U.S. Customs and Border Protection

19 CFR PART 24

CBP DEC. 24–05

RIN 1515–AE39

REFUND OF ALCOHOL EXCISE TAX

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

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with no changes, interim amendments to the U.S. Customs and Border Protection (CBP) regulations that were published in the **Federal Register** on December 30, 2022, as CBP Decision 22–26. Pursuant to these changes, the responsibility for administering refunds, reduced tax rates, and tax credits on imported alcohol moved from CBP to the U.S. Department of the Treasury, on January 1, 2023.

DATES: This rule is effective as of March 6, 2024.

FOR FURTHER INFORMATION CONTACT: Kellee Gross, Branch Chief, Trade Processes Branch, Office of Trade, 202–815–1699, *kellee.m.gross@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

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Amendments to CBP Regulations

I. Background

Sections 13801–13808 of the Tax Cuts and Jobs Act of 2017 (Pub. L. 115–97), signed December 22, 2017, commonly referred to as the Craft Beverage Modernization Act (CBMA), amended the Internal Revenue Code for two calendar years with respect to the tax treatment of imported alcohol, including beer, wine, and distilled spirits. The CBMA authorized reduced tax rates and tax credits for imported alcohol and permitted the refund of taxes paid prior to assigning a reduced tax rate or tax credit. On August 16, 2018, U.S. Customs and Border Protection (CBP) published an interim final rule, CBP Decision (CBP Dec.) 18–09, in the **Federal Register** (83 FR 40675), updating the language of title 19 of the Code of Federal Regulations (CFR) to implement the CBMA and make other technical changes to 19 CFR part 24.

On December 19, 2019, the Further Consolidated Appropriations Act was signed, which extended the relevant provisions of the CBMA through calendar year 2020. *See* Public Law 116–94. On December 27, 2020, the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Tax Relief Act) was enacted. *See* Public Law 116–260, Division EE, sections 106–110. The Tax Relief Act amended and made permanent the CBMA, and directed the Secretary of the Treasury to implement and administer amended provisions concerning imported alcohol, in coordination with CBP. This authority was subsequently delegated to the Alcohol and Tobacco Tax and Trade Bureau (TTB). The relevant provisions of the Tax Relief Act became effective on January 1, 2023.

On December 30, 2022, CBP published an interim final rule, CBP Dec. 22–26, in the **Federal Register** (87 FR 80442) to update the regulations issued in CBP Dec. 18–09, to reflect the transfer of authority for administration of the CBMA import refund program to TTB, and to direct the public to the relevant TTB regulations regarding refunds administered by TTB, in 27 CFR parts 27 and 70. Specifically, the interim final rule amended section 24.36 of title 19 of the Code of Federal Regulations (19 CFR 24.36). CBP Dec. 22–26 provided for the submission of comments from December 30, 2022, to March 2, 2023. No comments were received.

II. Conclusion

CBP is adopting as final the interim rule, CBP Dec. 22–26, published in the **Federal Register** (87 FR 80442) on December 30, 2022, without changes.

III. Statutory and Regulatory Requirements

A. Executive Orders 13563, 12866, and 14094

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule is not a "significant regulatory action," under section 3(f) of Executive Order 12866, as amended by Executive Order 14094. Accordingly, the Office of Management and Budget (OMB) has not reviewed this regulation.

B. Regulatory Flexibility Act

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

C. Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this final rule, because this final rule does not trigger any new or revised recordkeeping or reporting.

IV. Signing Authority

This final rule is being issued by CBP in accordance with section 0.1(a)(1) of the CBP regulations (19 CFR 0.1(a)(1)) pertaining to the authority of the Secretary of the Treasury (or the Secretary's delegate) to approve regulations related to certain customs revenue functions. The Senior Official Performing the Duties of the Commissioner Troy A. Miller, having reviewed and approved this document, has delegated the authority to electronically sign the document to the Director (or Acting Director, if applicable) of the Regulations and

Disclosure Law Division of CBP, for purposes of publication in the **Federal Register**.

Amendments to the Regulations

List of Subjects in 19 CFR Part 24

Accounting, Claims, Harbors, Reporting and recordkeeping requirements, Taxes.

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

■ Accordingly, the interim final rule amending part 24 of title 19 of the Code of Federal Regulations (19 CFR part 24), which was published in the **Federal Register** at 87 FR 80442 on December 30, 2022 (CBP Dec. 22–26), is adopted as final, without change.

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

AVIVA R. ARON-DINE,
Acting Assistant Secretary of the
Treasury for Tax Policy.

RECEIPT OF APPLICATION FOR "LEVER-RULE" PROTECTION

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

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

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from Sony Interactive Entertainment Inc. CORPORATION ("Sony") seeking "Lever-Rule" protection for certain video game consoles bearing the federally registered and recorded "PS5" trademark.

FOR FURTHER INFORMATION CONTACT: Rebecca Powell, Intellectual Property Enforcement Branch, Regulations & Rulings, (202) 325–1995.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from Sony seeking "Lever-Rule" protection. Protection is sought against importations of PS5 video game consoles intended for sale in Japan that bear the "PS5" mark (U.S. Trademark Registration No. 6,279,642/CBP Recordation No. TMK 21–00834). In the event that CBP determines that the video game consoles intended for sale in Japan are physically and materially different from the video game consoles authorized for sale in the United States, CBP will publish a notice in the Customs Bulletin, pursuant 19 CFR 133.2 (f), indicating that the above-referenced trademark is entitled to "Lever-Rule" protection with respect to those physically and materially different video game consoles.

Dated: February 29, 2024

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

U.S. Court of Appeals for the Federal Circuit

RKW KLERKS INC., Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee

Appeal No. 2023–1210

Appeal from the United States Court of International Trade in No. 1:20-cv-00001-MAB, Chief Judge Mark A. Barnett.

Decided: March 7, 2024

PATRICK CRAIG REED, Simons & Wiskin, New York, NY, argued for plaintiff-appellant. Also represented by PHILIP YALE SIMONS, JERRY P. WISKIN, Manalapan, NJ.

LUKE MATHERS, Commercial Litigation Branch, Civil Division, United States Department of Justice, New York, NY, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, AIMEE LEE, PATRICIA M. MCCARTHY, JUSTIN REINHART MILLER; FARIHA KABIR, Office of Assistant Chief Counsel, Bureau of Customs and Border Protection, United States Department of Homeland Security, New York, NY.

Before TARANTO, CHEN, and CUNNINGHAM, *Circuit Judges*.

CHEN, *Circuit Judge*.

RKW Klerks Inc. (RKW) appeals the determination of the United States Court of International Trade (CIT) that the United States Customs and Border Protection (Customs) correctly classified RKW's net wrap products in the Harmonized Tariff Schedule of the United States (HTSUS). *RKW Klerks Inc. v. United States*, 592 F. Supp. 3d 1349 (Ct. Int'l Trade 2022) (*CIT Decision*). Because the CIT did not err in determining that RKW's net wraps are not a part of harvesting or other agricultural machinery, we *affirm*.

BACKGROUND

RKW imports two types of net wrap, marketed as "Top Net" and "Rondotex" (collectively, Netwraps). The Netwraps are synthetic fabrics used to wrap round bales of harvested crops released from baling machines such that the bales maintain their compressed structure and are easier to transport. The Netwraps are made up of high-density polyethylene (HDPE) film layers that have been knit on a Raschel machine and wrapped around a cardboard core.

RKW is a subsidiary of RKW SE, a film producer that manufactures materials such as shrink bottle wrap, pallet stretch hoods, gardening and greenhouse films, trash bags, and other packaging solutions.

Neither RKW SE nor any of its subsidiaries produce or sell any harvesting or agricultural machinery.

At issue in this case is the proper classification of the Netwraps in the HTSUS. Customs classified the Netwraps under HTSUS Chapter 60 under subheading 6005.39.00 as "warp knit fabric," dutiable at the rate of 10% *ad valorem*. The relevant portions of this chapter, which covers "knitted or crocheted fabrics," recite:

> Chapter 60. Knitted or Crocheted Fabrics
>
> 6005: Warp knit fabrics (including those made on galloon knitting machines), other than those of headings 6001 and 6004:
>
> 6005.39 Of synthetic fibers:
>
> 6005.39.00 Other, printed

After Customs's initial classification, RKW filed a protest, which was deemed denied. RKW then appealed to the CIT, filing a motion for summary judgment. The government filed a cross-motion for summary judgment. In its motion, RKW contended that the Netwraps should instead be classified under Chapter 84, subheading 8433.90.50 as "parts" of harvesting machinery or alternatively subheading 8436.99.00 as "parts" of other agricultural machinery. The relevant portions of this chapter, which covers "nuclear reactors, boilers, machinery and mechanical appliances; parts thereof," recite:

> Chapter 84. Nuclear Reactors, Boilers, Machinery and Mechanical Appliances; Parts Thereof
>
> 8433: Harvesting or threshing machinery, including straw or fodder balers; grass or hay mowers; machines for cleaning, sorting or grading eggs, fruit or other agricultural produce, other than machinery of heading 8437; parts thereof:
>
> 8433.90 Parts
>
> 8433.90.50 Other
>
> 8436: Other agricultural, horticultural, forestry, poultry-keeping or bee-keeping machinery, including germination plant fitted with mechanical or thermal equipment; poultry incubators and brooders; parts thereof:
>
> 8436.99 Parts
>
> 8436.99.00 Other

The CIT held that the Netwraps are not classifiable as parts of harvesting machinery or as parts of other agricultural machinery and that Customs correctly classified the Netwraps under 6005.39.00. The CIT thus denied RKW's motion for summary judgment and

granted the government's cross-motion for summary judgment. RKW appeals. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

DISCUSSION

We review the CIT's grant of summary judgment as a matter of law, deciding de novo the interpretation of tariff provisions as well as whether there are genuine disputes of material fact. *Millenium Lumber Distrib. Ltd. v. United States*, 558 F.3d 1326, 1328 (Fed. Cir. 2009). "If we determine that there is no dispute of material facts, our review of the classification of the goods collapses into a determination of the proper meaning and scope of the HTSUS terms that, as a matter of statutory construction, is a question of law." *Aves. In Leather, Inc. v. United States*, 317 F.3d 1399, 1402 (Fed. Cir. 2003). Here, the nature and use of the Netwraps are not in dispute and "the resolution of this appeal turns on the determination of the proper scope of the relevant classifications." *Bauerhin Techs. Ltd. P'ship v. United States*, 110 F.3d 774, 776 (Fed. Cir. 1997).

The HTSUS contains General Rules of Interpretation (GRIs) that govern the classification of merchandise. GRI 1 provides, "classification shall be determined according to the terms of the headings and any relative section or chapter notes." When applying GRI 1, "[a] court first construes the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading." *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) (quoting *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998)).

The question before us is whether the Netwraps can be classified under heading 8433 or 8436 as "parts" of a machine, and if so, whether this classification should prevail over an alternative classification under heading 6005 as a warp knit fabric.[1]

There are multiple ways in which an imported item can be considered a "part" of another article. The determination is specific to the particular facts presented in each case. *See Bauerhin*, 110 F.3d at 779. We have held that if an item is "dedicated solely for use with another article and is not a separate and distinct commercial entity," *id*., or is an "integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article," *id*. (quoting *United States v. Willoughby Camera Stores, Inc*., 21 C.C.P.A.

[1] Although RKW also disputes whether the Netwraps can be properly classified under heading 6005, this argument was not raised to the CIT. *See CIT Decision*, 592 F. Supp. 3d at 1356–57. We therefore decline to address the argument on appeal. *In re Google Tech. Holdings LLC*, 980 F.3d 858, 863 (Fed. Cir. 2020) ("[A] position not presented in the tribunal under review will not be considered on appeal in the absence of exceptional circumstances.").

322, 324 (1933)), then the item is a part. *Id*. The Netwraps do not meet either scenario.

I

RKW contends that the Netwraps are dedicated solely for use with baling machines, and therefore they are a part of those machines. Appellant's Br. 12–13. We disagree. As our predecessor court has made clear, "the question of whether the article is a part must be determined from the nature of the article as it is applied to that use." *United States v. Pompeo*, 43 C.C.P.A. 9, 14 (1955). When an item is dedicated solely for use with another article such that the item has no independent function or purpose except to operate in conjunction with the larger article, that item is a "part." *See Bauerhin*, 110 F.3d at 779. Our predecessor court held in *Pompeo* that a supercharger, which is a device used to increase the power of an automobile engine, was a part of an automobile because it was "dedicated solely for use upon automobiles." 43 C.C.P.A. at 14. Likewise, in *Bauerhin*, we held that a canopy for child car seats was a part of the seat because it was dedicated solely for use with the seats. 110 F.3d at 779. In both of these instances, the items at issue were considered parts because they could not serve a function apart from being a component of the larger article.

This is unlike the relationship between the Netwraps and baling machines, at least because Netwraps have additional function outside of the machine. While the record may reflect that "Netwraps are designed specifically for use in the balers," we agree with the CIT that the Netwraps are being used *by* baling machines as inputs and exit baling machines as part of products—wrapped hay bales—that serve a function outside of and independent from the machine. *CIT Decision*, 592 F. Supp. 3d at 1358–60. The CIT reasoned that the Netwraps are "inserted into a chamber in the baler, fed through the baler, and wrapped around the compressed crops, and then remain with the bale once it has been released from the baler—*they do not remain affixed to the balers*. The Netwraps are thus a disposable input and not a part of round baling machines." *Id*. at 1360 (citation omitted). It does not follow that because the Netwraps are *used as inputs* to baling machines, they necessarily are "dedicated solely for use" with and are a part of the baling machines. In fact, as RKW confirmed, the Netwraps serve their key function—maintaining the shape of the compressed hay bale—outside of the machine, rather than when they are being used by the machine. *Id*. at 1359; J.A. 218.

When an item is consumable—like bullets in a gun, staples in a stapler, or film in a camera—although the consumable is used by a

particular machine, the consumable is not dedicated solely for use with the machine (and thus a machine part) simply because it is used exclusively by the machine. In *United States v. American Express Company*, our predecessor court explained that film is not a part of a camera in part because "the function of a camera is to convert an unexposed sensitized film into an exposed film. The exposed film is, therefore, a *product* of the camera, not an integral part of such camera." 29 C.C.P.A. 87, 93 (1941) (emphasis added). Here, the output product of the baling machine is the Netwrap packaged around a hay bale, and the Netwrap is never a part of the baling machine.

RKW analogizes the Netwraps to the products at issue in *National Carloading Corporation v. United States*, 53 C.C.P.A. 57 (1966), and *Mita Copystar America v. United States*, 160 F.3d 710 (Fed. Cir. 1998). However, both of these cases are distinguishable.

In *National Carloading*, our predecessor court held that spark plugs were not classifiable as parts of automobiles. 53 C.C.P.A. at 59, 61. There, the court relied in part on a holding in *Lodge Spark Plug Co v. United States*, 44 Cust. Ct. 448 (1960), that spark plugs were instead classified as a part of an internal combustion engine. RKW relies on *National Carloading*'s discussion of *Lodge Spark Plug* to argue the spark plugs were consumed in their use and needed to be replaced and yet were still considered a part of a combustion engine. Appellant's Br. 21. However, the spark plugs at issue in *Lodge Spark Plug* were not inputs into the combustion engine and did not exit as a functional output each time the engine was run. Unlike the spark plugs, which operated alongside an engine for the entirety of their useful life and only served a function within an engine, the Netwraps here continue to perform their compression function on a hay bale once they have exited the baling machine.

In *Mita Copystar*, we held that toner cartridges for photocopying machines were parts of the photocopier. 160 F.3d at 713. However, at issue in *Mita Copystar* was the toner *cartridge*, which included both the cartridge housing and toner inside. In the earlier-decided case, *Mita Copystar v. United States* (*Mita I*), which concerned only characterization of the toners and associated chemical developers, not the cartridges, we determined that the toners and developers were properly characterized as "chemical preparations for photographic use." 21 F.3d 1079, 1081 n.1, 1084 (Fed. Cir. 1994). The follow-on decision in *Mita Copystar* differed from *Mita I* in that the product at issue in *Mita Copystar* included the cartridge housing that mechanically interacted with the machine to deliver and apply toner to paper. Here, RKW argues that the Netwraps are analogous to the toner and the cardboard core that the Netwraps are wound on is analogous to the

cartridge, and thus the Netwraps are a part of the machine. Appellant's Br. 23. This argument assumes that the cardboard core, like the cartridge housing in *Mita Copystar*, is a part of the machine. However, here, the HTSUS specifically excludes the cardboard core from being a part of an agricultural machine. Note 1(c) to the HTSUS section containing Chapter 84 explicitly excludes "[b]obbins, spools, cops, cones, cores, reels or similar supports of any material" from classification within that section.[2] We therefore find RKW's analogy lacking and do not understand *Mita Copystar* to control the classification of the Netwraps.

Additionally, under the "dedicated solely for use" inquiry, the article cannot be a distinct and separate commercial entity. "[W]here an article 'performs its separate function without loss of any of its essential characteristics,' and, whether separate or joined, is 'complete in itself,' that article is a 'distinct and separate commercial entity' and not a 'part.'" *ABB, Inc. v. United States*, 421 F.3d 1274, 1277 (Fed. Cir. 2005) (quoting *Willoughby Camera*, 21 C.C.P.A. at 325). Here, the Netwraps constitute a complete product even without the baling machine. The record also reflects that the Netwraps and baling machines are sold separately because neither RKW nor its parent company RKW SE sells any kind of harvesting or agricultural machinery. While an item that is sold separately and has an independent commercial demand is not necessarily excluded from being a part, such features of a commercial article are certainly probative. *See Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1354 (Fed. Cir. 2002) (holding roller skating protective gear was not classifiable as "parts" of roller skates and noting that the gear "sell[s] separately from the roller skates"). In light of our foregoing analysis, under the circumstances, we conclude that the Netwraps are commercial articles that are distinct and separate from baling machines.

II

RKW also challenges the CIT's determination that the Netwraps are not integral to the function of the baling machine. We agree with the government that a baling machine is capable of performing its function of collecting crop pieces and compacting those pieces into the shape of a bale without the Netwraps. *See* J.A. 46 (Defendant's Statement of Undisputed Facts ¶ 21), 49 (Plaintiff's Response ¶ 21). Netwraps are no more "integral" to the baler machine's function than the

[2] We also note that here, unlike a printer cartridge and a printer, the cardboard core is not mechanically interacting with any component of the machine to output the bale of hay. *See* J.A. 127, 215–16.

hay the machine compresses into a bale. We thus agree with the CIT that the Netwraps "have their own distinct function—to maintain the shape of the bale *after it has been compressed* and released from the baler." *CIT Decision*, 592 F. Supp. 3d at 1359 (emphasis added). We therefore determine that the Netwraps are not integral to the compression function of the baling machine.

III

RKW does not present any basis for classifying the Netwraps as parts beyond the points discussed above. Because we determine that the Netwraps are not dedicated solely for use with baling machines and are not an integral, constituent, or component part of baling machines, we hold that the Netwraps are not a part of harvesting machinery or other agricultural machinery. We therefore need not address whether classification as a part of a machine under Chapter 84 prevails over a classification as other warp knit fabric under Chapter 60.

CONCLUSION

We have considered RKW's remaining arguments and find them unpersuasive. For the foregoing reasons, we *affirm* the CIT's denial of RKW's motion for summary judgment and grant of the government's cross-motion for summary judgment.

AFFIRMED

U.S. Court of International Trade

Slip Op. 24–22

NEXCO S.A., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN HONEY PRODUCERS ASSOCIATION AND SIOUX HONEY ASSOCIATION, Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 22–00203
PUBLIC VERSION

[Sustaining the Department of Commerce's Remand Redetermination.]

Dated: February 26, 2024

Julie C. Mendoza, *Donald B. Cameron*, *R. Will Planert*, *Brady W. Mills*, *Mary S. Hodgins*, *Eugene Degnan*, *Jordan L. Fleischer*, *Nicholas C. Duffey* and *Stephen A. Morrison*, Morris, Manning & Martin, LLP, of Washington, D.C., argued for plaintiff Nexco, S.A.

Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant United States. Also on the brief were *Patricia M. McCarthy*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Brian M. Boynton*, Principal Deputy Assistant Attorney General for defendant United States. Of Counsel was *Savannah Maxwell*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Melissa M. Brewer and *R. Alan Luberda*, Kelley Drye & Warren LLP, of Washington, D.C., for defendant-intervenors American Honey Producers Association and Sioux Honey Association.

