissal of this lawsuit with prejudice" upon Defendants' "timely performance of the commitments in Paragraph 11." SA ¶ 14. The court granted the Joint Motion to Stay and ordered that a status conference be held to discuss the status of the case. *See* Order at 2, Apr. 7, 2023, ECF No. 13.

On May 18, 2023, the Secretary certified to the President that "nationals of Mexico are engaging in taking and trade of the totoaba fish . . . and the related incidental take of vaquita . . . that diminishes the effectiveness of [CITES]." Letters from Sec'y Haaland, *supra*, at 1; *see also* 22 U.S.C. § 1978(a)(4) (requiring the Secretary to report to Congress, within fifteen days, a certification made to the President). She confirmed that "Interior, in consultation with the Department of State, has determined through a thorough investigation of the evidence that, despite international protections and commitments, the government of Mexico has failed to stem the illegal harvest and commercial export of totoaba." Letters from Sec'y Haaland, *supra*, at 1. She further stated that, consistent with the Pelly Amendment, the President will notify Congress of any action taken "to help encourage conservation actions to prevent the extinction of the vaquita and continued decline of the totoaba" within sixty days of the certification. *Id.*; *see also* 22 U.S.C. § 1978(b) (requiring the President to inform Congress within sixty days and, if no actions are taken, to "inform the Congress of the reasons therefor"). The President has thus far made no public comment on whether he will act on the Secretary's certification.

CONCLUSION

The parties filed a joint stipulation of dismissal with prejudice under USCIT Rule 41(a)(1)(A)(ii) on June 2, 2023. *See* Notice of Dismissal at 1. The court held a status conference on June 7, 2023, in which the parties provided an overview of the case and recent efforts to save the vaquita, and confirmed that they intend to dismiss this action with prejudice. *See* Status Conference.[7] But today's dismissal is far from a bill of health for the vaquita. It is simply an acknowledgement that Plaintiffs brought one claim, and that one claim has been satisfied by Interior's decision to certify Mexico. As the court recognized in *NRDC IV* and stresses now, "every death [of the vaquita] brings it perilously close to disappearing from the planet forever. . . . [T]he need for vigorous international enforcement against its

[7] The audio recording of the status conference is available to the public on the website of the U.S. Court of International Trade. *See Audio Recordings of Select Public Court Proceedings*, U.S. Ct. of Int'l Trade, https://www.cit.uscourts.gov/sites/cit/files/060723–22–00339-GSK.mp3 (last visited June 14, 2023).

continuing threat is a compelling one." 456 F. Supp. 3d at 1299. The panda of the sea, the little cow, is irreplaceable.

A voluntary dismissal by joint stipulation under Rule 41(a)(1)(A)(ii) is effective "automatically." *Versata Software, Inc. v. Callidus Software, Inc.*, 780 F.3d 1134, 1136 (Fed. Cir. 2015). The court declares the case **DISMISSED** by operation of the parties' filings.

SO ORDERED.

Dated: June 14, 2023
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 23–90

MAPLE LEAF MARKETING, INC., Plaintiff, v. UNITED STATES, Defendant, UNITED STATES, Counterclaimant, v. MAPLE LEAF MARKETING, INC., Counterclaim Defendant.

Before: Claire R. Kelly, Judge
Court No. 20–03839

[Granting Plaintiff's request to redesignate Defendant's counterclaim as a defense.]

Dated: June 14, 2023

John M. Peterson, *Richard F. O'Neill*, and *Patrick B. Klein*, Neville Peterson LLP, of New York, NY, for plaintiff Maple Leaf Marketing, Inc.

Justin R. Miller, Attorney-in-Charge, *Aimee Lee*, Assistant Director, and *Guy Eddon,* Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY for defendants United States. On the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director.

OPINION AND ORDER

Kelly, Judge:

Before the court is Plaintiff Maple Leaf Marketing, Inc.'s ("Maple Leaf") motion to dismiss Defendant U.S. Customs and Border Protection's ("CBP") counterclaim, and to redesignate the counterclaim as a defense pursuant to U.S. Court of International Trade Rule 8(d)(2). For the following reasons, CBP's counterclaim is redenominated as a defense, and Maple Leaf's motion to dismiss is denied as moot.