OPINION

Kelly, Judge:

Before the Court is the U.S. Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, Oct. 13, 2023, ECF No. 49 ("Remand Results") in the 2020–2021 antidumping duty investigation in its 2020–2021 less-than-fair-value investigation of raw honey from Argentina. In *Nexco S.A. v. United States* ("*Nexco I*"), this Court remanded to Commerce to reconsider or further explain its decision: (1) to use Nexco, S.A.'s ("Nexco") acquisition costs as a proxy for the beekeepers' costs of production ("COP"); and (2) to compare Nexco's third-country sales and U.S. sales on a monthly basis. 639 F. Supp. 3d 1312, 1324–25 (Ct. Int'l Tr. 2023). On remand, Commerce continues to use Nexco's acquisition costs for the purposes of determining sales below COP, *see* Remand Results at 2, and continues to compare Nexco's U.S. prices with normal values based on Nexco's third-country sales prices on a

monthly basis. *Id.* For the reasons that follow, the Court sustains Commerce's use of acquisition costs as a proxy for beekeepers' COP and its price comparison on a monthly basis.

BACKGROUND

The Court presumes familiarity with the facts of this case as set out in full in the previous opinion ordering remand to Commerce, *see Nexco I*, 639 F. Supp. 3d. at 1314–15, and here summarizes the facts relevant to its review of the Remand Results. On May 18, 2021, Commerce initiated an antidumping duty investigation of raw honey from Argentina. *See Raw Honey from Argentina, Brazil, India, Ukraine, and the Socialist Republic of Vietnam*, 86 Fed. Reg. 26,897 (Dep't Commerce May 18, 2021) (initiation of less-than-fair-value investigation). Nexco, a mandatory respondent, reported early on that it exports, rather than produces, raw honey which it purchases from numerous small suppliers. *See* Nexco's Request for Information Response, A-357–823, PD 89, bar 4135011–01 (June 17, 2021) ("Nexco RFI Resp.").

In its preliminary determination, Commerce found that the beekeepers, not Nexco, were the producers of honey, and issued questionnaires to two of Nexco's beekeepers and one middleman. *See* Decision Memo. for Prelim. Affirm. Determ. in the Less-Than-Fair-Value Investigation of Raw Honey from Argentina at 26, A-357–823, PD 365, bar 4183570–02 (Nov. 17, 2021) ("Prelim. Results"). Commerce determined that the beekeepers were not selling to Nexco below cost, and it would be reasonable to use Nexco's acquisition costs as a "proxy" for the beekeepers' COPs. *Id.* Commerce thus used Nexco's acquisition costs to calculate its COPs, in lieu of the costs of the beekeepers', for the purposes of the sales-below-cost test. *Id.* at 25–27. Commerce also found over 20 percent of Nexco's home market sales were below COP for certain products during the POI and excluded these sales pursuant to 19 U.S.C. § 1677b(b)(1). *Id.* at 28. Furthermore, Commerce determined that certain of Nexco's home market sales of foreign like product were less than five percent of its aggregate sales, and pursuant to 19 U.S.C. § 1677b(a)(1)(C), based normal value on Nexco's sales to Germany.[1] *Id.* at 22.

[1] When Commerce determines that no contemporaneous sales of foreign like product are available, it can base normal value on a respondent's sales of the foreign like product to a third country market as the basis for comparison market sales. *See* 19 U.S.C. § 1677b(a)(1)(C); 19 C.F.R. § 351.404. Here, Commerce used Nexco's sales to a third country, specifically Germany, as the basis for Nexco's normal value. *See* Prelim. Results at 22–23.

On April 14, 2022, Commerce issued its final determination. Commerce calculated a 9.17 percent dumping margin for Nexco,[2] and continued use of the COP methodology from the Preliminary Determination, again using Nexco's acquisition costs as a "reasonable proxy" for the beekeepers' COPs. *See Raw Honey from Argentina: Final Determination of Sales at Less than Fair Value and Final Affirmative Determination of Critical Circumstances*, 87 Fed. Reg. 22,179 (Dep't Commerce April 14, 2022) and accompanying issues and decision memo at 8–13 ("Final Decision Memo."). Commerce also applied its high inflation and alternative cost methodologies to Nexco's COPs. Final Decision Memo. at 15. Commerce found that the alternative costs methodology was appropriate because (1) there was more than 25 percent variance of Nexco's direct material costs during the period of investigation ("POI") in real, inflation-adjusted terms, and (2) Commerce found evidence of a linkage between Nexco's sales prices and material costs. *Id.* at 17; Prelim. Results at 24. Commerce employed its high inflation methodology because Argentina experienced more than 25 percent inflation during the POI. Final Decision Memo. at 17, 26; Prelim. Results at 20. Applying both methodologies, Commerce determined that more than 20 percent of Nexco's home market sales of certain products were made below cost. Prelim. Results at 28. Further determining that these sales did not provide for the recovery of costs during a reasonable period of time, Commerce excluded these sales from its normal value calculations. *Id.*

Nexco moved for judgment on the agency record, challenging Commerce's use of Nexco's acquisition costs as a proxy for the beekeepers' COP; Commerce's use of its alternative cost methodology, which used average production costs on a monthly rather than quarterly basis; and Commerce's determination to compare Nexco's third-country sales and U.S. sales on a monthly basis. *See* [Nexco's] Mot. J. Agency Rec. at 7–46, Nov. 18, 2022, ECF No. 25. This Court sustained Commerce's determination to compare Nexco's cost on a monthly basis for the purposes of sales below cost. *Nexco I*, 639 F. Supp. 3d at 1322. The Court remanded for further consideration or explanation Commerce's decision to use Nexco's acquisition costs as proxy for beekeepers' COP. *Id.* at 1316. In particular, the Court concluded that Commerce merely explained that the acquisition costs were not underinclusive but did not address, in light of record evidence, why they were not overinclusive. *Id.* at 1319. The Court also remanded for further consideration or explanation Commerce's determination that high inflation in Ar-

[2] A dumping margin is "the total amount by which the price charged for the subject merchandise in the home market (the 'normal value') exceeds the price charged in the United States." *Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1342 (Fed. Cir. 2001).

gentina justified its use of monthly comparisons of Nexco's sales with third country sales when the relevant sales were all made in U.S. dollars. *Id.* at 1324.

Commerce filed its Remand Results on October 13, 2023. In the Remand Results, Commerce persists that Nexco's acquisition costs are a reasonable proxy for calculating the beekeepers' COP. Remand Results at 6. Commerce also continues to justify a month-to-month comparison for its high inflation methodology because it is consistent with 19 C.F.R. § 351.414(d)(3) and Commerce's practice. *Id.* at 21–23. Commerce further rejects reliance on quarterly average prices because using quarterly averages "fails to account for the interrelationships of the margin calculations, the potential distortions addressed by high inflation, and the holistic approach of Commerce's high inflation methodology." *Id.* at 21.

On November 13, 2023, Nexco filed its comments on Commerce's Remand Results. [Nexco's] Cmts. on [Remand Results] at 27, Nov. 13, 2023, ECF No. 56 ("Nexco Cmts."). Nexco argues that the Remand Results fail to show that Nexco's acquisition prices are a reasonably proxy for the COP of raw honey and that Commerce's use of month-to-month averaging periods for Nexco's U.S. and third-country sales to Germany is unsupported. *Id.* at 2, 12. That same day, Defendant-Intervenors American Honey Producers Association and Sioux Honey Association ("Defendant-Intervenors") filed their comments supporting Commerce's redetermination, submitting that Commerce's explanations in the Remand Results comply with *Nexco I*, are supported by substantial evidence, and in accordance with law. [Def.-Int.] Cmts. in Supp. [Remand Results] at 1, Nov. 13, 2023, ECF No. 54 ("Def.-Int. Cmts.").

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to Section 516A of the Tariff Act of 1930,[3] as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c) (2018),[4] which grants the Court authority to review actions contesting the final determination in an antidumping duty order. The Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture Co. v. United States*, 968 F. Supp. 2d 1255, 1259 (Ct. Int'l Tr. 2014)

[3] 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.

[4] Further citations to Title 28 of the U.S. Code and Code of Federal Regulations are to the 2018 edition.

(quoting *Nakornthai Strip Mill Pub. Co. v. United States*, 587 F. Supp. 2d 1303, 1306 (Ct. Int'l Trade 2008).

DISCUSSION

On remand, Commerce maintains the reasonableness of its determinations in *Nexco I*. Commerce explains that using acquisition prices for raw honey as a proxy for beekeepers' COP is reasonable because acquisition costs capture all the actual manufacturing costs of the honey Nexco exports. Remand Results at 7–8; 25–29. Further, Commerce explains that month-to-month averaging of Nexco's U.S. sale prices with normal values based on Nexco's third-country sales prices is reasonable because it is permitted by 19 C.F.R. § 351.414(d)(3) and in accordance with department practice. *Id.* at 13–23. Nexco counters that Commerce's Remand Results fail to support either conclusion. Nexco Cmts. at 26. For the following reasons Commerce's use of Nexco's acquisition costs as a proxy for beekeepers' COP and its use of a monthly averaging period for its comparison of normal value based on comparison sales and U.S. prices is sustained.

I. Acquisition Costs

On Remand, Commerce continues to use Nexco's honey acquisition costs as a proxy for the beekeepers' COP, arguing that its choice is reasonable because the use of acquisition costs ensures that all costs have been captured. Remand Results at 6–9; Def.-Int. Cmts. at 3–8. Nexco challenges Commerce's redetermination, arguing that the Remand Results improperly shift Commerce's analysis from beekeepers' COP to Nexco's COP. Nexco Cmts. at 4–9. Nexco also asserts Commerce failed to address record evidence showing beekeeper costs substantially below Nexco's acquisition costs. *Id.* at 9–11.

Commerce imposes an antidumping duty on foreign merchandise that "is being, or is likely to be, sold in the United States at less than its fair value," and results in material injury or threat of injury to a U.S. domestic industry. 19 U.S.C. § 1673. The antidumping duty imposed is "an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." *Id.* To determine whether merchandise is being sold at less than fair value, Commerce compares export price or U.S. price against "normal value." 19 U.S.C. § 1677b(a). Normal value in this context is calculated based on the subject merchandise's home market sales occurring "in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). As a corollary, Commerce may disregard those sales not made "in the ordinary course of trade," including those sold below COP, i.e., dumped merchandise. 19 U.S.C. § 1677b(b)(1); *see* 19 U.S.C. § 1677(15)(A).

> Under the statute, COP is determined by calculating the sum of
>
> > (A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product . . .; (B) an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter. . .; and (C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment.

19 U.S.C. § 1677b(b)(3)(A). Although the statute does not require specific data Commerce must use in its COP calculations, it does prescribe that Commerce should ordinarily do so "based on the records of the exporter or producer of the merchandise,"[5] provided the records are kept pursuant to "generally accepted accounting principles of the exporting country" and reasonably reflect the "costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A).

By practice, when Commerce measures COP for a respondent that sells raw, unprocessed agricultural products, it looks to the producer's COP rather than the respondent's COP. *See, e.g., Final Determination of Sales at Less than Fair Value: Fresh and Chilled Atlantic Salmon from Norway*, 56 Fed. Reg. 7,661, 7,672 (Dep't Commerce Feb. 25, 1991) (using costs of random sample of salmon farmers as a proxy for salmon exporter's COP); *compare Final Determination of Sales at Less than Fair Value: Greenhouse Tomatoes from Canada*, 67 Fed. Reg. 8,781 (Dep't Commerce Feb. 26, 2002) and accompanying issues and decision memo. at Comment 7 (cost of farming tomatoes used as surrogate for tomato exporter's COP), *with Notice of Final Results of Antidumping Duty Administrative Review: Individually Quick Frozen Red Raspberries From Chile*, 70 Fed. Reg. 6,618 (Dep't Commerce Feb. 8, 2015) and accompanying issues and decision memo. at Comment 1 (purchase price from unaffiliated growers used as COP for raspberry processors). Commerce has applied this practice to determine exporter COP for raw honey from Argentina. *See Raw Honey from Argentina: Preliminary Results of Antidumping Duty Adminis-*

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[5] An "exporter or producer," for purposes of the statute, is defined as the exporter, producer, or both "to the extent necessary to accurately calculate the total amount incurred and realized for costs, expenses, and profits." 19 U.S.C. § 1677(28). "Commerce may include the costs, expenses, and profits of each firm in calculating [COP] and constructed value." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 835 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4172 ("SAA").

trative Review, 76 Fed. Reg. 2,655, 2,659 (Dep't Commerce Jan. 14, 2011) (unaffiliated beekeepers' COP used as unprocessed honey exporter's COP).

In its final determination, Commerce explained it departed from its practice of calculating the beekeepers' COP as Nexco's COP. Final Decision Memo. at 8. Because of the fragmented nature of honey producers in Argentina, as well as their unsophisticated operations and record-keeping practices, Commerce could not obtain COP data from beekeepers that held a large percentage of market share, and thus was unable to establish a reliable and complete beekeepers' COP record. *Id*. at 9. Commerce determined that the circumstances warranted using Nexco's acquisition costs as a proxy for the beekeepers' COP. *Id*.[6]

In *Nexco I*, the Court concluded that Commerce had adequately explained its decision to depart from its practice, but remanded to Commerce to reconsider or further explain its decision to use Nexco's raw honey acquisition cost as a proxy for the beekeepers' COP. *Id*. at 6; *see Nexco I*, 639 F. Supp. 3d at 1319. The Court found Commerce's explanation that "use of acquisition costs ensures the capture of all costs, expenses, and profits of the beekeepers and middlemen involved in the production and collection of raw honey" was insufficient to justify its decision to use acquisition costs as a proxy for beekeepers' COP. *Nexco I*, 639 F. Supp. 3d at 1319 (citing Final Decision Memo. at 13). Specifically, the Court concluded that although Commerce explained that its use of Nexco's cost would adequately capture all costs, it failed to address whether the costs used were overinclusive of the actual COP of the raw honey. *Id*. Record evidence indicated that Nexco's acquisition costs were much higher than the costs of its producers. *Id*.; *see Prelim*. Cost Prod. Memo. at attachs. 1, 3, A-357–823, PD 373, CD 646, bar 4184004–01 (Nov. 17, 2021) ("Prelim. Cost Memo."); Final Decision Memo. at 11–13. Thus, the Court concluded Commerce's explanation that the proxy was reasonable due to "a lack of missing costs alone" was unsupported by substantial evidence and required reconsideration or further explanation. *Nexco I*, 639 F. Supp. 3d at 1319.

[6] Rather than selecting a representative number of producers to calculate COP information, Commerce resorted to soliciting COP information from one beekeeper supplier, one middleman, and one middle-man-beekeeper supplier to Nexco to test whether reliance on Nexco's acquisition costs was reasonable. Final Decision Memo. at 12. Commerce chose the suppliers because they had the lowest sales prices to Nexco and therefore the highest risk to sell below their own COP and thus contribute to dumping. *Id.* Commerce found that the beekeepers sold to Nexco above their COP. *Id.* Thus, Commerce proceeded to use Nexco's acquisition costs as a proxy for the beekeepers' COP, explaining that its choice was reasonable because all production and collection costs were captured pursuant to 19 U.S.C. § 1677(28).

Commerce reasserts that use of Nexco's acquisition costs serves as a reasonable proxy for calculating the beekeepers' COP for Nexco's goods subject to investigation. Remand Results at 6. Commerce explains

> [W]hen setting its U.S. prices, Nexco knows what it paid the beekeeper-suppliers, but there is no record evidence to suggest that Nexco knows the costs that its unaffiliated beekeeper-suppliers incurred in producing the raw honey. Even if Nexco were privy to such information, there is no evidence suggesting that Nexco would consider the costs of an unaffiliated party when setting its prices. Thus, the pertinent cost data to Nexco is what is recorded in its own books and records, i.e., the acquisition costs. While Commerce is concerned with whether there are additional costs to be considered if the beekeeper-suppliers sold their product below their COPs, Nexco would not have such concerns. Because Nexco sets the prices to the comparison and U.S. markets, [Commerce] find[s] that using Nexco's own COPs (or constructed values) for those sales is reasonable and does not overstate the costs of the products that were sold by Nexco. Therefore, [Commerce] find[s] that using the raw honey acquisition costs in the calculation of Nexco's COP for the raw honey sold to the United States is not overinclusive of costs from the perspective of the company responsible for setting the U.S.price.

Id. at 9. Thus, Commerce again asserts that its use of Nexco's acquisition costs ensures that all costs are included.

With respect to whether Commerce's determination is unreasonable because the use of Nexco's costs is overinclusive, it is reasonably discernible that Commerce is not concerned with whether the use of acquisition costs is overinclusive in this instance. *Id*. at 9 (explaining the costs are not overinclusive "from the perspective of the company responsible for setting the U.S. price"). Commerce explains that "in calculating dumping margins in an investigation, [Commerce] seek[s] to determine whether the respondent sold the subject merchandise in the United States at a price below fair value." *Id*. at 7. Commerce explains further that when capturing cost of production, Section 1677(28) reveals that Congress intended Commerce to have the "discretion regarding how far beyond the exporter it will examine." *Id*. at 26. Section 1677(28) allows Commerce to use Nexco's production costs and the costs of beekeeper producers "to the extent necessary to accurately calculate the total amount incurred and realized for costs, expenses, and profits" of the raw honey Nexco exports, *see* 19 U.S.C. § 1677(28), and that it can rely upon Nexco's own records to calculate

this value. *See* Remand Results at 25–26; 19 U.S.C. §§ 1677b(b)(3), 1677b(f)(1)(A). Commerce further invokes the SAA's statement that it may include both producers' and exporters' costs. Remand at Results at 25–26 (citing SAA at 4172) ("The SAA clarifies that where different firms perform the production and selling functions, Commerce may include the costs, expenses, and profits of each firm"). Thus, Commerce posits that because it is concerned with ensuring all costs are captured pursuant to Congress' broad grant of discretion to achieve this purpose, and because it reasonably deviates from its practice of using producers' costs, any overinclusiveness of total cost calculation does not affect the reasonableness of its choice of exporter's acquisition cost as a proxy for beekeepers' COP. *Id*. at 25. Because the statute emphasizes determining whether merchandise is sold below fair value, Commerce's determination, in this instance, where it reasonably deviates from its normal practice, is justified.[7] *See* 19 U.S.C. § 1673; 19 U.S.C. § 1677b(b); 19 U.S.C. § 1677(28) ("term 'exporter or producer' includes both the exporter . . . and the producer [of the good] . . . to accurately calculate the total amount incurred and realized for costs, expenses, and profits in connection with production and sale of that merchandise"); SAA at 4172 ("Commerce may include the costs, expenses, and profits of each [producer or exporter] in calculating [COP] and constructed value").

Commerce also addresses the record evidence that Nexco's acquisition costs were much higher than the costs of its producers. *Nexco I*, 639 F. Supp. 3d at 1319; *see* Prelim. Cost Memo. at attachs. 1, 3; Final Decision Memo. at 11–13. Commerce responds that this record evidence does not detract from its determination because these suppliers were chosen "to satisfy the statute's concern that there were no missing costs" and thus because their prices were low. Remand Results at 27. The very limited number of producers represent neither a statistically valid sample nor a meaningful percentage of the population of suppliers. *See* Final Decision Memo. at 10, 12 (explaining that of the over 15,500 beekeeper producers in Argentina, Commerce used data from one direct beekeeper, one middleman and one middleman-beekeeper supplier from Nexco to gauge if Nexco's acquisition costs were a reasonable proxy for beekeepers' COP); Remand Results at 27 (acknowledging that the "curtailed and purposeful selection of two beekeepers" was not a statistically valid sample and did

[7] Nexco argues that 19 U.S.C. § 1677(28) simply clarifies that "exporter or producer" can mean either or both the exporter or producer for the purposes of determining normal value, and does not inform how Commerce should identify COP here. Nexco Cmts. at 7–8. Nexco's argument is unpersuasive. Commerce invokes 19 U.S.C. § 1677(28) not because it identifies how to calculate COP in any given case, but to demonstrate that Congress intended it to have broad discretion in ensuring that all costs were captured.

not cover a meaningful population of Nexco's beekeeper-suppliers). Thus, Commerce acknowledges the evidence, but concludes, given the reason these particular producers were selected, that the evidence does not detract from its conclusion.[8] Remand Results at 27. The Court cannot disagree.

Nexco argues that Commerce has impermissibly shifted its analysis to focus on Nexco's own COP, rather than the COP of the beekeepers. Nexco Cmts. at 4. Commerce has indeed shifted to using Nexco's own costs; but, contrary to Nexco's argument, such a shift in this instance is not impermissible given its reasonableness under the circumstances. In *Nexco I*, the Court already concluded that Commerce justified its departure from its practice of using the producers' costs for COP of unprocessed agricultural goods. 639 F. Supp. 3d at 1318. The only question remaining is whether its use of Nexco's acquisition costs is a reasonable alternative. Commerce's explanation in light of Commerce's objective in identifying costs and the information available to it is reasonable. *See* 19 U.S.C. § 1677(28); 19 U.S.C. §§ 1677b(b)(3), 1677b(f)(1)(A); SAA at 4127; Remand Results at 7–9, 25–29.

II. High Inflation Month-to-Month Comparisons

Commerce continues to compare normal value, based on third country sales prices and U.S. sales prices, on a monthly rather than quarterly basis in its redetermination. Remand Results at 13–23. Commerce maintains that 19 C.F.R. § 351.414(d) does not "strictly circumscribe" its ability to adopt a monthly averaging period. *Id.* at 22. Nonetheless, and to comply with the Remand Order, Commerce explains that month-to-month averaging is consistent with the 19 C.F.R. § 351.414(d) because the normal values and U.S. prices differed significantly over the POI. *Id.* at 21–23. Commerce also argues that the Court should sustain its use of monthly averaging regardless of whether prices differ significantly because its high inflation methodology, which includes month-to-month averaging, is a "holistic" approach to combat the distortions caused by high inflation in dumping calculations more generally. *Id.* at 14–21 (detailing Commerce's high inflation methodology). Nexco argues Commerce has not demonstrated that normal values and U.S. prices differed significantly over the POI warranting month-to-month averaging under 19 C.F.R.

[8] Commerce's sample of the beekeepers with the lowest sale prices to Nexco is reasonable, given its determination that such beekeepers are the most likely to contribute to dumping and the unobtainability of actual beekeepers' COP. *See* Remand Results at 7 ("obtaining a representative population of beekeeper-supplier costs was not feasible, neither for Commerce to administer nor for the respondents to induce participation from multitudes of unaffiliated beekeeper-suppliers with unsophisticated and incomplete record-keeping").

§ 351.414(d)(3), and further adds that Commerce's description of its high inflation methodology fails to demonstrate that monthly averaging is justified. Nexco Cmts. at 12–25.

In an antidumping investigation, Commerce ordinarily determines whether goods are being sold at less than fair value "by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise." 19 U.S.C. § 1677f-1(d)(1)(A)(i). Although the statute is silent as to the time period Commerce should use when comparing normal value and U.S. prices, *see Nexco I*, 639 F. Supp. 3d at 1322 (citing the SAA at 4178), 19 C.F.R. § 351.414(d)(3) favors averaging during the POI. Moreover, the regulation provides:

> When applying the average-to-average method in an investigation, the Secretary normally will calculate weighted averages for the entire period of investigation. However, when normal values, export prices, or constructed export prices differ significantly over the course of the period of investigation, the Secretary may calculate weighted averages for such shorter period as the Secretary deems appropriate.

19 C.F.R. § 351.414(d)(3).

As explained in its Final Results, Commerce employs its high inflation methodology in price comparisons if inflation exceeds 25 percent in the exporting country during the POI. Final Decision Memo. At 18–19.[9] Commerce explains the reasoning behind its high inflation price comparison practice:

> The purpose of the high inflation methodology is to account for the significant change in the value of the prices and costs denominated in the currency of the exporting country, i.e., the inflation in the exporting country. Inflation impacts the nominal value of revenues and expenses in relation to their real value. This change in the nominal value of the revenues and expenses over time may distort Commerce's margin calculations, which

[9] *See Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2020–2021*, 87 Fed. Reg. 34242 (June 6, 2022), and accompanying issues and decision memo. at 10 ("Because Turkey's economy experienced high inflation (i.e., above 25 percent) during the POR, it is Commerce's practice to limit our comparisons of U.S. sale prices to [normal value] during the same month in which the U.S. sale occurred. This methodology minimizes the extent to which calculated dumping margins may be overstated or understated due solely to inflation in the Turkish market" (internal citation omitted)); *see also Notice of Final Determination of Sales at Less than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate Products from Indonesia*, 64 Fed. Reg. 73,164, 73,170 (Dep't Commerce Dec. 29, 1999) (explaining that Commerce "make[s] sales comparisons on a monthly average basis, rather than on a POI average basis, in order to minimize the effects of inflation on our analysis").

> makes the assumption that the relationship between real value and nominal value remains constant through the POI . . . When inflation rises to the level where it is "high," Commerce finds that this assumption is no longer reasonable and must account for the potential for distortions based on the fluctuations of the nominal value of the revenues and expenses in its margin calculations.

Remand Results at 14–15. Previously, the Court concluded Commerce failed to reasonably justify monthly averaging periods where both the U.S. and third-country sales were dominated in U.S. dollars.[10] *Nexco I*, 639 F. Supp. 3d at 1323. The Court found that "Commerce's discretion to choose averaging periods for price comparisons is circumscribed by regulation," *Id.*, and in particular that "Commerce 'may calculate weighted averages for such shorter period as the Secretary deems appropriate' when normal values 'differ significantly over the course of the period of investigation.'" *Id.* (quoting 19 C.F.R. § 351.414(d)(3)).

On remand, Commerce maintains that its month-to-month comparison period for Nexco's third-country sales prices and U.S. sales prices is reasonable, because the regulation does not "strictly circumscribe" Commerce's discretion and, in any event, differing prices justifies its use of monthly averaging. Remand Results at 22. Commerce also argues its high inflation methodology, which includes month-to-month averaging, is a "holistic" methodology combating the distortions caused by high inflation in dumping calculations more generally. *Id.* at 15. Finally, Commerce points to record evidence to demonstrate that prices differed significantly throughout the POI. *Id.* at 33–34.

Commerce rejects the view it may only shorten the average period by demonstrating that prices differ significantly. *Id.* at 22 ("[Commerce does] not agree that, to use shorter averaging periods for U.S. and comparison market prices, Commerce must make a finding that either normal values, export prices, or constructed export prices differ significantly over the course of the POI pursuant to 19 C.F.R. § 351.414(d)(3)"). Commerce argues the use of the word "normally" in the first sentence of 19 C.F.R. § 351.414(d)(3) frees it to deviate and use a shorter period when it chooses, not merely "when normal values, export prices, or constructed export prices differ significantly over the course of the period of investigation" as the second sentence

[10] The Court explained that the administrative precedent referenced by Commerce supported the use of shorter averaging periods when sales were denominated in local currencies, not U.S. dollars. *Nexco I*, 639 F. Supp. 3d at 1323.

would seem to imply. Assuming for the purposes of argument that Commerce has broader discretion to deviate from the normal practice than that which is provided for in the second sentence of the regulation, it would still need to act reasonably. *See Vicentin S.A.I.C. v. United States*, 466 F. Supp. 3d 1227, 1243 (Ct. Int'l Trade 2020) (citing *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003)) (stating that even where Commerce has discretion to develop a methodology, it must still act reasonably). Thus, Commerce must still explain why its use of a shorter averaging period is reasonable. Here, Commerce offers two reasons for deviating from the norm established in its regulations.

First, Commerce explains that high inflation affects margin calculations regardless of whether the currency denomination is in U.S. dollar or Argentine Peso. Remand Results at 35; Def.-Int. Cmts. at 10. Commerce highlights the "holistic" nature of its high inflation methodology in the Remand Results by explaining the need for monthly averaging in a number of antidumping computations involving high inflation. *See* Remand Results at 14–21. For example, Commerce explains that it determines a respondent's COPs under high inflation practice based upon nominal monthly expenses and replacement costs. *Id.* at 15. A respondent's costs are indexed to the last month of the averaging period, aggregated, and then indexed again so that the weighted-average COPs are linked to each month during the POI, which then serve as a core function of Commerce's margin calculations. *Id.* at 16. Commerce's margin calculations and the revenue of a respondent's reported data are also impacted by inflation, which might preclude comparison of nominal price and expense values across a POI if the prices and expenses are denominated in the domestic currency of the exporting country experiencing high inflation. *Id.* Commerce explains that when nominal values are compared, they are made on a monthly basis because the level of inflation is likewise measured monthly, and thus comparable at a single level of inflation. *Id.* Commerce explains that even where sales are not denominated in local currency and not based on constructed value, the comparison sales will still be subject to price adjustments—such as differences-in-merchandise adjustments—based on monthly indexed values using the high inflation methodology. *Id.* at 18. Other price adjustments made either to normal value or U.S. prices will also be made on a monthly basis. *Id.* at 18–19 (listing examples of other adjustments made on monthly bases). Thus, Commerce explains that similar use of a monthly averaging period when comparing U.S. and

third-country market prices promotes accuracy and consistency in its high inflation methodology. *Id.* at 22. Therefore, where Commerce confronts high inflation, it argues, it shifts to this methodology. Commerce contends that the discretion afforded it in 19 C.F.R. § 351.414(d)(3) permits it to resort to month-to-month averaging based solely on its finding of high inflation as part of its "holistic" approach to high inflation. *Id.* at 21–22.

At the same time, Commerce also finds that Nexco's sales prices correlate with Nexco's changing costs due to high peso inflation. *Id.* at 23, 33–35. Consequently, Commerce concludes that Nexco's sales prices in the U.S. and comparison markets differed significantly during the POI. *Id.* at 33. Specifically, Commerce asserts the U.S. dollar gross unit prices reported by Nexco differ over the POI, reflecting changes in both the U.S. and comparison market prices. *Id.* at 33.[11] To support its claim, Commerce cites Defendant-Intervenors' comments, which Commerce asserts its determination that prices differed during the POI warranting monthly averaging.[12] *Id.* (citing Def.-Int. Cmts. at 7–8). Moreover, Defendant-Intervenors' expound upon the same findings in their comments.[13] Def.-Int. Cmts. at 8 (citing Pet. Reb. Br. at attach. 2). Because Commerce's second reason for using month-to-month averaging is specifically articulated in its regulations, it is a sufficient basis for Commerce's redetermination to be sustained. The Court need not reach the question of whether triggering of Commerce's high inflation methodology, without more, is sufficient for it to adopt a month-to-month averaging period when all sales are

[11] Commerce notes Nexco's reported prices "[[ ]]." Remand Results at 33.

[12] Specifically, Commerce asserts:

> Nexco's product with the largest sales volume sold in the U.S. market an [[ ]] over the POI, while Nexco's product with the largest sales volume sold in the comparison market saw an [[ ]] over the POI.

Remand Results at 33 (citing Def.-Int. Cmts. at 7–8).

[13] Defendant-Intervenors explain that "[i]n aggregate (i.e. all sales), Nexco's [U.S. dollar]-denominated U.S. prices [[ ]] by [[ ]] percent over the POI and its [U.S. dollar]-denominated comparison market prices [[ ]] by [[ ]] percent over the POI." Def.-Int. Cmts. at 8 (citing Petitioners' Rebuttal Brief at attach. 2, PD 426, CD 804, bar code 4207373–01 (Jan. 31, 2022) ("Pet. Reb. Br.")).

denominated in U.S. dollars, rather than local currency.[14] Therefore, Commerce has explained how its choice to use a monthly averaging period for U.S. and comparison market prices is reasonable. Accordingly, the Remand Results are sustained.

CONCLUSION

Commerce has provided a reasonable explanation for its use of Nexco's acquisition costs as a proxy for beekeepers' COP and its decision to use a monthly averaging period for its normal value comparisons. In light of its explanation, and consistent with *Nexco I*, 639 F. Supp. 3d 1312, Commerce's remand redetermination is sustained. Judgment will enter accordingly.

Dated: February 26, 2024
New York, New York

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

[14] Defendant-Intervenors explain in a practical sense that in all likelihood prices will necessarily differ significantly where there is hyper-inflation, regardless of whether sales are denominated in local currency:

> [I]f an Argentine company kept its [U.S. dollar]-denominated selling prices constant in September and October 2020, then its ARS-denominated sales revenue would have increased by 2.6860 percent from September to October due to the devaluation of the ARS with respect to the [U.S. dollars] based on the record data for exchange rates. Petitioners also explained that by contrast, the Argentine company's costs would have increased by 6.0455 percent from September to October based on the record data for Argentine due to inflation. This means that in order to maintain the same profitability level in September and October, the Argentine company would have to increase its [U.S. dollar]-denominated selling prices by 3.2716 percent from September to October, which is an annualized increase of 47.1536 percent. Consequently, the effect of high inflation on a company's costs puts inflationary pressure on its selling prices, even when those selling prices are denominated in [U.S. dollars].

Def.-Int. Cmts. at 11 n.5 (citing Pet. Reb. Br. at 52–54, attach. 1) (internal citations omitted).

Slip Op. 24–24

NINESTAR CORPORATION, ZHUHAI NINESTAR INFORMATION TECHNOLOGY CO., LTD., ZHUHAI PANTUM ELECTRONICS CO., LTD., ZHUHAI APEX MICROELECTRONICS CO., LTD., GEEHY SEMICONDUCTOR CO., LTD., ZHUHAI G&G DIGITAL TECHNOLOGY CO., LTD., ZHUHAI SEINE PRINTING TECHNOLOGY CO., LTD., and ZHUHAI NINESTAR MANAGEMENT CO., LTD., Plaintiffs, v. UNITED STATES OF AMERICA; DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; FORCED LABOR ENFORCEMENT TASK FORCE; ALEJANDRO MAYORKAS, in his official capacity as the Secretary of the Department of Homeland Security; TROY A. MILLER, in his official capacity as the Senior Official Performing the Duties of the Commissioner for U.S. Customs and Border Protection; and ROBERT SILVERS, in his official capacity as Under Secretary for Office of Strategy, Policy, and Plans and Chair of the Forced Labor Enforcement Task Force, Defendants.

Before: Gary S. Katzmann, Judge
Court No. 23–00182
PUBLIC VERSION

[Plaintiffs are not required to exhaust their administrative remedies under the particular facts of this case. Plaintiffs' Motion for Preliminary Injunction is denied.]

Dated: February 27, 2024

Gordon D. Todd, Sidley Austin LLP, of Washington, D.C., argued for Plaintiffs Ninestar Corporation, Zhuhai Ninestar Information Technology Co., Ltd., Zhuhai Pantum Electronics Co., Ltd., Zhuhai Apex Microelectronics Co., Ltd., Geehy Semiconductor Co., Ltd., Zhuhai G&G Digital Technology Co., Ltd., Zhuhai Seine Printing Technology Co., Ltd., and Zhuhai Ninestar Management Co., Ltd. With him on the briefs were *Cody M. Akins*, *Michael E. Murphy*, and *Michael E. Borden*.

Monica P. Triana, Senior Trial Counsel, 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, *Claudia Burke*, Deputy Director, *Justin R. Miller*, Attorney-In-Charge International Trade Field Office, *Guy Eddon*, Trial Attorney, and Luke Mathers, Trial Attorney.

OPINION

Katzmann, Judge:

Plaintiffs Ninestar Corporation and its corporate affiliates (collectively, "Ninestar") are Chinese manufacturers and sellers of laser printers and printer-related products to U.S. companies and consumers. Defendants the United States and various federal agencies and officials determined last year that Ninestar was working with the government of the Xinjiang Uyghur Autonomous Region ("XUAR") of

the People's Republic of China ("China") to recruit, transport, transfer, harbor or receive forced labor or persecuted ethnic minorities out of the XUAR. After such determination by the interagency Forced Labor Enforcement Task Force ("FLETF"), an embargo against Ninestar immediately entered into force under the Uyghur Forced Labor Prevention Act ("UFLPA"). *See* Pub. L. No. 117–78, 135 Stat. 1525 (2021); *see also Notice Regarding the Uyghur Forced Labor Prevention Act Entity List*, 88 Fed. Reg. 38080, 38082 (Dep't Homeland Sec. June 12, 2023) ("*Listing Decision*"). Now before the court is Ninestar's Motion for Preliminary Injunction staying the Listing Decision. The motion is denied, and the embargo remains in force.

Following reports of forced labor and ongoing genocide in the XUAR, Congress passed and the President signed into law the UFLPA.[1] Per the text of the statute, the UFLPA is designed to "strengthen the prohibition against the importation of goods made with forced labor, including by ensuring that the Government of the People's Republic of China does not undermine the effective enforcement of section 307 of the Tariff Act of 1930." Pub. L. 177–78, § 1(1), 135 Stat. at 1525. Section 307 of the Tariff Act, as amended, moreover, prohibits the importation of merchandise created wholly or in part by forced labor. *See* Tariff Act of 1930, Pub. L. 71–361, § 307, 46 Stat. 590, 689–90 (as amended at 19 U.S.C. § 1307) ("Section 307"). The FLETF's addition of Ninestar to the Entity List of the UFLPA presumptively prohibits, under section 307, the importation into the United States of any goods produced by Ninestar. *See* UFLPA § 3(a), 135 Stat. at 1529. The FLETF also provided a procedure for listed entities to request removal. *See Listing Decision*, 88 Fed. Reg. at 38082.

Without first availing itself of the FLETF's removal procedure, Ninestar filed this action before the U.S. Court of International Trade ("CIT") requesting that the court vacate the Listing Decision and lift the embargo because the Listing Decision violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), on four counts: (1) the FLETF failed to adequately explain its decision; (2) the FLETF's determination is unsupported by substantial evidence; (3) the FLETF

[1] The State Department has characterized the atrocities in the XUAR as genocide. *See* Press Release, A. Blinken, Sec'y of State, The Signing of the Uyghur Forced Labor Prevention Act (Dec. 23, 2021), https://www.state.gov/the-signing-of-the-uyghur-forced-labor-prevention-act/ ("[The President] today signed the [UFLPA], underscoring the United States' commitment to combatting forced labor, including in the context of the ongoing genocide in Xinjiang."); Press Release, M. Pompeo, Sec'y of State, Determination of the Secretary of State on Atrocities in Xinjiang (Jan. 19, 2021), https://2017–2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang/ (concluding that the atrocities in the XUAR constituted "genocide against the predominantly Muslim Uyghurs and other ethnic and religious minority groups in Xinjiang" and that "this genocide is ongoing").

exceeded its authority by using a burden of proof of reasonable cause rather than preponderance of the evidence; and (4) the FLETF's determination amounted to an impermissibly retroactive application of the UFLPA. *See* Am. Compl. ¶¶ 61–79, Dec. 6, 2023, ECF No. 69. Before the court now, however, is Ninestar's Motion for Preliminary Injunction—the first of its kind since the UFLPA was signed in 2021—requesting the court to (1) stay the FLETF's decision to add Ninestar to the Entity List and (2) prevent the Government from taking any action predicated on the Listing Decision against the importation of Ninestar's goods. *See* Mot. for Prelim. Inj., Aug. 22, 2023, ECF No. 9 ("PI Mot."). In a prior decision, the court concluded that Ninestar was likely to establish the CIT's exclusive subject matter jurisdiction over this action under 28 U.S.C. § 1581(i)(1) because the UFLPA's import prohibition is an embargo. *See Ninestar Corp. v. United States* ("*Ninestar I*"), 47 CIT __, __, 666 F. Supp. 3d 1351, 1363 (2023), ECF No. 58.

The court first exercises its discretion under 28 U.S.C. § 2637(d) to determine that the administrative exhaustion requirement is not appropriate in this case due to the conclusory nature of the FLETF's initial *Listing Decision*. Turning next to Ninestar's Motion for Preliminary Injunction, the court concludes that Ninestar (1) is not likely to succeed on Counts One, Three, and Four of the Amended Complaint, (2) has failed to establish irreparable harm, and (3) does not prevail in the balancing of equities and public interest. The Motion for Preliminary Injunction is therefore denied. The embargo is still in force, meaning that Ninestar's merchandise continues to be prohibited from entering the United States.

BACKGROUND

I. Legal Background

Federal law has long prohibited the importation of foreign goods made by forced labor. Section 307 states in relevant part:

> All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by . . . forced labor . . . shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited . . . .

19 U.S.C. § 1307. Section 307 further defines forced labor as "all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily" and includes forced child labor. *Id.*

In the United States–Mexico–Canada Agreement Implementation Act of 2020, Congress directed the President to establish a Forced Labor Enforcement Task Force, referred to as the FLETF, "to monitor United States enforcement of the prohibition under section 307 of the Tariff Act of 1930." Pub L. No. 116–113, § 741(a), 134 Stat. 11, 88 (2020) (codified at 19 U.S.C. § 4681). Per the statute and the President's subsequent Executive Order, the FLETF is chaired by the Secretary of the Department of Homeland Security ("DHS") and comprises seven member agencies: DHS, the U.S. Trade Representative ("USTR"), and the Departments of Justice, Labor, State, Treasury, and Commerce. *See* 19 U.S.C. § 4681(b)(1); Exec. Order No. 13923 § 2, 85 Fed. Reg. 30587, 30587 (May 20, 2020).[2] The FLETF also includes six observer agencies: the Departments of Energy and Agriculture, the U.S. Agency for International Development, the National Security Council, U.S. Customs and Border Protection ("Customs"), and the U.S. Immigration and Customs Enforcement Office of Homeland Security Investigations. *Listing Decision*, 88 Fed. Reg. at 38081.

In January 2021, the State Department determined that China was committing "genocide against the predominantly Muslim Uyghurs and other ethnic and religious minority groups in Xinjiang" and that "this genocide is ongoing," a characterization that the State Department has repeatedly maintained. *Supra* note 1. "Other human rights abuses in Xinjiang involve discriminatory surveillance, ethno-racial profiling measures designed to subjugate and exploit minority populations in internment camps and, since at least 2017, the use of widespread state-sponsored forced labor." DHS, *Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China* 10 (2022) (footnote omitted) ("*FLETF Strategy*").[3] According to the FLETF, forced labor, either through state-run internment camps or labor transfer programs, is a key part of the Chinese government's repression of Uyghurs and other minorities in Xinjiang:

> Forced labor is a central tactic used for repression in state-run internment camps. The PRC has implemented labor programs across the country with a stated objective of eradicating poverty. However, use of such programs in Xinjiang and the use of labor

[2] DHS, as the FLETF Chair, may invite representatives from other agencies to participate as either members or observers. *See* Executive Order No. 13923 § 2. DHS invited the Department of Commerce ("Commerce") to join the FLETF as a member. *See Listing Decision*, 88 Fed. Reg. at 38081 n.1.

[3] Available at https://www.dhs.gov/sites/default/files/2022–06/22_0617_fletf_uflpa-strategy.pdf. The court may take note of matters of public record, including public agency reports. *See, e.g.*, *Sebastian v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

> sourced from persecuted groups carries a particularly high-risk of forced labor for members of ethnic and religious minority groups. . . .
>
> The PRC government administers labor programs that target Uyghurs, Kazakhs, Kyrgyz, Tibetans, and members of other persecuted groups. Purported "poverty alleviation," "pairing assistance," and "labor transfer" programs can include discriminatory social control, pervasive surveillance, and large-scale internment. An official PRC government report published in September 2020 indicated that the government reports to have placed over two and a half million workers at farms and factories in Xinjiang and across the PRC. Research has since shown that workers in these schemes are largely members of ethnic minorities who are subjected to systemic oppression through forced labor and do not offer themselves voluntarily.

Id. at 18 (footnotes omitted).

As has been noted, in December 2021, Congress passed and the President signed into law the UFLPA, Pub. L. No. 117–78, 135 Stat. 1525. The UFLPA declared that it is the policy of the United States to "strengthen the prohibition against the importation of goods made with forced labor, including by ensuring that the Government of the People's Republic of China does not undermine the effective enforcement of section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307)." UFLPA § 1(1), 135 Stat. at 1525. Other aims that Congress identified included "to lead the international community in ending forced labor practices . . . by stopping the importation of any goods made with forced labor"; "to actively work to prevent, publicly denounce, and end human trafficking including with respect to forced labor"; "to regard the prevention of atrocities as it is in the national interest of the United States, including efforts to prevent torture, enforced disappearances, severe deprivation of liberty, including mass internment, arbitrary detention, and widespread and systematic use of forced labor, and persecution targeting any identifiable ethnic or religious group"; and "to address gross violations of human rights in the Xinjiang Uyghur Autonomous Region." *Id.* § 1(2), (4)–(6), 135 Stat. at 1525.

The UFLPA implements those policies in two main parts. First, the UFLPA requires that the FLETF "develop a strategy for supporting enforcement of Section 307 of the Tariff Act of 1930 (19 U.S.C. 1307) to prevent the importation into the United States of goods mined, produced, or manufactured wholly or in part with forced labor in the People's Republic of China." *Id.* § 2(c), 135 Stat. at 1526. The FLETF

published this strategy in June 2022. *See FLETF Strategy*, *supra*. As part of that strategy, the FLETF must create and update four statutory sub-lists:

> (i) a list of entities in the Xinjiang Uyghur Autonomous Region that mine, produce, or manufacture wholly or in part any goods, wares, articles and merchandise with forced labor;
>
> (ii) a list of entities working with the government of the Xinjiang Uyghur Autonomous Region to recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of the Xinjiang Uyghur Autonomous Region;
>
> . . .
>
> (iv) a list of entities that exported products described in clause (iii) from the People's Republic of China into the United States; [and]
>
> (v) a list of facilities and entities, including the Xinjiang Production and Construction Corps, that source material from the Xinjiang Uyghur Autonomous Region or from persons working with the government of the Xinjiang Uyghur Autonomous Region or the Xinjiang Production and Construction Corps for purposes of the "poverty alleviation" program or the "pairing-assistance" program or any other government labor scheme that uses forced labor . . . .

UFLPA § 2(d)(2)(B), 135 Stat. at 1527; *see also FLETF Strategy*, *supra*, at 22–25. The UFLPA Entity List refers to "a consolidated register of the above four lists." *Listing Decision*, 88 Fed. Reg. at 38081. The statute requires that the FLETF update the strategy annually. *See* UFLPA, Pub. L. 177–78, § 2(e)(2), 135 Stat. at 1527; *see also FLETF Strategy*, *supra*, at 58 ("The FLETF also intends to update the UFLPA Entity List multiple times per year.").[4] An entity added to the Entity List may petition the FLETF for its removal. *See, e.g.*, *Listing Decision*, 88 Fed. Reg. at 38082.

Second, the UFLPA requires Customs to apply a rebuttable presumption that the imports of merchandise produced by any entity on the Entity List are prohibited under section 307. The statute reads in relevant part:

[4] Moreover, "[a]ny FLETF member agency may submit a recommendation to the FLETF Chair to add an entity to the UFLPA Entity List. Following review of the recommendation by the FLETF member agencies, the decision to add an entity to the UFLPA Entity List will be made by majority vote of the FLETF member agencies." *Listing Decision*, 88 Fed. Reg. at 38082.

> (a) In General.—[Customs] shall, except as provided by subsection (b), apply a presumption that, with respect to any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People's Republic of China or produced by an entity on a list required by clause (i), (ii), (iv) or (v) of section 2(d)(2)(B)—
>
> (1) the importation of such goods, wares, articles, and merchandise is prohibited under section 307 of the Tariff Act of 1930 (19 U.S.C. 1307); and
>
> (2) such goods, wares, articles, and merchandise are not entitled to entry at any of the ports of the United States.

UFLPA § 3(a), 135 Stat. at 1529. Customs applies the rebuttable presumption requirement of the UFLPA through its general authority to examine and decide whether to detain, release, exclude, or seize merchandise under 19 U.S.C. § 1499 and associated regulations. *See* Customs, *Uyghur Forced Labor Prevention Act: U.S. Customs and Border Protection Operational Guidance for Importers* 7 (2022) ("*Operational Guidance*").[5] Customs "will provide importers with notice, in accordance with the customs laws, when enforcement actions are taken on their shipments." *Id.* Until that presumption is rebutted, the UFLPA's import prohibition in § 3(a) imposes an embargo. *See Ninestar I*, 666 F. Supp. 3d at 1363.

An affected importer may rebut the UFLPA's presumption if it complies with relevant agency regulations, orders, and guidance, and if it demonstrates the admissibility of the merchandise by clear and convincing evidence. Specifically, the UFLPA requires Customs to enforce the presumptive embargo unless it determines:

> (1) that the importer of record has—
>
> (A) fully complied with [guidance in the *FLETF Strategy*] and any regulations issued to implement that guidance; and
>
> (B) completely and substantively responded to all inquiries for information submitted by the Commissioner to ascertain whether the goods were mined, produced, or manufactured wholly or in part with forced labor; and
>
> (2) by clear and convincing evidence, that the good, ware, article, or merchandise was not mined, produced, or manufactured wholly or in part by forced labor.

[5] Available at https://www.cbp.gov/sites/default/files/assets/documents/2022-Jun/CBP_Guidance _for_Importers_for_UFLPA_13_June_2022.pdf.

Id. § 3(b), 135 Stat. at 1529. Customs has a process for requesting an exception to the rebuttable presumption and for furnishing information that would meet the UFLPA's admissibility requirements. *See Operational Guidance*, *supra*, at 9–10. And the *FLETF Strategy* contains detailed guidance on how importers may demonstrate the admissibility of their merchandise. *Supra*, at 40–51. If Customs decides to exclude the merchandise after the importer's attempted showing of admissibility, the importer may challenge that decision by filing a protest under 19 U.S.C. § 1514(a)(4) and 19 C.F.R. part 174. *See Operational Guidance*, *supra*, at 7–8.

II. Factual Background and Procedural History

As has been noted, Plaintiff Ninestar Corporation is a Chinese company that manufactures and sells laser printers, integrated circuit chips, and printer consumables such as toner and inkjet cartridges. Am. Compl. ¶¶ 8, 35–36. All other plaintiffs in this case are corporate affiliates of Ninestar Corporation. *Id.* ¶¶ 9–15. Ninestar manufactures and sells, or supports the manufacture and sale of, products directly and indirectly to numerous U.S.-based companies and customers. *Id.* ¶¶ 36–37. According to the Amended Complaint, prior to June 2023, Customs did not communicate to Ninestar that any of Ninestar's products violate section 307. *See id.* ¶ 39.

On June 9, 2023, the FLETF announced that Ninestar would be added to the UFLPA's Entity List.[6] Three days later on June 12, DHS, on behalf of the FLETF, published an updated Entity List in the *Federal Register* (the "Listing Decision"). *See Listing Decision*, 88 Fed. Reg. at 38082. Specifically, Ninestar was added to the second sub-list created pursuant to § 2(d)(2)(B)(ii) of the UFLPA, which contains the entities determined to be working with the XUAR government to "recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of the Xinjiang Uyghur Autonomous Region." *See id.* Ninestar alleges that the listing was accompanied by no further explanation. Ninestar received public notice of a process to submit to the FLETF a request for removal from the Entity List, *see id.*, which Ninestar did not submit, *see* Am. Compl. ¶ 47.

On August 22, 2023, Ninestar filed the initial Complaint initiating this action before the CIT. *See id.* Ninestar alleged that it was "unaware of any facts relating to their respective businesses or otherwise supporting such an allegation," and that "[w]ithout learning the

[6] *See* Press Release, Dep't of Homeland Sec., DHS to Ban Imports from Two Additional PRC-Based Companies as Part of Its Enforcement of the Uyghur Forced Labor Prevention Act (UFLPA) (June 9, 2023), https://www.dhs.gov/news/2023/06/09/dhs-ban-imports-two-additional-prc-based-companies-part-its-enforcement-uyghur.

bases upon which Defendants added Plaintiffs to the UFLPA Entity List, Plaintiffs [were] unable meaningfully to seek removal from the list or otherwise challenge this final agency action." *See* Compl. ¶ 45. The Complaint pleaded one cause of action for arbitrary and capricious agency action violating the APA, 5 U.S.C. § 706(2)(A), for failure to provide "*any* explanation[] for adding Plaintiffs to the UFLPA Entity List." Compl. ¶ 62. Ninestar further asserted that it was not "able to seek relief under the APA challenging the action as contrary to the evidence in the administrative record, as Plaintiffs know neither the bases for the charge, nor the contents of the record." *Id.* ¶ 46. "After filing," Ninestar continued, "Plaintiffs will seek the record and, when appropriate, seek additional relief." *Id.*

On the same day, Ninestar also filed a motion for preliminary injunction requesting that the court (1) stay the Listing Decision and (2) prevent the Government from taking any action against the importation of Ninestar's goods predicated on the Listing Decision. *See* PI Mot. at 2; *see also* Pls.' Mem. of Law in Support of Mot. for Prelim. Inj., Aug. 22, 2023, ECF No. 9 ("Pls.' Br."). On October 3, 2023, the Government responded in opposition to Ninestar's Motion for Preliminary Injunction and moved to dismiss the case. *See* Defs.' Mot. to Dismiss & Opp. to Pls.' Mot. for a Prelim. Inj., Oct. 3, 2023, ECF No. 24 ("Defs.' Resp."). Ninestar filed a reply in support of their motion on October 13, 2023. *See* Pls.' Reply, Oct. 13, 2023, ECF No. 30. The Government also filed a confidential administrative record that Ninestar's counsel—but not Ninestar the client—could review under the terms of an amended Judicial Protective Order. *See* Conf. Admin. R., Oct. 24, 2023, ECF No. 41; Am. Protective Order, Oct. 24, 2023, ECF No. 40. Certain portions of the Confidential Administrative Record are redacted, even to Ninestar's counsel, and the court ordered a privilege log documenting the Government's reasons for redaction. *See* Privilege Redaction Log, Oct. 26, 2023, ECF No. 43. Additionally, pursuant to 28 U.S.C. § 2635(d)(2)[7] and USCIT Administrative Order No. 21–01, the court ordered the Government to file paper copies of the fully unredacted administrative record and to move to treat such

[7] "The agency shall identify and transmit under seal to the clerk of the court any document, comment, or other information that was obtained on a confidential basis and that is required to be transmitted to the clerk under paragraph (1) of this subsection. . . . The confidential or *privileged* status of such material shall be preserved in the civil action, but the court may examine such material in camera and may make such material available under such terms and conditions as the court may order." *Id.* § 2635(d)(2) (emphasis added).

submissions as highly sensitive documents.[8] *See* Order, Oct. 27, 2023, ECF No. 44. The Government so moved, *see* Mot. to Treat Subm. as Highly Sensitive Doc., Oct. 30, 2023, ECF No. 45, and the court granted that motion, *see* Order, Oct. 30, 2023, ECF No. 49. The paper copies of the fully unredacted administrative record are now stored securely with the court for *in camera* review.

A preliminary injunction hearing was initially scheduled for November 2, 2023, but was ultimately postponed to December 7, 2023, because the parties had been exploring the possibility of negotiating a process for the FLETF's consideration of a request of removal from the Entity List. *See* Joint Status Report & Mot. to Modify the Schedule at 2, Nov. 13, 2023, ECF No. 55; Order, Nov. 15, 2023, ECF No. 56. On November 30, 2023, the court issued an opinion holding that Ninestar was likely to establish the CIT's exclusive subject matter jurisdiction over this action under 28 U.S.C. § 1581(i)(1) because the UFLPA is a law providing for embargoes. *See Ninestar I*, 666 F. Supp. 3d at 1363.

On December 4, 2023, the parties filed a joint status report indicating that the parties were unable to negotiate an out-of-court process. *See* Joint Status Report, Dec. 4, 2023, ECF No. 59. On the same day, Ninestar filed a motion to unseal and unredact the administrative record. *See* Mot. to Unseal & Unredact Admin. R., Dec. 4, 2023, ECF No. 60. The court held a status conference on the following day to discuss the next steps in the litigation, *see* Videoconference, Dec. 5, 2023, ECF No. 63, after which Ninestar moved to amend the Complaint to add three new causes of action, *see* Mot. for Leave to File Am. Compl., Dec. 6, 2023, ECF No. 64. The court granted the motion the next day and deemed the Amended Complaint as filed. *See* Order, Dec. 6, 2023, ECF No. 68; *see also* Am. Compl. Specifically, Count 2 of the Amended Complaint alleges arbitrary and capricious agency action as unsupported by substantial evidence; Count 3 alleges agency action in excess of statutory authority for FLETF's use of a burden of proof that is below preponderance of the evidence; and Count 4 alleges agency action in excess of statutory authority for having applied the UFLPA's provisions retroactively. *See* Am. Compl. ¶¶ 69–79.

On December 8, the court issued a scheduling order. *See* Order, Dec. 8, 2023, ECF No. 77. Specifically, the court ordered supplemental briefing for Ninestar's Motion for Preliminary Injunction in light of

[8] Per USCIT Administrative Order 21–01, highly sensitive documents "are limited to documents containing information that has such a high level of sensitivity as to present a clear and compelling need to avoid filing on the existing CM/ECF system, such as certain privileged information or information the release of which could pose a danger of physical harm to any person." Admin. Order 21–01, at 1. Due to their sensitive nature, such documents "must be filed in paper format" and "may not be uploaded to CM/ECF." *Id.* at 2.

the newly Amended Complaint; denied the Government's Motion to Dismiss as moot without prejudice to renewal; and set due dates for briefs related to Ninestar's Motion to Unredact and Unseal, the forthcoming Motion for Judgment on the Agency Record, and other motions concerning the record. *See id.* at 2. Ninestar filed its supplemental brief in support of the Motion for Preliminary Injunction on December 15, 2023. *See* Pls.' Supp. Br., Dec. 15, 2023, ECF No. 78. On December 22, 2023, the Government did not renew their motion to dismiss and instead filed an answer to Ninestar's Amended Complaint. *See* Answer, Dec. 22, 2023, ECF No. 81. On January 3, 2024, the Government filed a supplemental response in opposition to Ninestar's Motion for Preliminary Injunction, *see* Defs.' Supp. Resp., Jan. 3, 2024, ECF No. 82, to which Ninestar replied on January 10, 2024, *see* Pls.' Supp. Reply, Jan. 10, 2023, ECF No. 89. Regarding the Motion to Unseal and Unredact the Administrative Record, the Government filed its response on January 8, 2024, *see* Defs.' Resp. in Opp. to Mot. to Unseal & Unredact, Jan. 8, 2024, ECF No. 85, and Ninestar replied on January 15, 2024, *see* Pls.' Reply in Supp. of Mot. to Unseal & Unredact, Jan. 15, 2024, ECF No. 92.[9]

On January 18, 2023, the court held a hearing on Ninestar's Motion for Preliminary Injunction and Ninestar's Motion to Unredact and Unseal the Administrative Record that was open in part and closed in part. *See* Hearing, Jan. 18, 2023, ECF No. 99. The next day, the Government filed a new version of the Confidential Administrative Record that does not contain clerical errors; this is the version that the court uses as the authoritative record for resolving the instant motion. *See* Conf. Admin. R., Jan. 19, 2023, ECF No. 100 ("CAR"). The court also requested that the parties file letters recounting all authorities cited at the hearing and invited the parties to make post-hearing submissions; all parties made such filings on January 25, 2024. *See* Pls.' Post-Hearing Subm., Jan. 25, 2024, ECF No. 104; Pls.' Post-Hearing Letter, Jan. 25, 2024, ECF No. 103; Defs.' Post-Hearing Subm., Jan. 25, 2024, ECF No. 106; Defs.' Post-Hearing Subm., Jan.

[9] In the Government's response to the Motion to Unseal, the Government agreed to the disclosure of certain portions of the Confidential Administrative Record to Ninestar the client. *See* Defs.' Resp. in Opp. to Mot. to Unseal & Unredact at 3. On January 9, 2024, Ninestar filed a motion seeking immediate leave for such disclosure. *See* Mot. for Leave to Disclose Non-Conf. Info., Jan. 9, 2024, ECF No. 88. The court denied the motion as premature and requested proposed modifications to the existing Judicial Protective Order. *See* Paperless Order, Jan. 10, 2024, ECF No. 90. Upon review of the parties' proposed modifications, *see* Resps. to Order, Jan. 16, 2024, ECF Nos. 94–95, and the Government's modification of the Confidential Administrative Record to indicate which portions of the record may be disclosed with Ninestar the client, *see* Conf. Admin. R., Jan. 16, 2024, ECF No. 96, the court adopted the Government's modifications and ordered that Ninestar's counsel could share certain confidential information with its client. *See* Order, Jan. 16, 2024, ECF No. 97.

25, 2024, ECF No. 107. Ninestar has also filed its Motion for Judgment on the Agency Record, Jan. 31, 2024, ECF No. 109, and its Motion to Complete or Supplement the Administrative Record, Jan. 31, 2024, ECF No. 108, neither of which is ripe for the court's decision at this time.