BACKGROUND[1]

Maple Leaf is the importer and distributor of boronized steel tubing used in the oil and gas industry. Compl. ¶¶ 6, 8, Sept. 23, 2022, ECF No. 10; Answer and Counterclaim of Defendant United States, ¶¶ 6, 8, Jan. 20, 2023, ECF No. 21 ("Answer"). Maple Leaf's Canadian vendor, Endurance Technologies Inc. ("ETI") receives U.S.-manufactured tubes from U.S. vendors. Compl. ¶¶ 11–13; Answer ¶¶ 11–13. ETI then boronizes the tubes in Canada, which enhances the tubes' corrosion resistance and overall suitability for use in oil drilling. Compl. ¶¶ 16–17; Answer ¶¶ 16–17. Maple Leaf then imports the boronized steel tubing from Canada. Compl. ¶ 20; Answer ¶ 20.

Upon importation, Maple Leaf sought classification under subheading 9802.00.50 of the Harmonized Tariff Schedule of the United States ("HTSUS") as "[a]rticles returned to the United States after

[1] The facts set forth in this background section are taken from the Complaint and Counterclaim, see ECF Nos. 10 & 21, which are assumed to be true for the purposes of this opinion and order.

having been exported to be advanced in value or improved in condition by any process of manufacture or other means: Articles exported for repairs or alterations: Other [than pursuant to a warranty].” Compl. ¶ 21; Answer ¶ 21. Goods entering the United States under this classification the value of the repairs or alterations made to the tubes while they underwent boronization in Canada. *See* 19 C.F.R. § 181.64(a). CBP liquidated Maple Leaf’s entries from Canada under subheadings other than 9802.00.50, HTSUS, and imposed special duties under Section 232 of the Trade Expansion Act. Compl. ¶ 22; Answer ¶22. CBP subsequently denied Maple Leaf’s protests. Compl. ¶ 1, 5; Answer ¶ 1, 5.

Maple Leaf commenced this action, asserting jurisdiction under 28 U.S.C. § 1581(a). Compl. ¶¶ 2, 4; Answer ¶¶ 2, 4. CBP did not raise any defenses in its answer, but brought a counterclaim against Maple Leaf pursuant to 19 U.S.C. §§ 1503, 1505(b) & (c), the tariff code (19 U.S.C. § 1202 et seq.), and 28 U.S.C. §§ 1582(3), 1583, 2643(b) & (c), seeking to deny the applicability of subheading 9802.00.50, HTSUS, and reliquidate entries under subheading 7306.29.6, 7304.29.50, or 9903.80.01, HTSUS. Answer at 7. Maple Leaf moves to dismiss CBP’s counterclaim and designate it as a defense, and Defendant opposes Maple Leaf’s motion. *See* Pl.’s Mot. Dismiss Answer and Redesignate as Defense, Feb. 10, 2023, ECF No. 22 (“Pl. Br.”); Def.’s Mem. Opp. Pl.’s Mot. Dismiss Answer, Mar. 31, 2023, ECF No. 27 (“Def. Br.”).

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2018) over a claim contesting the denial of a protest under 19 U.S.C. § 1514(a).[2] Pursuant to 28 U.S.C. § 1583, the Court may also exercise jurisdiction over “any counterclaim, cross-claim, or third-party action of any party” if the claim involves the same merchandise that is the subject matter of the original civil action. 28 U.S.C. § 1583. U.S. Court of International Trade Rule 8(d)(2) provides that when a party mistakenly designates a defense as a counterclaim, the “court must, if justice requires, treat the pleading as though it were correctly designated.” U.S. Ct. Int’l Trade R. 8(d)(2).

To survive a motion to dismiss for failure to state a claim upon which relief can be granted brought under Rule 12(b)(6), a pleading “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When considering a motion to dismiss, the Court as-

[2] Further Citations to the Tariff Act of 1930, as amended are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

sumes all well-pleaded factual allegations in the counterclaim to be true, and draws all reasonable inferences in favor of the non-moving party. *Wanxiang Am. Corp. v. United States*, 12 F.4th 1369, 1373 (Fed. Cir. 2021).