With the parties' extensive filings in hand, the court resolves only Ninestar's Motion for Preliminary Injunction in this opinion. The court will decide Ninestar's Motion to Unredact and Unseal the Administrative Record at a future date.

JURISDICTION AND LEGAL STANDARD

The CIT has exclusive jurisdiction over this action under 28 U.S.C. § 1581(i) because the UFLPA is a "law . . . providing for . . . embargoes." *Ninestar I*, 666 F. Supp. 3d at 1363 (quoting 28 U.S.C. § 1581(i)(1)). The statutory procedures associated with CIT jurisdiction apply here. *See* 28 U.S.C. ch. 169.

Actions falling within the CIT's "residual" jurisdiction as provided under § 1581(i) are subject to the standard of review set forth in the APA, 5 U.S.C. § 706. *See* 28 U.S.C. § 2640(e); *Humane Soc'y of U.S. v. Clinton*, 236 F.3d 1320, 1324 (Fed. Cir. 2001). Under the APA, the court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2). The court's inquiry is "highly deferential to the administrative agency's factual findings." *Humane Soc'y*, 236 F.3d at 1325 (internal quotation marks and citation omitted).

DISCUSSION

Ninestar requests a preliminary injunction to stay the Listing Decision and to prevent the Government from taking any action against the importation of Ninestar's goods predicated on the Listing Decision. *See* PI Mot. at 2. The Government opposes, arguing that Ninestar is not likely to succeed on the merits of its claim for failure to exhaust administrative remedies and for failure to prevail on Counts I, III, and IV of the Amended Complaint. *See* Defs.' Resp. at 15–31; Defs.' Supp. Resp. at 5–12. The Government also contends that Ninestar has not been irreparably harmed and that the public interest and balance of hardships compel a denial of injunctive relief. *See* Defs.' Resp. at 31–40; Defs.' Supp. Resp. at 12–13.

The court first determines that, on the specific facts of this case, the FLETF's exhaustion requirement does not bar Ninestar's action. The court then concludes that Ninestar fails to establish any of the four

elements required for a preliminary injunction. The Motion for Preliminary Injunction is therefore denied, and the embargo remains in force.

I. Administrative Exhaustion Does Not Bar Ninestar's Action

As a threshold matter, the Government argues that Ninestar is not entitled to preliminary relief for its failure to exhaust administrative remedies. *See* Def.'s Resp. at 19–22.[10] Neither the UFLPA nor any associated regulation outlines an administrative procedure for contesting the addition of an entity to the Entity List. The procedure was instead noticed in the *Listing Decision*, which allows listed entities to request removal:

> Any listed entity may submit a request for removal (removal request) from the UFLPA Entity List along with supporting information to the FLETF Chair at FLETF.UFLPA.EntityList[at]hq.dhs.gov. In the removal request, the entity (or its designated representative) should provide information that demonstrates that the entity no longer meets or does not meet the criteria described in the applicable clause ((i), (ii), (iv), or (v)) of section 2(d)(B) of the UFLPA. The FLETF Chair will refer all such removal requests and supporting information to FLETF member agencies. Upon receipt of the removal request, the FLETF Chair or the Chair's designated representative may contact the entity on behalf of the FLETF regarding questions on the removal request and may request additional information. Following review of the removal request by the FLETF member agencies, the decision to remove an entity from the UFLPA Entity List will be made by majority vote of the FLETF member agencies.
>
> Listed entities may request a meeting with the FLETF after submitting a removal request in writing to the FLETF Chair at FLETF.UFLPA.EntityList[at]hq.dhs.gov. Following its review of a removal request, the FLETF may accept the meeting request at the conclusion of the review period and, if accepted, will hold the meeting prior to voting on the entity's removal request. The

[10] The Government's exhaustion defense was originally raised in the portion of its response brief in support of an independent motion to dismiss the case for lack of subject matter jurisdiction under USCIT Rule 12(b)(1). *See id.* While the Government did not renew its Motion to Dismiss following Ninestar's filing of the Amended Complaint, the Government did "incorporate by reference [its] initial response to Ninestar's motion for a preliminary injunction" and cited the entirety of its brief at ECF No. 24. Defs.' Supp. Resp. at 1. Moreover, all parties and the court understood that exhaustion would be considered as part of the Government's opposition to the Motion for Preliminary Injunction. *See* Ct.'s Letter to Parties at 2–3; Pls.' Post-Hearing Subm. at 1–3; Defs.' Post-Hearing Subm. at 2–8.

> FLETF Chair will advise the entity in writing of the FLETF's decision on its removal request. While the FLETF's decision on a removal request is not appealable, the FLETF will consider new removal requests if accompanied by new information.

Listing Decision, 88 Fed. Reg. at 38082; *see also Notice on the Addition of Entities to the Uyghur Forced Labor Prevention Act Entity List*, 87 Fed. Reg. 47777, 47778 (DHS Aug. 4, 2022) (detailing the same procedure in a prior Entity List addition notice).

The Government asks the court to require Ninestar to first request removal from the Entity List pursuant to FLETF's process before bringing suit before the CIT. *See* Defs.' Resp. at 20–21. Ninestar objects, arguing that (1) the APA prevents the court from requiring exhaustion in § 1581(i) cases and, in the alternative, (2) exhaustion would not be prudent here due to the delay, futility, and inadequacy of FLETF's removal request procedure. *See* Pls.' Reply at 5–7 & n.1. The court first holds that the APA does not categorically bar the CIT from applying prudential exhaustion in cases within its subject matter jurisdiction. The court then concludes that while exhaustion pursuant to FLETF's request removal procedure is generally required, the particular facts of this case do not warrant enforcing the exhaustion requirement.

A. The APA Does Not Limit Prudential Exhaustion in CIT Cases

"The doctrine of exhaustion of administrative remedies provides that judicial relief is not available for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Sunpreme Inc. v. United States*, 892 F.3d 1186, 1192 (Fed. Cir. 2018). The exhaustion requirement may apply either by statute, called "statutory exhaustion," or judicial discretion, called "prudential exhaustion." Specifically, "[w]here Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (citations omitted), *superseded by statute on other grounds*.

Beyond the exhaustion doctrines that apply generally when reviewing federal agency action is the CIT's unique exhaustion statute. As mentioned above, the CIT has exclusive subject matter jurisdiction over this action under 28 U.S.C. § 1581(i). *See Ninestar I*, 666 F. Supp. 3d at 1363. And in § 1581(i) actions, "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The Federal Circuit has held that in

§ 2637(d), "Congress has not required exhaustion." *Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998). Indeed, Congress's use of the phrase "where appropriate" has "vested discretion in the [CIT] to determine the circumstances under which it shall require the exhaustion of administrative remedies." *Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1186 n.26, 240 F. Supp. 2d 1268, 1297 n.26 (2006).

But § 2637(d) is not a mere hollow codification of prudential exhaustion. "Although that [provision's] statutory injunction is not absolute, it indicates a congressional intent that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007). And "[o]f paramount importance to any exhaustion inquiry," including prudential exhaustion, "is congressional intent." *McCarthy*, 503 U.S. at 144. Indeed, "even in this field of judicial discretion, appropriate deference to Congress'[s] power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme." *Id.* Section 2637(d), then, is a succinct congressional directive to the CIT: require exhaustion broadly, excuse it carefully.

In a matter of first impression before this court, Ninestar argues that the APA's exhaustion standard forecloses the prudential exhaustion codified in § 2637(d). Recall that the CIT applies the APA's standard of review in § 1581(i) actions. *See* 28 U.S.C. § 2640(e); *Humane Soc'y*, 236 F.3d at 1324. Section 10(c) of the APA, quoted in relevant part below, gives rise to its own exhaustion doctrine:

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704. Interpreting that provision, the Supreme Court has held that "where the APA applies," exhaustion "is a prerequisite to judicial review only when [1] expressly required by statute or [2] when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Darby v. Cisneros*, 509 U.S. 137, 154 (1993). Absent either circumstance, "[c]ourts are not free to impose an exhaustion requirement as a rule

of judicial administration." *Id.* The parties agree that exhaustion here is not expressly required by either the UFLPA or any applicable agency rules.

Ninestar argues that *Darby*, then, prevents the court from applying prudential exhaustion in this case. That broad reading—relying on *Darby*'s holding that courts "are not free" to impose prudential exhaustion, 509 U.S. at 154—sets § 10(c) of the APA on a collision course with 28 U.S.C. § 2637. On the one hand would be § 2637, a specific congressional directive to apply prudential exhaustion. *See Corus Staal*, 502 F.3d at 1379. And on the other would be the APA, which contains a generalized congressional directive barring prudential exhaustion. *See* 5 U.S.C. § 704; *Darby*, 509 U.S. at 154. To the question of whether the CIT may exercise prudential exhaustion in § 1581(i) cases, § 2637(d) answers yes; the APA and *Darby* answer no. Under Ninestar's reading, the two statutes are irreconcilable.

But there is better reading of the two provisions that avoids conflict. Recall that exhaustion under the APA "is a prerequisite to judicial review only [1] when expressly required by statute or [2] when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Darby*, 509 U.S. at 145 (emphasis added); *see also* 5 U.S.C. § 704 ("Except as otherwise expressly required by statute . . . ."). Section 2637 is the statute here that "expressly require[s]" exhaustion and, therefore, exempts CIT cases from the APA default rule of no prudential exhaustion. *See Corus Staal*, 502 F.3d at 1379. This reading of two potentially conflicting statutes would "give effect to each . . . while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981).

Ninestar disagrees, arguing that § 2637 does not "expressly require[]" exhaustion because of its discretionary, rather than mandatory, nature. Pls.' Post-Hearing Subm. at 1. But unlike *Darby*, where the court was reviewing a statutory limitation on judge-made prudential exhaustion, this case involves two competing statutory directives—one limiting (the APA) and the other authorizing (§ 2637(d)). Ninestar's theory would mean that Congress could impose either a mandatory exhaustion requirement or no exhaustion requirement, but never a prudential exhaustion requirement. Relatedly, the Federal Circuit has already determined that § 2637 reflects a congressional intent of implementing prudential exhaustion. *See Corus Staal*, 502 F.3d at 1379. Holding for Ninestar would ignore that legislative directive and run counter to Federal Circuit precedent, effectively turning § 2637 into dead letter for all CIT cases involving

the APA. And at bottom it would be odd to graft *Darby*'s holding, which interprets a statute that limits judicial discretion, onto a statute that authorizes judicial discretion.

The court therefore holds that where § 2637(d) applies, the APA does not bar the CIT from imposing exhaustion requirements. Interpreting § 2637 to be a statute expressly exempting the default rule of the APA is the best reading because it harmonizes Congress's intentions behind the generally applicable APA and specifically applicable CIT exhaustion statute. *Cf. also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("It is a commonplace of statutory construction that the specific governs the general. That is particularly true where . . . Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." (citations omitted)). Whereas the APA "limits the authority of courts to impose additional exhaustion requirements," *Darby*, 509 U.S. at 145, § 2637 grants that authority to the CIT.

B. Exhaustion Is Not Appropriate Here

Having established that § 2637(d) applies here, the court now turns to whether exhaustion is appropriate under the particular circumstances of this case. The court concludes that while exhaustion of FLETF's removal procedure would be appropriate before filing suit in most circumstances, no exhaustion requirement is warranted here.

Two broad aims motivate the doctrine of exhaustion. First is Congress's delegation of responsibility to agencies to oversee and administer federal programs. *McCarthy*, 503 U.S. at 145. Indeed, "[e]xhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise." *Id.* Second is judicial efficiency; exhaustion allows an agency to correct its own errors or further develop a record, which is valuable "especially in a complex or technical factual context." *Id.* That said, the CIT has not required exhaustion pursuant to § 2637(d) under four circumstances: when "(1) plaintiff's argument involves a pure question of law; (2) there is a lack of timely access to the confidential record; (3) a judicial decision rendered subsequent to the administrative determination materially affected the issue; or (4) raising the issue at the administrative level would have been futile." *Gerber Food (Yunnan) Co. v. United States*, 33 CIT 186, 193, 601 F. Supp. 2d 1370, 1377 (2009); *see also Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 452 n.2, 773 F. Supp. 1549, 1555 n.2 (1991) (collecting cases).

The second exception applies here. Exhaustion is not appropriate in this case because Ninestar did not receive "timely access to the confidential record" or even an explanation of why it was listed. *Gerber*, 33 CIT at 193, 601 F. Supp. 2d at 1377. At the time of filing this action, all the *Listing Decision* stated—and all that Ninestar knew—was that Ninestar was added to "the section 2(d)(2)(B)(ii) list of the UFLPA for working with the government of Xinjiang to recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of Xinjiang." 88 Fed. Reg. at 38082. That is a near-verbatim recitation of the statutory language. *See* UFLPA § 2(d)(2)(B)(ii), 135 Stat. at 1527. That is not to suggest that the FLETF's language in the *Listing Decision* is error under the APA. *See infra* section II.A.1. Nor does the court suggest that other UFLPA cases in the future—which may involve listing decisions accompanied by more detail than what was given here—are categorically exempt from the exhaustion requirement. But this court has regularly recognized that exhaustion would be "necessarily speculative, illogical, and useless" when the facts or argumentation supporting an agency's conclusion either did not exist at the time of the opportunity to exhaust, *Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1326, 1337 (2017) (facts supporting the challenge arose in the final determination, which was after the opportunity to exhaust), or were not yet made available to a party challenging agency action, *see Philipp Bros., Inc. v. United States*, 10 CIT 76, 80, 630 F. Supp. 1317, 1321 (1986) (plaintiff did not have timely access to confidential administrative record, which it "needed to make presentation of alternative arguments possible"). To illustrate the point, consider a hypothetical routine CIT case in which Commerce issues a final order stating, with no additional explanation, that an entity is selling subject merchandise at less than fair value. *See* 19 U.S.C. § 1677b. Refuting that broad conclusion would of course be a "necessarily speculative, illogical, and useless" task. *Mid Continent*, 219 F. Supp. 3d at 1337.

In short, parties are not held to the standard of guessing or preempting an agency's reasoning when presented with the option to exhaust administrative remedies. Citing no cases to the contrary of that principle, the Government instead contends that prudential concerns of agency expertise and judicial efficiency, the twin aims of the exhaustion doctrine, compel exhaustion here. *See McCarthy*, 503 U.S. at 145–46. But those benefits of exhaustion would have applied in greater force if Ninestar had an opportunity to request delisting at the agency level with the benefit of more than a near-verbatim recitation of the UFLPA. The FLETF's expertise on forced labor brings

little to bear on an agency-level delisting request where Ninestar cannot dispute or characterize the agency's reasoning or belief. And gains to judicial efficiency are slim where Ninestar cannot identify evidence that would allow the agency to correct its errors or hone the record. Dismissing this case to encourage speculative exhaustion would not meaningfully further those twin aims here. Requiring the exhaustion of administrative remedies is therefore not "appropriate" under the particular facts of this case.[11] 28 U.S.C. § 2637(d).

II. Ninestar Is Not Entitled to Preliminary Relief

Ninestar requests a preliminary injunction to stay the Listing Decision and to prevent the Government from taking any action against the importation of Ninestar's goods predicated on the Listing Decision. *See* PI Mot. at 2. A preliminary injunction is an extraordinary remedy that is "never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)); *see also Invenergy Renewables LLC v. United States* ("*Invenergy I*"), 44 CIT __, __, 422 F. Supp. 3d 1255, 1280 (2019). The court weighs four factors when deciding whether to grant a preliminary injunction: (1) whether the plaintiff is likely to succeed on the merits; (2) whether the plaintiff would suffer irreparable harm without the preliminary injunction; (3) whether the balance of hardships favors the plaintiff; and (4) whether the preliminary injunction would serve the public interest. *See, e.g.*, *Winter*, 555 U.S. at 20; *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018); *Invenergy I*, 422 F. Supp. 3d at 1280. "[T]he movant, by a clear showing, carries the burden of persuasion" on a motion for preliminary injunction. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (internal quotation marks, emphasis, and citation omitted).

Because Ninestar does not make a clear showing on any of the four factors, the Motion for Preliminary Injunction is denied.

A. Ninestar Is Not Likely to Succeed on the Merits

Ninestar asserts likelihood of success on the merits for three out of the four challenges to the Listing Decision: (1) arbitrary and capricious agency action for failure to explain agency action; (2) agency action in excess of statutory authority for FLETF's use of a burden of proof that is below preponderance of the evidence; and (3) agency action in excess of statutory authority for having applied the UFLPA's

[11] The court later explains how, in future UFLPA cases, the twin aims of exhaustion may be harmonized with the need for adequate explanation of agency action. *See infra* note 15.

provisions retroactively. *See* Am. Compl. ¶¶ 61–68, 72–79.[12] Tying these causes of actions together is the request to "vacat[e] [the] FLETF's determination to add Plaintiffs to the UFLPA Entity List and remand[] to [the] FLETF for such further action as is lawful and appropriate consistent with the APA and other applicable laws." *Id.* at 23. That request for relief is consistent with the Motion for Preliminary Injunction, which urges the court to "stay[] the Listing Decision and prevent[] Defendants from taking any action against the importation of Plaintiffs' goods predicated on the Listing Decision." PI Mot. at 2; *see also* Pls.' Br. at 11 ("Because FLETF failed to explain its decision at all, that final agency action must be vacated. Ninestar is therefore likely to succeed on the merits.").

1. Adequate Explanation

Ninestar's first cause of action is that the Listing Decision must be vacated because it lacked an adequate explanation, rendering it arbitrary and capricious agency action under the APA. *See* Am. Compl. ¶¶ 61–68; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that an agency acts unlawfully when it fails to "articulate a satisfactory explanation for its action"). Upon review of the Public Administrative Record filed in this litigation, the court concludes that the FLETF has provided an adequate explanation that allows for meaningful judicial review at this preliminary stage of the litigation.

Recall that the *Listing Decision* states:

> This update adds two entities and eight subsidiaries to the section 2(d)(2)(B)(ii) list of the UFLPA for working with the government of Xinjiang to recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of Xinjiang: . . . Ninestar Corporation and its eight Zhuhai-based subsidiaries . . . .

88 Fed. Reg. at 38082. Compare that language to the text of the UFLPA, which requires the FLETF to create a strategy that includes, as the second sub-list, "a list of entities working with the government of the Xinjiang Uyghur Autonomous Region to recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of the Xinjiang Uyghur Autonomous Region." UFLPA § 3(d)(2)(B)(ii), 135 Stat. at 1527. Be-

[12] For the purposes of the Motion for Preliminary Injunction, Ninestar does not argue likelihood of success on the merits on Count 2 of the Amended Complaint, which alleges arbitrary and capricious agency action for lack of substantial evidence. Ninestar explains that Count 2 "requires a detailed parsing of the record more suitable for Ninestar's forthcoming motion for judgment." Pls.' Supp. Reply at 1 n.1.

yond reciting the statutory text, the FLETF does not include any further explanation for adding Ninestar to the Entity List.

As a general matter, a conclusory recitation of the statute without further explanation plainly fails the APA's arbitrary and capricious standard. *See Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) ("[C]onclusory statements will not do; an agency's statement must be one of reasoning." (internal quotation marks and citation omitted)); *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1405 (D.C. Cir. 1995) ("When an agency merely parrots the language of a statute without providing an account of how it reached its results, it has not adequately explained the basis for its decision."). That is because an agency's "explanation must reasonably tie the determination under review to the governing statutory standard and to the record evidence by indicating what statutory interpretations the agency is adopting and what facts the agency is finding." *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016). That requirement is not mere formalism but a "basic principle" in administrative law that is "indispensable to sound judicial review." *Amerijet*, 753 F.3d at 183. "Such an explanation enables [the court] to fulfill [its] review function and also to avoid making choices reserved to the agency," *id.*, which "would remove the discretionary judgment from the agency to the court," *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987); *see also, e.g.*, *SMA Surfaces, Inc. v. United States, 47 CIT __, __, 617 F. Supp. 3d 1263, 1277 (2023) (applying the same principle under the CIT-specific administrative review statute); Nucor Corp. v. United States, 44 CIT __, __, 461 F. Supp. 3d 1374, 1379 (2020) (same); Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States, 41 CIT __, __, 222 F. Supp. 3d 1255, 1268–69 (2017) (same, with a discussion of Amerijet).*

When the grounds for agency action are inadequate, "a court may remand for the agency to do one of two things: First, the agency can offer a fuller explanation of the agency's reasoning *at the time of the agency action*." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907 (2020) (internal quotation marks and citation omitted). Importantly, "[w]hen an agency's initial explanation 'indicate[s] the determinative reason for the final action taken,' the agency may elaborate later on that reason (or reasons) but may not provide new ones." *Id.* (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam)). Second, "the agency can 'deal with the problem afresh' by taking *new* agency action." *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947)).

It is the first route that is relevant here. When the Listing Decision was published on June 12, it recited the UFLPA's statutory provi-

sions. *See Amerijet*, 753 F.3d at 1350. But the Listing Decision, which "may have been curt," nonetheless "surely indicated the determinative reason for the final action taken." *Camp*, 411 U.S. at 143. The agency's determinative reason—easily discerned here—was that Ninestar was allegedly working with the XUAR government to recruit, transport, transfer, harbor or receive forced labor or persecuted minorities out of the XUAR. *See Listing Decision*, 88 Fed. Reg. at 38082. If that were the only basis for the FLETF's Listing Decision that was ever provided to Ninestar, a remand for the FLETF to "elaborate later on that reason" but to "not provide new ones" may have been appropriate. *Dep't of Homeland Sec.*, 140 S. Ct. at 1907.

But that was not the only basis that was provided to Ninestar. As part of its litigation before the CIT, the FLETF docketed a Public Administrative Record, Oct. 3, 2023, ECF No. 24–1 ("PAR"). The first two pages of the Public Administrative Record are a memorandum from DHS explaining that the Listing Decision is based on an allegation from an informant, whose identity is redacted, as well as:

> PRC government documents, Ninestar's company documents, and media reports that corroborate that Ninestar is participating in the PRC government's 'poverty alleviation' programs transferring laborers from 'remote and underdeveloped areas' to its facilities. This information reasonably indicates that these workers from the [XUAR] were coerced to enter state-sponsored labor transfer programs and are unable to leave voluntarily once they begin working in the facilities, which are thousands of miles away from their hometowns in the [XUAR].

PAR 1. In a later document, the FLETF states that Ninestar "is reported to have worked with the government of the [XUAR] through a third-party agency" and that "[a]ll sources . . . corroborate that Uyghur laborers working at Zhuhai Ninestar facilities were recruited, transferred, and are presently still monitored by the officials of the XUAR government." PAR 4. The FLETF also elaborates that "Ninestar's company documents disclose its participation in the 'poverty alleviation' programs sponsored by the Guangdong provincial government. Such information is further supported, both directly and circumstantially, by PRC government agencies and state media reports." PAR 6. In other words, whereas the June 12 publication of the Listing Decision did not have an accompanying explanation, the October 3 filing of the Public Administrative Record supplied that explanation.

At this juncture, that explanation satisfies the APA. The UFLPA listing under § 3(d)(2)(B)(ii) requires the entity to be "[1] working with the government of the Xinjiang Uyghur Autonomous Region [2] to recruit, transport, transfer, harbor or receive [3] forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups [4] out of the Xinjiang Uyghur Autonomous Region." UFLPA § 3(d)(2)(B)(ii), 135 Stat. at 1527. The connection between the facts found and each element is either expressly discussed in, or reasonably discerned from, the Public Administrative Record: (1) officials of the XUAR government, through a third-party agency, are involved; (2) laborers are recruited, transferred, and presently still monitored by such officials; (3) the laborers are Uyghurs; and (4) the participation of Uyghurs in the PRC's 'poverty alleviation' programs transferring laborers from 'remote and underdeveloped areas' is a reasonable indication that such individuals were removed from their hometowns in the XUAR. The FLETF's explanation therefore "reasonably tie[s] the determination under review to the governing . . . standard and to the record evidence by indicating . . . what facts the agency is finding," *CS Wind Viet.*, 832 F.3d at 1376, and allows for meaningful judicial review, *see Amerijet*, 753 F.3d at 183. Ninestar is therefore not likely to succeed on the merits of its adequate explanation claim at this juncture.

The Government takes it further, arguing that the filing of the administrative record renders Ninestar's adequate explanation challenge moot. Not quite. "[A]n issue becomes moot 'when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Sea Shepherd N.Z. v. United States*, 47 CIT __, __, 639 F. Supp. 3d 1367, 1376 (2023) (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)). Later in these proceedings, either a more developed agency record or the adjudication of Ninestar's substantial evidence claim could hypothetically lead to a remand order requiring the FLETF to supply further explanation or reconsideration of the Listing Decision. For example, Ninestar contends that relief is still available because the FLETF's explanation "suffers from several explanatory deficiencies," and Ninestar cites to purported mismatches

between certain facts in the Confidential Administrative Record and the FLETF's explanation in support of the listing determination.[13] Am. Compl. ¶ 68; *see also* Pls.' Supp. Br. at 9–11. To be clear, it would be premature to opine on those challenges now. Those arguments are more accurately characterized as challenges to agency action for lack of substantial evidence, which is any "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Broadcom Corp. v. Int'l Trade Comm'n*, 28 F.4th 240, 249 (Fed. Cir. 2022). And Ninestar does not advance its substantial evidence challenge at the preliminary injunction stage, *see supra* note 12, so the court reserves it for final resolution in the Motion for Judgment on the Agency Record. But because remand for additional explanation remains a possible remedy in this case, the court holds that the first cause of action remains live.[14] Accordingly, without expressing any view as to the weight of the record evidence, the court concludes that

[13] Specifically, Ninestar's objections refer to portions of the Confidential Administrative Record, including:

1. A challenge to the FLETF's conclusion that Ninestar works "with the government of the [XUAR]" when [[ ]]. PAR 4; CAR 4.
2. A challenge to the FLETF's conclusion that Ninestar "works," presently, with the XUAR government, PAR 2, when its evidence purportedly only dates [[ ]]. *But see also infra* section II.A.3 (holding that Ninestar is unlikely to prevail on its retroactivity challenge).
3. A challenge to the FLETF's conclusion that Ninestar's [[

]].

See Am. Compl. ¶ 68.

[14] Ninestar also objects to mootness on the basis that the explanation in the "Confidential Administrative Record . . . was not issued publicly." Am. Compl. ¶ 67; Pls.' Supp. Br. at 8; *see also Invenergy Renewables LLC v. United States* ("*Invenergy IV*"), 44 CIT __, __, 476 F. Supp. 3d 1323, 1331 (2020) (requiring the agency's explanation to be "made available to the parties or to the public at large"). But because Public Administrative Record is sufficient here for adequate notice, that objection is inapposite.

Ninestar is not likely to succeed on the merits of its adequate explanation claim, subject to the further proceedings of this case.[15]

2. Burden of Proof

In its third cause of action, Ninestar requests that the Listing Decision be vacated for the FLETF's failure to apply the correct burden of proof. *See* Am. Compl. ¶¶ 72–75. The FLETF determined that there was "reasonable cause to believe" that Ninestar was working with the XUAR government in violation of the UFLPA. PAR 2. Ninestar argues that the FLETF erred because it is "well-established" that, absent statutory instruction to the contrary, "preponderance of the evidence is the minimal appropriate burden of proof in administrative proceedings." *Rodriguez v. Dep't of Veteran Affs.*, 8 F.4th 1290, 1301 (Fed. Cir. 2021); *see also* Am. Compl. ¶¶ 74. Ninestar is not likely to succeed on the merits of this challenge.

No applicable statute expressly supplies a burden of proof here. The UFLPA does not specify a burden of proof for the FLETF when it determines whether an entity has engaged in culpable conduct warranting addition to the Entity List. *See* UFLPA § 2(d)(2)(B), 135 Stat. at 1527. Nor does the APA, which establishes a preponderance-of-the-evidence standard for formal agency adjudications but does not mandate a particular burden of proof for informal agency adjudications

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[15] The court's holding is not to say that suing the FLETF before the CIT is the proper way for listed entities to receive adequate notice. "Requiring that the parties litigate a final agency decision in order to gain knowledge of and access to the agency's rationale wastes judicial resources and delays corrective agency action that would otherwise be addressed by the agency in the first instance." *Invenergy*, 476 F. Supp. 3d at 1347. As noted above, the FLETF was likely obligated to provide more than what it did in the *Listing Decision*. *See Amerijet*, 753 F.3d at 183. Better avenues for disclosure would include either the *Federal Register* notice itself or, considering the unique sensitivities involved with the foreign affairs implications of the FLETF's determinations, the FLETF's delisting request process. *See, e.g.*, *Strait Shipbrokers Pte. Ltd. v. Blinken*, 560 F. Supp. 3d 81, 94 (D.D.C. 2021) (denying challenge to OFAC designation notice, which repeated verbatim the language of an executive order, for inadequate explanation under the APA because the agency did not need to "immediately turn over the entire administrative record on or around the date of designation" and the State Department later provided "more specific information" through its administrative process for reconsideration).

This case's particular facts counsel the court to move on from this procedural quandary, both on legal grounds, since the adequate notice requirement is likely satisfied by the filing of the Public Administrative Record, and on prudential grounds, since exhaustion will no longer promote economy here. *See also supra* section I.B. But the FLETF would do well to offer a more developed explanation before future disputes reach the court. Conversely, if future litigants fail to exhaust their remedies and then bring suit for lack of adequate explanation, this decision provides notice that exhaustion may be particularly appropriate for those future cases so that listed entities receive an explanation for their listing first. *See* 28 U.S.C. § 2637(d). Exhaustion of the FLETF's delisting procedure, rather than litigation, is the preferable route through which a litigant should receive adequate notice; it better conserves judicial resources and it makes use of the FLETF's expertise. *See McCarthy*, 503 U.S. at 145.

like the one at issue here. *See Steadman v. SEC*, 450 U.S. 91, 102 (1981) (reading the burden of proof into 5 U.S.C. § 556(d), which applies only to formal adjudications). Also silent is the CIT's statute governing burdens of proof in agency proceedings. *See* 28 U.S.C. § 2639. "Where Congress has not prescribed the degree of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an administrative proceeding," the judiciary "has felt at liberty to prescribe the standard, for '[i]t is the kind of question which has traditionally been left to the judiciary to resolve.'" *Steadman*, 450 U.S. at 95 (quoting *Woodby v. INS*, 385 U.S. 276, 284 (1966)).[16]

Relatedly, the Federal Circuit has held that "[p]reponderance of the evidence has long been recognized as the traditional burden of proof in civil administrative proceedings." *Rodriguez*, 8 F.4th at 1299 (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389–90 (1983); *Steadman*, 450 U.S. 91, 101 n.21 (1981)).[17] That said, "[t]here may be exceptional circumstances in which a lower burden of proof than preponderance of the evidence could legitimately be applied. . . . But those circumstances would be rare and would typically require an explicit directive to use a burden of proof lower than preponderance in order to justify departing from the traditional standard." *Id.* at 1301. If not express, the burden of proof may be implied from congressional intent, as inferred from text, context, and even legislative history. *See Steadman*, 450 U.S. at 98–102 (using numerous tools of statutory interpretation); *Rodriguez*, 8 F.4th at 1301 (looking for "any language," either "explicit[]" or "implicit[]," concerning burden of proof).

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[16] The Government states that because the APA does not supply a burden of proof for informal adjudications, "the FLETF is free to select a burden of proof appropriate under the circumstances." Defs.' Supp. Resp. at 10. The Government cites no authority for its position. Moreover, the Government's position would seem to lie in tension with *Steadman*, which left the question of administrative burdens of proof to the judiciary's "liberty" rather than the agency's discretion. 450 U.S. at 95; *cf. FAG Italia S.p.A. v. United States*, 291 F.3d 806, 816 (Fed. Cir. 2002) ("[T]he absence of a statutory prohibition cannot be the source of agency authority.").

To the extent that the FLETF suggests that the court owes deference to its choice of burden of proof, *see* Defs.' Supp. Br. at 11, that is not so, absent a statutory or regulatory hook upon which an agency may interpret ambiguous text. *See Bender v. Clark*, 744 F.2d 1424, 1430 (10th Cir. 1984) ("The deference given to an agency's decision on a matter requiring expertise should be made only in the judicial forum . . . . Hence, the scope of judicial review of final agency action has no effect on the requisite standard of proof in the administrative hearing itself." (citing *FPC v. Fla. Power & Light Co.*, 404 U.S. 453, 463 (1972))).

[17] The agency proceeding under review in *Rodriguez* was a process "by which the Secretary of Veterans Affairs may remove, demote, or suspend employees of the Department of Veterans Affairs [('DVA')] 'if the Secretary determines the performance or misconduct of the covered individual' warrants such measures." *Id.* at 1297 (quoting 38 U.S.C. § 714(a)(1)). Because DVA-specific statutes, not the APA, governed those agency proceedings, *see* 38 U.S.C. § 714, *Rodriguez* does not conclusively resolve this case.

Reasonable cause is the appropriate burden of proof for UFLPA listing decisions. "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Instead, it is "presumed that Congress legislates against the backdrop of existing law." *Gazelle v. Shulkin*, 868 F.3d 1006, 1011 (Fed. Cir. 2017). The operative existing law here, of course, is section 307. *See Ninestar I*, 666 F. Supp. 3d at 1361 (holding that the UFLPA and section 307 "do not operate independently from one another"). Indeed, the UFLPA's express goal is to "strengthen the prohibition against the importation of goods made with forced labor, including by ensuring that the Government of the People's Republic of China does not undermine the effective enforcement of section 307." UFLPA § 1(1), 135 Stat. at 1525.

Reasonable cause furthers that goal in two meaningful ways. First, a reasonable cause burden of proof avoids an illogical asymmetry where the Government can more easily obtain section 307 embargoes than UFLPA embargoes. Under the UFLPA, the FLETF makes the singular decision of listing an entity. *See* UFLPA § 2(d)(2)(B), 135 Stat. at 1527. Once the listing decision is issued, a presumptive embargo enters into force. *See id.* § 3(a), 135 Stat. at 1529; *Ninestar I*, 666 F. Supp. 3d at 1363. Enforcement of section 307 and its associated regulations, however, is more complicated and involves three successive agency actions.[18] First, a Customs officer initiates an investigation of merchandise based on a reason to believe. See 19 C.F.R. § 12.42(a). Next, Customs issues a WRO against particular merchandise based on its "reasonabl[e] but not conclusive[]" belief, *see id.* § 12.42(e), which is comparable to a burden of proof of reasonable cause. At that point, an embargo against that suspect merchandise goes into effect. *See id.* Finally, Customs publishes a formal finding

[18] More specifically, under the implementing regulations of section 307, if a port director or Customs officer "has reason to believe that any class of merchandise that is being, or is likely to be, imported into the United States is being produced" with forced labor, then such official will communicate their belief to the Commissioner of Customs. 19 C.F.R. § 12.42(a). If Customs "finds at any time that information available reasonably but not conclusively indicates that merchandise within the purview of section 307 is being, or is likely to be, imported," the agency issues an order withholding release of the merchandise ("withhold-release orders," or "WROs"). *Id.* § 12.42(e). The WRO is subject to further "instructions from the Commissioner as to whether the merchandise may be released otherwise than for exportation." *Id.*

Upon completion of its investigation, if Customs "determine[s] on the basis of the foregoing that the merchandise is subject" to section 307, "a finding to that effect" is published in the *Federal Register*, after which point the importer may rebut the finding with "satisfactory evidence that the merchandise" did not involve forced labor. *Id.* § 12.42(f)–(g).

based on its preponderance-of-the-evidence "determin[ation]." *See id.* § 12.42(f).

Ninestar argues that the preponderance standard for formal section 307 findings, rather than the reasonable cause–like standard for section 307 WROs, should apply to UFLPA listing decisions. *See* Pls.' Post-Hearing Subm. at 5. But Congress designed the UFLPA against the backdrop of section 307's existing statutory and regulatory enforcement scheme. *See Gazelle*, 868 F.3d at 1011. And under that scheme, section 307 WROs, not formal section 307 findings, are the main method of forced labor enforcement. Customs currently enforces fifty-one section 307 WROs dating from 1991 but only eight formal section 307 findings. *See Withhold Release Orders and Findings List*, Customs, https://www.cbp.gov/trade/forced-labor/withhold-release-ordersand-findings (last updated Nov. 17, 2023). Moreover, WROs were the Government's main method of targeting forced labor associated with Xinjiang before the UFLPA's effective date of June 22, 2022. *See FLETF Strategy*, *supra*, at 28. Those WROs even served as the "initial sources for the entities listed" pursuant to the UFLPA. *Id.* at 22. If the UFLPA required a preponderance of the evidence instead of reasonable cause, the Government would need more evidence for UFLPA embargoes than it does for section 307 WROs. Section 307 WROs would become the easier method of achieving Congress's directive of quickly prohibiting the entry of goods made with forced labor. But that would hardly "strengthen the prohibition against the importation of goods made with forced labor" and would fall short of "ensuring . . . the effective enforcement of section 307." UFLPA § 1(1), 135 Stat. at 1525 (emphasis added). Reasonable cause, by contrast, better strengthens forced labor enforcement by bringing UFLPA listing decisions in line with section 307 WROs and avoiding that statutory asymmetry.

Second, a preponderance standard in the UFLPA would not cohere with Congress's concern with the difficulty of obtaining information regarding forced labor in China. Congress wanted to ensure that "the Government of the People's Republic of China," specifically, did not "undermine the effective enforcement of section 307." UFLPA § 1(1), 135 Stat. at 1525. Beyond that express statement of purpose, one lawmaker elaborated on the House floor:

> It has been illegal to import forced labor products into the United States for more than 90 years, but it is exceedingly difficult to spot them since Chinese producers often mix together products that are the result of both involuntary and voluntary labor. Moreover, the lack of Chinese Government transparency and the police state atmosphere in Xinjiang make auditing of

> product sourcing unreliable if not impossible, according to the [Biden] administration's "Xinjiang Supply Chain Business Advisory."

212 Cong. Rec. H7499 (daily ed. Dec. 8, 2021) (statement of Rep. Jim McGovern).[19] Put simply, the UFLPA is in part intended to overcome the transparency issues prohibiting section 307's effective enforcement in Xinjiang. The Government offers helpful examples in its briefing, such as the fact that "the Chinese government must sign off on all information obtained from China, which limits the availability of reliable information," Defs.' Supp. Resp. at 8, or that China has evaded U.S. forced labor enforcement by developing a "web of agents, shippers, suppliers, and sub-contractors" to "easily hide a product's point of origin," as well as "alternate product and prison names" and "strictly limited" access to facilities. Sarah A. Thornton, *Importing Prison Labor Products from the People's Republic of China: Re-Examining U.S. Enforcement of Section 307 of the Trade and Tariff Act of 1930*, 3 Pac. Rim L. & Pol'y J. 437, 450–51 (1995). Faced with such informational scarcity, the FLETF under the preponderance standard would be required to "rule out" a listed entity's "explanation for suspicious facts," even if it did not have the realistic ability to do so. *District of Columbia v. Wesby*, 583 U.S. 48, 61 (2018). Requiring a preponderance would therefore frustrate, not enhance, the FLETF's efforts to effectively implement section 307's prohibition in Xinjiang.[20]

In sum, no law expressly supplies an administrative burden of proof in this case. The court concludes that a reasonable-cause burden of

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[19] Another representative put the transparency issue in starker terms:

> We have no access, Mr. Speaker, to the concentration camps in Xinjiang. We have no idea [sic] the supply chains. It is closed. It is a dictatorship. There are no onsite inspections. Again, we are talking genocide against these Muslims who are being wiped off the face of the Earth.

Id. at H7501 (statement of Rep. Christopher Smith).

[20] Ninestar contends that preserving the preponderance standard would not mean that the UFLPA is a weaker enforcement tool than section 307. *See* Pls.' Post-Arg. Subm. at 6. Ninestar argues that a few key differences between the two statutes would still give the UFLPA relative force: (1) the UFLPA's replacement of Customs's findings as to particular merchandise under section 307 with a presumption that goods made in a certain region or by certain entities are subject to section 307; (2) the UFLPA's replacement of section 307's "satisfactory evidence" burden with "clear and convincing evidence" when an importer tries to overcome an embargo; and (3) the UFLPA's removal of the section 307 investigation and WRO steps entirely, jumping straight to the embargo. *See id.* While all true, those differences do not prove Ninestar's point that there is nothing in the UFLPA to suggest that reasonable cause is preferable to preponderance of the evidence. As discussed above, implementing a preponderance standard would interpret the statute in a manner inconsistent with express congressional intent and the underlying section 307 enforcement scheme.

proof best coheres with Congress's clear intention of promoting the effective enforcement of section 307. Reasonable cause avoids the statutory asymmetry that would follow from a preponderance standard and reflects the unique challenges to forced labor enforcement involving Xinjiang. Because the FLETF applied a burden of proof consistent with the regulatory scheme created by section 307 and the UFLPA,[21] Ninestar is not likely to succeed on the merits of its third cause of action.