DISCUSSION

Maple Leaf urges the Court to dismiss and redesignate CBP's counterclaim as a defense, because no statute cited by CBP establishes a cause of action. *See* Pl. Br. at 5. Defendant argues that some combination of 19 U.S.C. §§ 1202, 1503, 1505(b) & (c), 1514(a) and 28 U.S.C. §§ 1582(3), 1583, 2643(b) & (c) give it authority to assert a counterclaim and seek reliquidation under a different classification.[3] *See* Def. Br. at 5–6. For the following reasons, the Court redesignates CBP's counterclaim as a defense, and denies Maple Leaf's motion to dismiss as moot.

Congress has created specific remedies allowing CBP to classify, re-classify, and collect duties on goods imported into the United States. *See generally* 19 U.S.C. §§ 1500, 1501, 1504, 1505, 1509, 1515, 1581–1631. Nowhere in this scheme does Congress explicitly authorize the United States to assert a counterclaim challenging CBP's classification. The Court has previously held that Defendant does not have a cause of action to assert a counterclaim against CBP, *see Cyber Power Systems (USA) Inc. v. United States*, 586 F. Supp. 3d 1325 (Ct. Int'l Trade 2022); *see also Second Nature Designs, Ltd. V. United States*, 586 F. Supp. 3d 1334 (Ct. Int'l Trade 2022), and now reaffirms the reasoning and conclusions of *Cyber Power* and *Second Nature*.

Defendant cites to 19 U.S.C. § 1202 to support its purported counterclaim, of merchandise." Def. Br. at 5–6. Section 1202 simply sets forth the Harmonized Tariff Schedule, and nothing in the language of the section creates a cause of action for the United States to challenge CBP's classification. *See Cyber Power*, 586 F. Supp. at 1331 ("Nothing in the plain, unambiguous terms of Section 1202 permits the United States to challenge CBP's classification via a counterclaim").

Equally inapposite is 19 U.S.C. § 1503, which concerns reliquidations ordered by the U.S. Court of International Trade. *See* 19 U.S.C. § 1503. Defendant offers no argument to support its claim that § 1503 creates a cause of action. *See* Def. Br. at 4. Section 1503 relates to the valuation, rather than the classification of imports, and contains no

[3] Defendant acknowledges this Court's recent decisions *Second Nature Designs, Ltd. v. United States*, 586 F. Supp. 3d 1334 (Ct. Int'l Trade 2022), and *Cyber PowerSystems (USA) Inc. v. United States*, 586 F. Supp. 3d 1325 (Ct. Int'l Trade 2022), stating "[a]lthough the court in both cases redenominated the Government's counterclaims as defenses, we assert a counterclaim in this case, asking the court to order CBP to reliquidate the subject entries [and] to preserve our rights, should this legal question be appealed." Answer at 7 n.1.

language authorizing a counterclaim. *See Cyber Power*, 586 F. Supp. at 1331.

Section 1514(a) provides that liquidation is not final when an importer challenges CBP's determinations. *See* 19 U.S.C. § 1514(a). Although a timely protest under § 1514 suspends the finality of liquidation for all parties, the section does not imply that the United States may assert a counterclaim challenging CBP's classification. *See Cyber Power*, 586 F. Supp. at 1331–32. Section 1514 provides importers with a formal mechanism to protest customs decisions, but Defendant enjoys no such right to challenge classifications post-liquidation. *See id.*

Defendant cites to §§ 1582–83 as additional bases for its counterclaim. *See* Def. Br. at 12–19. Section 1582 specifies that the U.S. Court of International Trade has exclusive jurisdiction over claims commenced by the United States to recover customs duties. *See* 28 U.S.C. § 1582(3). This provision is jurisdictional, and does not create any cause of action. Similarly, § 1583 gives the Court jurisdiction over counterclaims. *See* 28 U.S.C. § 1583. Section 1583 is also purely jurisdictional, providing the U.S. Court of International Trade with "exclusive jurisdiction to render judgment upon any counterclaim." 28 U.S.C. § 1583; *see Cyber Power*, 586 F. Supp. at 1332–33. The statute empowers the Court, not the Defendant. *See Cyber Power*, 586 F. Supp. at 1333 ("Congress only provided the U.S. Court of International Trade with jurisdiction to hear such counterclaims, to the extent such claims are properly brought as counterclaims. . . . Congress did not provide the United States with any statutory authority to assert counterclaims challenging the liquidated classification and duty rate"). Thus, § 1583 does not serve as a statutory basis for a cause of action.