3. Retroactivity

Ninestar lastly argues that the Listing Decision should be vacated because the FLETF based its Listing Decision on alleged conduct that preceded the UFLPA, which does not apply retroactively. *See* Pls.' Supp. Br. at 6. "Retroactivity is not favored in the law," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and courts "will construe a statute to avoid retroactivity unless there is clear evidence that Congress intended otherwise," *Hicks v. Merit Sys. Prot. Bd.*, 819 F.3d 1318, 1321 (Fed. Cir. 2016).

The Government does not dispute that the UFLPA is solely prospective. *See* Defs.' Supp. Resp. at 12. The parties appear to agree that because the UFLPA requires the listed entity to be "working" with the XUAR government to recruit, transport, transfer, harbor or receive forced laborers or ethnic minorities, UFLPA § 2(d)(2)(B)(ii), 135 Stat. at 1527, the FLETF must reasonably conclude that Ninestar's alleged conduct occurred after the statute's enactment. *See Frederick v. Shinseki*, 684 F.3d 1263, 1270 (Fed. Cir. 2012) (noting that words used in the present tense describe future and present conduct but generally do not describe past conduct). The Government argues that (1) the information provided by the informant supports a

[21] Even assuming that the UFLPA and the underlying section 307 enforcement scheme compel no result on the burden of proof question, the *Rodriguez* default rule is inapposite here. Yes, "[p]reponderance of the evidence has long been recognized as the traditional burden of proof in civil administrative proceedings," but this case is far from a traditional civil administrative proceeding. *Rodriguez*, 8 F.4th at 1299. Ninestar is a foreign company with insufficient contacts in the United States to grant it any constitutional rights, *see People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999), and it lacks any express statutory rights regarding burden of proof.

Rodriguez's default rule fits well with more typical adjudicative proceedings that are generally bounded by due process concerns, such as veterans' benefits eligibility. By contrast, reasonable cause–like standards in more analogous agency determinations concerning U.S. foreign and economic policy, such as listing decisions by Commerce's Bureau of Industry Security ("BIS") and the Department of the Treasury's Office of Foreign Assets Control ("OFAC"), form a better basis for a presumptive standard of proof here. *See* 15 C.F.R. § 744.11(b) (authorizing BIS listings based on "reasonable cause to believe"); *Kadi v. Geithner*, 42 F. Supp. 3d 1, 12 (D.D.C. 2012) (upholding OFAC's "reason to believe" standard).

finding of post-enactment violations of the UFLPA, and that (2) there are otherwise no retroactivity concerns where pre-enactment conduct is being used as evidence of post-enactment violations. *See* Defs.' Supp. Resp. at 12.[22]

The Government has it right on both points. Having reviewed the unredacted Confidential Administrative Record *in camera* pursuant to 28 U.S.C. § 2635(d)(2),[23] the court concludes that the redacted information constitutes record evidence of post-enactment violations of the UFLPA at Ninestar's Zhuhai facilities. Moreover, where there is record evidence of post-enactment conduct, an agency's reliance on evidence dated before the statute is not per se unreasonable, *see, e.g.*, *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1086 (9th Cir. 2011) (agency's reliance on ten-year-old data, without "any scientific studies or testimony in the record" that the data was substantially the same ten years later, was arbitrary and capricious), nor does it run afoul of the presumption against retroactivity, *see, e.g.*, *Frontier-Kemper Constructors, Inc. v. U.S. Dep't of Lab.*, 876 F.3d 683, 689 (4th Cir. 2017), *as amended* (Dec. 12, 2017) ("[A] statute has no retroactive effect where the conduct being regulated begins before a statutory change occurs and continues after that change has taken effect."); *McAndrews v. Fleet Bank of Mass., N.A.*, 989 F.2d 13, 16 (1st Cir. 1993) ("Even when the later-occurring circumstance depends upon the existence of a prior fact, that interdependence, without more, will not transform an otherwise prospective application into a retroactive one." (citing *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 500, 505–06 (1909))).

Today's holding is limited to the narrow question of whether there is any quantum of record evidence supporting a finding of post-enactment culpable conduct. Because such record evidence exists in the form of the redacted informant evidence, Ninestar is not likely to succeed on its retroactivity challenge.[24] And with all three of Nine-

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[22] The Government does not appear to dispute that, out of all the record evidence, it is only the redacted information from the confidential informant that describes ongoing violations of the UFLPA. *See id.* The Government does, however, argue that past evidence can support a finding of continuing violations of the UFLPA. *See id.*

[23] "The confidential or privileged status of [the record] shall be preserved in the civil action, but the court may examine such material in camera and may make such material available under such terms and conditions as the court may order." *Id.* § 2635(d)(2) (emphasis added).

[24] Hypothetically, if the weight of the informant evidence is questioned at a later stage of this litigation and the evidentiary link between post-enactment and pre-enactment conduct is weakened, then the FLETF's Listing Decision could conceivably be presented with substantial evidence and retroactivity issues. But at this preliminary juncture, the court makes clear that it does not intimate any view as to the weight of any record evidence. *See also supra* section II.A.1.

star's asserted challenges unlikely to prevail on the merits, the court concludes that Ninestar fails to satisfy the first prong of the preliminary injunction analysis.[25]

B. Ninestar Has Not Established Irreparable Harm

Regarding the next prong of the preliminary injunction inquiry, Ninestar argues that it has suffered and will continue to suffer irreparable harm due to the Listing Decision absent a preliminary injunction. "A preliminary injunction will not issue simply to prevent a mere possibility of injury, even where prospective injury is great. A presently existing, actual threat must be shown." *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983). The movant must show "that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (citations omitted). "Critically, irreparable harm may not be speculative or determined by surmise." *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. v. United States*, 43 CIT __, __, 393 F. Supp. 3d 1271, 1276 (2019) (citations omitted).

Ninestar asserts four bases of harm that the court broadly sorts into two categories: (1) the economic harms of financial loss, business

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[25] Even if Ninestar's challenges have merit, the Government argues that remand without vacatur is the appropriate remedy here. *See* Defs.' Resp. at 27–28. The court does not resolve that question at this preliminary juncture.

Remand with vacatur is the default remedy for unlawful agency action under the APA, which states that courts should "hold unlawful and *set aside* agency action, findings, and conclusions found to be . . . arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (emphasis added). But a court may remand agency action without vacatur "where the failure lay in lack of reasoned decisionmaking [or] where the order was otherwise arbitrary and capricious." *Int'l Union v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 966 (D.C. Cir. 1990). When deciding whether to issue remand without vacatur, the court must consider "[1] the seriousness of the order's deficiencies . . . and [2] the disruptive consequences of an interim change that may itself be changed." *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 260 F.3d 1365, 1380 (Fed. Cir. 2001) (quoting *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995)); *see also In re Section 301 Cases*, 46 CIT __, __, 570 F. Supp. 3d 1306, 1343 (2022). That said, remand without vacatur remains a rare remedy. *See Env't Def. Fund v. FERC*, 2 F.4th 953, 976 (D.C. Cir. 2021).

The court need not decide now whether the Listing Decision's "deficiencies," if any, are of sufficient "seriousness" that prompts the court to "doubt whether the agency chose correctly" in its final decision. *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993) (quoting *Int'l Union*, 920 F.2d at 967). But the court does note that, consistent with its analysis in the third and fourth factors for preliminary injunction, vacatur in this case would risk severe disruption of Congress's forced labor priorities. *See infra* section II.C (concluding that the hardships from an injunction balance in favor of the Government). Remand without vacatur may indeed be well suited to preserve, rather than disrupt, Congress's weighty humanitarian, economic, and foreign policy concerns. *See North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (remanding without vacatur where there were "fundamental flaws" requiring remand but allowing the EPA's rule to remain in effect to "at least temporarily preserve the environmental values covered by" the rule); *see also NOVA*, 260 F.3d at 1380 (remanding without vacatur a regulation governing veteran benefit eligibility due to "disruptive consequences").

opportunity loss, and reputational loss, and (2) the harm of being denied a procedural right under the APA. Evaluating each theory in turn and proceeding with careful understanding of the Listing Decision's serious consequences, the court concludes that Ninestar has not established that it will be irreparably harmed "absent a preliminary injunction." *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012).

1. Economic Harms of Financial Loss, Business Opportunity Loss, and Reputational Loss

First, Ninestar argues that the financial losses resulting from the Listing Decision warrant a finding of irreparable harm. *See* Pls.' Br. at 12–13. While financial injuries alone are typically insufficient for a finding of irreparable harm, the calculus is different in APA cases where "the United States, and the agencies thereof, are cloaked in sovereign immunity" and may not be sued for monetary damages. *Canadian Lumber Trade All. v. United States*, 30 CIT 892, 897, 441 F. Supp. 2d 1259, 1265 (2006) (collecting cases), *aff'd*, 517 F.3d 1319 (Fed. Cir. 2008); *see also Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1156 (Fed. Cir. 2011) (reasoning that "the likely availability of those monetary payments helps define the circumstances" of whether a party is irreparably harmed absent an injunction).

But that "is not to say that the existence of any unrecoverable financial injury from an entity that enjoys sovereign immunity means irreparable harm can be established." *Luokung Tech. Corp. v. Dep't of Def.*, 538 F. Supp. 3d 174, 192 (D.D.C. 2021). "To hold otherwise would essentially eviscerate the irreparable harm requirement for any cases brought against the government." *Xiaomi Corp. v. Dep't of Def.*, No. CV 21–280 (RC), 2021 WL 950144, at *10 (D.D.C. Mar. 12, 2021). Avoiding an outcome where financial harms "even as little as $1" can be deemed irreparable, "[t]he wiser formula requires that the economic harm be *significant*, even where it is irretrievable because a defendant has sovereign immunity." *Air Transp. Ass'n of Am., Inc. v. Exp.-Imp. Bank of the U.S.*, 840 F. Supp. 2d 327, 335 (D.D.C. 2012) (emphasis added). "Otherwise, a litigant seeking injunctive relief against the government would always satisfy the irreparable injury prong, nullifying that requirement in such cases." *ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 49 (D.D.C. 2014).

In support of its showing of irreparable harm, Ninestar appends two declarations from Ms. Yiling Cheng, the Director of the Enterprise Planning Department at Ninestar Corporation. *See* Decl. of Yiling Cheng, Aug. 31, 2023, ECF No. 20–1 ("Cheng Decl."); Suppl. Decl. of Yiling Cheng, Dec. 15, 2023, ECF No. 78–1 ("Suppl. Cheng. Decl."). In the original declaration, Ninestar alleges the losses that it

"risks . . . in U.S. sales" and "in the global market over the next year" and notes a related financial issue. Cheng Decl. ¶ 20.[26] In the supplemental declaration, Ninestar alleges the diminished financial projections and related financial issues of another corporate entity.[27] Ninestar also points to its declining share price on the Shenzhen Stock Exchange in China. *Id.* ¶ 9.

That evidence falls short of establishing substantial financial harm. Generally, "affidavits submitted by interested parties are weak evidence, unlikely to justify a preliminary injunction." *Shandong Huarong Gen. Grp. v. United States*, 24 CIT 1286, 1290, 122 F. Supp. 2d 143, 147 (2000) (citation omitted); *see also Premier Trading, Inc. v. United States*, 40 CIT __, __, 144 F. Supp. 3d 1354, 1359 (2016). Neither Cheng Declaration is supported by financial statements or other "independent evidence indicating exactly how and when these lost sales would force [Ninestar] out of business" or, at least, to incur substantial losses. *Shandong*, 24 CIT at 1290, 122 F. Supp. 2d at 147 (citation omitted); *see also, e.g.*, *Premier Trading*, 144 F. Supp. 3d at 1359 ("This affidavit contains bald assertions without accompanying support. Plaintiff does not include any financial statements . . . ."); *Companhia Brasileira Carbureto de Calcio v. United States*, 18 CIT 215, 217 (1994) ("No hard evidence was submitted to the court indicating what specific effect loss of such sales would have upon [the

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[26] Regarding financial losses, the Cheng Declaration represents the following in particular:

- On net, Ninestar "risks losses in U.S. sales approaching [[ ]] and [[ ]] of losses in the global market over the next year" and notes [[ ]]. Cheng Decl. ¶ 20.
- Ninestar Corporation lost its only customer in the U.S., resulting in a cancellation of outstanding orders valued at [[ ]]. *See id*. ¶ 23. Ninestar Corporation will lose more than [[ ]] in U.S. sales in the next year. *Id*. ¶ 24.
- Zhuhai Ninestar Information Technology cannot export any products to the United States, "reducing its annual sales from [[ ]] down to 0." *Id*. ¶ 28. U.S. customers have cancelled orders worth [[ ]] and the company "may lose well over [[ ]] in U.S. sales." *Id*. Moreover, the company has experienced [[ ]] *Id*. ¶ 30.
- Zhuhai Pantum Electronics Co., Ltd. ("Pantum") expects to lose [[ ]] in expected revenue and has lost [[ ]]. *Id*. ¶¶ 32–33. In total, Pantum will lose [[ ]] in U.S. sales in the next year. *Id*. ¶ 36.
- Apex Microelectronics has lost [[ ]] due to cancelled purchase orders from U.S. customers and risks losing [[ ]] in U.S. sales in the next year. *Id*. ¶¶ 40–41.
- Geehy Semiconductor's U.S. customers have cancelled sales contracts worth [[ ]], and projected sales have decreased from [[ ]] to zero. *Id*. ¶¶ 46–47.

[27] Specifically, Ms. Cheng states that [[

]]. Suppl. Cheng Decl. ¶ 6.

plaintiff]."); *Shree Rama Enterprises v. United States*, 21 CIT 1165, 1167, 983 F. Supp. 192, 195 (1997) ("No marketing studies, written financial data or other hard evidence of the serious permanent harm which would result from denial of the injunction was presented." (citation omitted)).

The need for clarifying and corroborating evidence is particularly important because the court cannot determine that Ninestar's losses are sufficiently substantial when considering its many subsidiaries and affiliates across the globe. For instance, Ninestar alleges that it "risks losses in U.S. sales" and "in the global market over the next year." Cheng Decl. ¶ 20; *see also supra* note 26. To be sure, Ninestar's potential losses are a serious matter. But at least two key questions remain unanswered: (1) what is the likelihood of that risk, and (2) is the share of those losses sufficiently substantial when considering Ninestar's overall enterprise? *See Shandong*, 24 CIT at 1290, 122 F. Supp. 2d at 146 ("Plaintiff provides no evidence demonstrating how sales to this customer fit within its total sales figures; nor how the loss of these sales will impact its overall financial position."); *Air Transp. Ass'n*, 840 F. Supp. 2d at 338 (holding in a case with a sovereign defendant that a hypothetical loss of $2.1 billion, representing less than 7 percent of total revenue, would not establish irreparable harm). The court acknowledges that financial losses are not to be taken lightly for any business. But ultimately, Ninestar's showing of substantial financial harm is too "speculative" and "determined by surmise" to justify the extraordinary measure of preliminary injunction. *Coalition*, 393 F. Supp. 3d at 1276.

Or take another example: Ninestar points to the diminished financial projections and related financial issues of another corporate entity. *See* Suppl. Cheng Decl. ¶ 6; *see also supra* note 27. But that entity is not a party to this action. Even taking the declaration at face value, Ninestar has not established with evidence on the record how, and to what extent, that entity's losses translate to losses for Ninestar. Alternatively, Ninestar appends a chart of its share price without prices on the y-axis or any analysis attributing a fall in share price to the Listing Decision. *See id.* ¶ 9. Why that chart establishes irreparable harm remains unexplained. Even if the court were to presumably attribute the entire decline in share price to the Listing Decision, such losses fall short of stock market losses that district courts have found to be substantial against sovereign defendants. *See, e.g.*, *Xiaomi*, 2021 WL 950144, at *11 ($10 billion in market capitalization loss was accompanied by restrictions by three banks on trading of warrants linked to the plaintiff's shares; plaintiff's listings on the Hong

Kong Stock Exchange were terminated and withdrawn; removal of plaintiff's shares from global stock indices; and $1.5 billion liquidity crunch due to lack of access to U.S. capital markets); *Luokung*, 538 F. Supp. 3d at 192 (expected loss of $10 million in revenue was accompanied by delisting from Nasdaq, the only stock market for plaintiff's shares, and removal of plaintiff's shares from global stock indices). In sum, Ninestar does not establish substantial financial loss that rises to the level of irreparable harm.

Ninestar next argues that the Listing Decision has interfered with Ninestar's opportunity to build business relationships with U.S. and non-U.S. customers alike, thwarting efforts such as a prior product exhibition in Las Vegas and a prolonged corporate negotiation. *See* Cheng Decl. ¶¶ 34–58.[28] Ninestar also contends that the Listing Decision irreparably tarnished its reputation and goodwill, both in the printing industry and in the business world more broadly. *See id.* To establish loss of reputation, Ninestar appends four public notices issued by three trade associations—the European Toner & Inkjet Remanufacturers Association ("ETIRA"), the U.S. Business Technology Association ("BTA"), and the International Imaging Technology Council ("IITC"). *Id.* at 13–21. The ETIRA's and IITC's statements, dated on June 12, 2023, and August 4, 2023, respectively, advise businesses to distance themselves from Ninestar due to the Listing Decision. *Id.* at 14, 21. On July 25, 2023, the BTA issued a statement moving to remove Ninestar as a member due to the Listing Decision while noting that other Ninestar affiliates, such as Lexmark International, should not be held "guilt[y] by association." *Id.* at 17–19. And on October 24, 2023, the ITTC announced that it would not

[28] Regarding losses of business opportunities, the Cheng Declaration represents the following regarding the named parties in this litigation:

- Pantum participated in a multi-day product exhibition in Las Vegas in early 2023, resulting in more than [[ ]] new customers who expressed interest in future collaborations. *Id*. 34. "Those collaborations have been put on hold because of the Listing Decision and may not be recoverable." *Id*.
- Pantum "encountered business disruptions outside the United States," namely [[

]]. *Id*. ¶ 35.
- Apex Microelectronics's Chinese customers have paused sales "out of concern that . . . they will not be able to sell" to U.S. customers. *Id*. ¶ 42. One of Apex Microelectronics's [[

]]. *Id*. ¶ 43.
- Non-U.S. customers of Geehy Semiconductors have indicated that they would terminate business relationships due to the Listing Decision. *Id*. ¶ 48. Moreover, "the Listing Decision will cause [Chinese customers] to discontinue their relationship with Geehy Semiconductor" due to inability to sell into the United States. *Id*. ¶ 49.
- Zhuhai G&G Digital Technology, Zhuhai Seine Printing Technology, and Zhuhai Ninestar Management Co. do not export products to the United States, but their "reputation has been harmed in the same way as the other listed Ninestar entities." *Id*. ¶¶ 52, 55, 58.

renew Ninestar's STMC Recertification, a valuable seal of approval in the printer cartridge industry, on ethical grounds with the reasoning that "certification of Ninestar would facilitate enhanced sales of products identified by the United States as likely to be produced by slave labor." Suppl. Cheng Decl. at 8.

Ninestar's losses of business opportunity and reputation, as presented here, do not amount to irreparable harm. Ninestar again suffers from a sufficiency problem. It is true that "[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm." *Celsis*, 664 F.3d at 930. But the district court in *Celsis* heard fact testimony regarding the plaintiff's specific financial records, particular instances of customers purchasing from other companies, evidence of corporate policies and market sensitivities, and unrebutted expert testimony about damage to irreversible price erosion and loss of marketing capabilities. *See id.* at 930–31. On that robust record, the Federal Circuit found no clear error in a determination that loss of reputation and business opportunity at an early growth stage was irreparable for the plaintiff. *See id.* at 931. Ninestar simply has not offered the same quantum of evidence here to show that the loss of its reputation is irreparable absent a preliminary injunction. The trade association statements all make clear that the guidance to remove Ninestar from member companies' supply chains is due to the Listing Decision. The same reasoning goes for lost customers, who have purportedly abandoned their business relationships either due to the Listing Decision or because Ninestar can no longer import into the United States. Given the absence of additional evidence that could make Ninestar's claim for irreparable harm stronger, such as evidence of the enduring nature of customers' objections or information on inelasticity in the global market for printer components, *see Celsis*, 664 F.3d at 930, there is little reason to believe that these customers and trade associations would not interpret and rely on a reversal of the Listing Decision as a clean bill of health.