Defendant also cites for support 28 U.S.C. § 2643(b) & (c), which provide that the U.S. Court of International Trade may "order a retrial or rehearing for all purposes, or may order further administrative or adjudicative procedures as the Court considers necessary to enable it to reach the correct decision" and may "order any other form of relief that is appropriate in a civil action." 28 U.S.C. § 2643 (b), (c)(1); *see* Def. Br. at 18. Section 2643 empowers the U.S. Court of International Trade to take various actions and provide specified forms of relief to litigants. Defendant does not specify how this section creates substantive rights. *See* Def. Br. does not create a cause of action.

Defendant has failed to assert a valid statutory basis to support its cause of action, and therefore has failed to state a claim upon which

relief can be granted. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570. However, U.S. Court of International Trade Rule 8(d)(2) provides that "[i]f a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so." U.S. Ct. Int'l Trade R. 8(d)(2). In accordance with the Court's previous determinations in *Cyber Power* and *Second Nature*, the Court re-designates Defendant's counterclaim as a defense. The Court therefore denies Maple Leaf's motion to dismiss the Defendant's counterclaim as moot, and grants Maple Leaf's motion to redesignate the counterclaim as a defense pursuant to Rule 8(d)(2).

CONCLUSION

In accordance with the foregoing, it is

ORDERED that Defendant's counterclaim is redenominated as a defense; and it is further

ORDERED that Plaintiff's motion to dismiss is DENIED as moot.

Dated: June 14, 2023
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

Index

Customs Bulletin and Decisions
Vol. 57, No. 25, June 28, 2023

U.S. Customs and Border Protection

General Notices

	Page
Revocation of One Ruling Letter and Revocation of Treatment Relating to the Tariff Classification of Certain Beverage Dispenser Machines	1
Withdrawal of Proposed Modification of Two Ruling Letters and Proposed Revocation of Treatment Relating to the Tariff Classification of Musical Candle Holders Packaged with Wax Birthday Candles	8

U.S. Court of International Trade

Slip Opinions

	Slip Op. No.	Page
Pirelli Tyre Co., Ltd., Pirelli Tyre S.p.A., and Pirelli Tire LLC, Plaintiffs, and Shandong New Continent Tire Co., Ltd., Plaintiff-Intervenor, v. United States, Defendant, and The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, Defendant-Intervenor.	23–86	13
Hyundai Steel Company, Plaintiff, AJU Besteel Co., Ltd., Nexteel Co., Ltd., and Husteel Co., Ltd., Consolidated Plaintiffs, and Husteel Co., Ltd., Nexteel Co., Ltd., and SeAH Steel Corporation, Plaintiff-Intervenors, v. United States, Defendant, and Vallourec Star, L.P., Welded Tube USA Inc., and United States Steel Corporation, Defendant-Intervenors.	23–87	41
Ikadan System USA, Inc., and Weihai Gaosai Metal Product Co., Ltd., Plaintiffs, v. United States, Defendant, and Hog Slat, Inc., Defendant-Intervenor.	23–88	58
Center for Biological Diversity, Animal Welfare Institute, and Natural Resources Defense Council, Inc., Plaintiffs, v. Deb Haaland, in her official capacity as Secretary of the U.S. Department of the Interior, and U.S. Department of the Interior, Defendants.	23–89	77
Maple Leaf Marketing, Inc., Plaintiff, v. United States, Defendant, United States, Counterclaimant, v. Maple Leaf Marketing, Inc., Counterclaim Defendant.	23–90	87

GPO U.S. G.P.O.: 2023—423-106/30030