That leads to another, broader point: The decline of all U.S. sales to zero, as well as the deterioration of international business opportunities and corporate reputation, are obvious consequences that would be true for any entity on the UFLPA's Entity List. Holding those harms to be sufficient would create an impermissible "per se irreparable harm rule," which would yield "a result likely contrary to the extraordinary nature" of preliminary injunctions. *Corus Grp. PLC v. Bush*, 26 CIT 937, 944, 217 F. Supp. 2d 1347, 1356 (2002), *aff'd in part sub nom. Corus Grp. PLC. v. Int'l Trade Comm'n*, 352 F.3d 1351 (Fed.

Cir. 2003); *see also ConverDyn*, 68 F. Supp. 3d at 49 (reasoning that a per se irreparable harm rule would "nullify[] that requirement"). That result is doubly disfavored here, where a per se irreparable harm rule would lie in tension with the UFLPA itself. The UFLPA intended that the United States "lead *the international community* in ending forced labor practices . . . by stopping the importation of any goods made with forced labor" and "actively work to prevent, *publicly denounce*, and end human trafficking including with respect to forced labor," UFLPA § 1(2), (4), 135 Stat. at 1525 (emphasis added), and that the only way for a listed entity to lift the presumptive embargo is to make a clear and convincing showing of no forced labor, *see also infra* section II.C. Because Ninestar's alleged irreparable harm here would be the same for all other similarly situated plaintiffs, the court is careful not to undo Congress's choice of policy. Ninestar, therefore, does not establish irreparable harm on the facts of this case.

2. Procedural Harm

Relying on *Invenergy I*, 422 F. Supp. 3d 1255, and *Invenergy IV*, 476 F. Supp. 3d 1323, Ninestar also argues that the FLETF's failure to comply with the APA's requirements constitutes irreparable harm of Ninestar's procedural rights. But the holdings of those cases do not apply to the facts presented here.

In the events leading to *Invenergy I*, the President had imposed safeguard duties protecting the domestic solar panel industry and had delegated to the USTR the authority to issue exclusions of certain products from those duties, which it had done after a lengthy process. *See* 422 F. Supp. 3d at 1263–64. Four months later, USTR reversed course and attempted to withdraw the exclusion without the APA's notice-and-comment procedures. *See id.* The plaintiffs, who were importers, purchasers, and consumers of solar panels, sought a preliminary injunction staying the USTR's withdrawal of its prior exclusion decision. *See id.* at 1264. This court granted that injunction. *Id.* at 1294. Regarding irreparable harm, the court concluded that "[a] procedural violation can give rise to irreparable harm justifying injunctive relief because lack of process cannot be remedied with monetary damages or post-hoc relief by a court," and that "[a] failure to comply with APA procedural requirements therefore itself causes irreparable harm because 'the damage done by [the agency's] violation of the APA cannot be fully cured by later remedial action.'" *Id.* at 1290 (quoting *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 18 (D.D.C. 2009)).

That holding is inapplicable here for one simple reason: Ninestar's alleged procedural harms can be remedied on remand. While the

Listing Decision remains in force, the FLETF can (1) issue a more thorough explanation of its agency action, (2) reconsider the weight of the record, (3) apply a higher burden of proof, or (4) rely on recent evidence. Compare the facts here to those in *Invenergy I*, where absent the preliminary injunction, the USTR's withdrawal of the exclusion would have gone into effect, and the plaintiffs' procedural harms relating to lost notice-and-comment opportunities would be without remedy on remand. *See id.* at 1291 ("[I]f the [Withdrawal] is not enjoined prior to its effective date, Invenergy will never have an equivalent opportunity to influence USTR's decision as to its imposition." (internal quotation marks and citation omitted)).

The same distinction separates this case from *Invenergy IV*. In that decision, the court concluded that the USTR's renewed attempt at withdrawal, which involved a notice and comment procedure, was likely to be unlawful as arbitrary and capricious and modified the original preliminary injunction accordingly to prevent procedural harm. *Invenergy IV*, 476 F. Supp. 3d at 1352. The court accordingly reasoned that "a procedurally flawed and inadequately explained decision" will "establish a new status quo and engender new reliance interests on a decision that did not take account of public input as required by the APA." *Id.* at 1353. Ninestar seeks to extend that reasoning to agency decisions that engender the alleged errors in this case, *see* Pls.' Reply at 20, but once again, the agency error alleged in the *Invenergy* cases is fundamentally different. The *Invenergy* plaintiffs would not have been able to vindicate their rights to participate in agency rulemaking once the withdrawal, which was the result of arbitrary and capricious agency action, went into effect. Here, Ninestar's errors may be resolved on remand without the need for a preliminary injunction to preserve the status quo ante. Unable to prevail on either a procedural or economic theory, Ninestar has not demonstrated that "that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis omitted).

C. The Balance of Hardships Is in Favor of the Government

Turning to the third and fourth preliminary injunction factors, Ninestar argues that the balance of hardships tips in its favor and that the public interest will be served by a preliminary injunction. *See* Pls.' Br. at 15–17. These factors require the court to "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief" and to "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (internal quotation marks omitted) (quoting *Amoco Production Co. v. Gambell*,

480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). When the Government opposes the preliminary injunction, the balance of hardships and public interest factors merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Weighing the public interests as defined by the UFLPA against Ninestar's economic and procedural harms, the court concludes that the balance of hardships tips for the Government.

Ninestar argues that the balance of hardships tips in its favor because of the "significant economic losses" and "irreparable procedural injury" that it has incurred due to the Listing Decision. Pls.' Br. at 15. Ninestar then states that the Government "would suffer no remotely comparable hardship" beyond an increase in the administrative burden of implementing the injunction, *see id.*, which, the court agrees, is not usually sufficient hardship if the administrative burden results from agency error under the APA, *see Invenergy I*, 422 F. Supp. 3d at 1292. But that proposed weighing of the equities gives short shrift to the Government. "In balancing the public interest, courts have traditionally looked to the underlying statutory purposes at issue." *Canadian Lumber Trade*, 30 CIT at 900, 441 F. Supp. 2d at 1267 (collecting cases). And the court identifies at least two broadly defined public interests from the UFLPA's text and legislative history.

First, the UFLPA makes clear that even a single entry of goods made with forced labor from Xinjiang is one too many. *See Ninestar I*, 666 F. Supp. 3d at 1362 & n.11. That is because the UFLPA is intended to "ensure [that] Americans and American companies are not complicit in the Chinese Communist Party's human rights atrocities" in Xinjiang. 212 Cong. Rec. H7499 (daily ed. Dec. 8, 2021) (statement of Rep. Gregory Meeks); *see also id.* at H7499 (statement of Rep. Michael McCaul) ("We must refuse to be complicit in the CCP's genocide against the Uyghurs . . . ."); *id.* at H7502 (statement of Rep. Tom Rice) ("[W]e must take steps to ensure that U.S. companies and consumers are not complicit in the abuses."). Lifting the embargo against Ninestar, even if temporarily, would constitute a risk to the public interest—as defined by Congress—that the American public and markets are complicit in, and legitimize goods made with, forced labor from Xinjiang.

Second, the UFLPA's prohibitions are intended to strengthen international protections for human rights beyond Xinjiang and to forcefully denounce any form of forced labor. Congress declared it the policy of the United States "to lead the international community in ending forced labor practices . . . by stopping the importation of any goods made with forced labor"; "to actively work to prevent, publicly denounce, and end human trafficking including with respect to forced

labor"; "to regard the prevention of atrocities as it is in the national interest of the United States, including efforts to prevent torture, enforced disappearances, severe deprivation of liberty, including mass internment, arbitrary detention, and widespread and systematic use of forced labor, and persecution targeting any identifiable ethnic or religious group." *Id.* § 1(2), (4)–(5), 135 Stat. at 1525. One lawmaker stated that, "as the world's strongest economy, America has a moral duty to tie our trade relations with human rights." 212 Cong. Rec. H7504 (daily ed. Dec. 8, 2021) (statement of Rep. Nancy Pelosi). Another emphasized that "[t]his legislation is critical to showing that we are putting human rights at the center of our foreign policy and economic policy." *Id.* at H7499 (statement of Rep. Gregory Meeks). The American public interest, then, extends beyond consumer and corporate complicity in Chinese atrocities in Xinjiang. It encompasses a directive, global in scope, that the high watermark of human rights be satisfied in international trade.

Ninestar counters that the public interest is in its favor rather than the Government's, but neither of its cited reasons is availing. First, while it is of course true that "[t]he public interest is served by ensuring that governmental bodies comply with the law, and interpret and apply trade statutes uniformly and fairly," *Am. Signature, Inc. v. United States*, 598 F.3d 816, 830 (Fed. Cir. 2010),[29] that reason cannot by itself resolve the public interest analysis. If so, injunctions against the Government would issue as a matter of course. Second, Ninestar contends that an injunction would vindicate the purposes of the UFLPA, which are "frustrated both by listing entities with no involvement with forced labor or the Xinjiang region, and by failing to explain publicly legitimate grounds for listings and their ensuing consequences." Pls.' Br. at 16–17. To the extent that Ninestar's second argument is not a UFLPA-specific recitation of the first, it fails because Congress already considered the risk of incorrect listings in the UFLPA's scheme. By structuring the statute to have a presumptive embargo that can later be rebutted by clear and convincing evidence, Congress subordinated the risk of overbreadth to the public interests served by the UFLPA's presumptive embargo.

Having defined the broad contours of the Government's interests here, the court now turns to weighing the equities. The harm to the public interests protected by the UFLPA if a preliminary injunction enters must outweigh the economic and procedural harms to Nine-

[29] Ninestar's citation to that case does not get them very far. The Federal Circuit concluded in the next sentence that because "[b]oth sides in this dispute contend that they are seeking to effectuate these important goals," the public interest did not clearly favor either party. *Id.* All parties here would agree that all sides are concerned with effectuating the important goals of uniform and fair application of the law.

star if a preliminary injunction does not issue. As stated above, Ninestar points only to its economic and procedural hardships flowing from the Listing Decision. *See* Pls.' Br. at 15. The loss of financial revenues, business opportunities, and reputation is a matter to be weighed seriously in any circumstance. *Cf. Celsis*, 664 F.3d at 930. But those hardships are entirely predictable consequences that were likely foreseen by Congress, rather than unexpected or extraordinary byproducts, of an adverse listing. To hold here that Ninestar's foreseeable hardships outweigh the UFLPA-defined public interests would favor preliminary injunctions in nearly every challenge to the UFLPA. That conclusion would at best lie in tension with, and at worst entirely undermine, a statute that intentionally contemplates a difficult escape valve for importers: the rebuttal of the presumptive embargo with a clear and convincing showing of no forced labor. *See* UFLPA § 3(b), 135 Stat. at 1529. Indeed, that "rebuttable presumption is the key to this legislation," 212 Cong. Rec. H7501 (daily ed. Dec. 8, 2021) (statement of Rep. Christopher Smith), and the "core and essential provision," *id.* at H7502 (statement of Rep. Tom Rice), that renders section 307 enforcement effective against Chinese importers involved in Xinjiang.

Beyond its foreseeable economic and procedural hardships, Ninestar points to no other harms that would ensue if the preliminary injunction were denied. Considering the significant weight of the public interests of avoiding American complicity and denouncing forced labor against the fact that Ninestar's only cited hardships are economic and procedural in nature, the court concludes that the balance of equities tips heavily for the Government. And having resolved all four factors for preliminary injunction for the Government, each of which the court views as sufficient to sustain a denial independently, the court denies Ninestar's Motion for Preliminary Injunction.

CONCLUSION

In sum, the court holds that while the CIT's prudential exhaustion statute applies to this APA case, administrative exhaustion is nonetheless not required under the particular facts here. The court then concludes that Ninestar (1) is not likely to succeed on the merits of its adequate explanation, burden of proof, and retroactivity claims, (2) has failed to establish irreparable harm, and (3) does not prevail against the weighty public interests defined by the UFLPA. Ninestar's Motion for Preliminary Injunction is therefore denied for its

failure to establish any of the four factors, *see Winter*, 555 U.S. at 20, each of which is sufficient to independently sustain the denial of the preliminary injunction. The embargo against Ninestar remains in force.

Dated: February 27, 2024
New York, New York

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

Slip Op. 24–25

RISEN ENERGY, CO., LTD., Plaintiff, JA SOLAR TECHNOLOGY YANGZHOU CO., LTD., et al., Consolidated Plaintiffs, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Consol. Court No. 22–00231

[Commerce's Final Results in the Eighth Administrative Review of Commerce's countervailing duty order on crystalline silicon photovoltaic cells from the People's Republic of China are affirmed.]

Dated: February 29, 2024

Gregory S. Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, for Plaintiff. With them on the brief was *James K. Horgan*.

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, DC, for Consolidated Plaintiffs. With him on the brief were *Sarah M. Wyss*, and *Yixin (Cleo) Li*.

Kelly M. Geddes, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Spencer Neff*, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

JUDGMENT

This matter is before the court following the filing of the results of the first remand order. *See* Final Results of Redetermination Pursuant to Court Remand Order, ECF No. 53 (Jan. 9, 2024) ("*Remand Results*"); *see also Risen Energy Co. v. United States*, 658 F. Supp. 3d 1364 (CIT 2023). All parties were given the opportunity to comment on these results, but only consolidated plaintiffs JA Solar (Xingtai) Co., Ltd., JA Solar Co., Ltd., JA Solar Technology Yangzhou Co., Ltd., and Shanghai JA Solar Technology Co., Ltd. (collectively, "JA Solar") did so. *See* Comments in Support of Final Results of Redetermination Pursuant to Court Remand on Behalf of Consolidated Plaintiffs and Plaintiff-Intervenors JA Solar Technology Yangzhou Co., Ltd., Shanghai JA Solar Technology Co., Ltd., JA Solar Co., Ltd. (A.K.A Jingao Solar Co., Ltd.) and JA Solar (Xingtai) Co., Ltd., ECF No. 56 (Feb. 8, 2024). In its comments, JA Solar supported the U.S. Department of Commerce's ("Commerce") Remand Results. *Id.* at 2. Reviewing the *Remand Results*, the court finds that Commerce complied with its opinion. The court notes Commerce's voluntary decision not to attempt verification in this case. *See Remand Results* at 5–6. The court's opinion did not require that Commerce forego verification, but merely cautioned Commerce against any verification efforts that would "overly burden voluntary participants." *Risen Energy*, 658 F. Supp. 3d

at 1372. Nonetheless, the *Remand Results* comply with the court's order. Accordingly, it is

ORDERED, **ADJUDGED**, and **DECREED** that the *Remand Results* by Commerce are **SUSTAINED**.

Dated: February 29, 2024
New York, New York

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

Slip Op. 24–27

DIAMOND TOOLS TECHNOLOGY LLC, Plaintiff, v. UNITED STATES, Defendant, and DIAMOND SAWBLADES MANUFACTURERS' COALITION, Defendant-Intervenor.

Before: Timothy M. Reif, Judge
Court No. 20–00060

[Denying plaintiff's application for attorney fees.]

Dated: March 1, 2024

Lucius B. Lau, White & Case LLP, of Washington, D.C., for Plaintiff Diamond Tools Technology LLC. With him on the brief were *Jay C. Campbell*, *Walter J. Spak*, *Ron Kendler*, and *Allison J.G. Kepkay*.

Antonia R. Soares, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Tamari J. Lagvilava*, Senior Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection.

OPINION AND ORDER

Reif, Judge:

Before the court is the application by plaintiff Diamond Tools Technology, LLC ("DTT USA" or "plaintiff") for attorney fees brought under 28 U.S.C. § 2412. *See* Pl.'s Application for Att'y Fees ("Pl. App'n"), ECF No. 103. Plaintiff seeks an award of $603,111.11 on account of the position taken by U.S. Customs and Border Protection ("Customs") throughout the investigation under the Enforce and Protect Act ("EAPA"), 19 U.S.C. § 1517 (2018),[1] and what plaintiff alleges as Customs' "unreasonable adherence to that unlawful position in this Court." *Id.* at 1.

In response, defendant the United States (the "government" or "defendant") argues that plaintiff's action fails because the "case presented a matter of first impression and a novel issue," which, defendant asserts, substantially justifies the position taken by Customs during the investigation and case before the court. Defs.' Resp. to Pl. App'n ("Def. Resp."), at 1, ECF No. 106. Defendant asserts that plaintiff concedes as much. *Id.* at 1, 11. For the reasons discussed below, the court denies plaintiff's motion.

[1] All citations to the Tariff Act of 1930, as amended, are to the Title 19 of the U.S. Code, and all references to the U.S. Code are to the 2018 edition unless otherwise specified. EAPA 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).

BACKGROUND

The court presumes familiarity with the facts of this case as set out in its previous opinions. *See Diamond Tools Tech., LLC v. United States* ("*Diamond I*"), 45 CIT __, 545 F. Supp. 3d 1324 (2021); Diamond *Tools Tech. LLC v. United States* ("*Diamond II*"), 46 CIT __, 609 F. Supp. 3d 1378 (2022); Diamond *Tools Tech. LLC v. United States* ("*Diamond III*"), 47 CIT __, 647 F. Supp. 3d 1383 (2023). The court recounts the following procedural events relevant to plaintiff's application for attorney fees.

On March 12, 2020, plaintiff filed a complaint contesting Customs' final determination of evasion under EAPA. *See* Compl., ECF No. 2. On November 5, 2021, the court issued an opinion and order sustaining in part and remanding in part Customs' Final Determination of evasion and Final Administrative Decision. *See Diamond I*, 45 CIT __, 545 F. Supp. 3d 1324 at 1356. In *Diamond I,* the court remanded in part Customs' determination that DTT USA violated EAPA, ordering Customs to re-examine its finding that plaintiff had entered covered merchandise by means of a material false statement. *Id.* The court concluded that "the interaction between Customs' EAPA investigations and Commerce's scope inquiries, specifically a circumvention inquiry, [was] a novel one . . . ." *Id.* at __, 545 F. Supp. 3d at 1349. Relying on the Conference Committee on the Trade Enforcement Act of 2015 ("Conference Report") and the *Chevron* doctrine*,* the court further sustained Customs' determination as to the first two elements of a finding under EAPA. *Id.* at __, 545 F. Supp. 3d at 1349–50 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842–43 (1984)). The court held "that Customs did not violate DTT USA's due process rights[,]" sustained Customs' imposition of interim measures and concluded "that Customs' finding that DTT USA's entries that pre-dated December 1, 2017, are 'covered merchandise' is in accordance with law." *Id.* at __, 545 F. Supp. 3d at 1356. However, the court remanded to Customs the issue concerning the entry of the covered merchandise by means of a "material and false statement or act." *Id.*; *see* 19 U.S.C. § 1517(a)(5)(A)). The court ordered Customs to explain "how DTT USA's failure to seek . . . clarification [as to the scope of Commerce's instructions] constitutes a material and false statement or act, or a material omission." *Id.* at __, 545 F. Supp. 3d at 1354.

On January 27, 2022, Customs issued a remand redetermination. *See* Final Remand Redetermination ("First Remand Results"), ECF No. 70. Customs again found that "DTT [USA] made material false statements, or acts, or material omissions with respect to its entries of diamond sawblades imported prior to December 1, 2017." *Id.* at 1.

On December 16, 2022, the court issued an opinion and order remanding *to* Customs for the reconsideration of "the applicability of the EAPA in the confined circumstance of an importer's reliance on Commerce's clear directive." *Diamond II*, 46 CIT at __, 609 F. Supp. 3d at 1391. The court stated that "DTT USA filling out the import documentation based on the explicit and clear terms of Commerce's order and the associated 2006 IDM, does not, in accordance with statutory construction, comprise a material and false statement or omission." *Id* at __, 609 F. Supp. 3d at 1388. On March 21, 2023, Customs issued a second remand redetermination "under respectful protest" and determined that DTT USA did not evade the AD Order. *See* Final Remand Redetermination ("Second Remand Results"), ECF No. 92.

On July 28, 2023, the court issued a final judgment sustaining Customs' Second Remand Results. *See Diamond III*, 47 CIT __, 647 F. Supp. 3d. 1383.

On October 26, 2023, plaintiff filed its application for attorney fees. *See* Pl. App'n. The application requests "reasonable attorney fees" in the amount of $603,111.11 pursuant to the Equal Access to Justice Act ("EAJA"). *Id.* at 1 (citing 28 U.S.C. § 2412). Plaintiff maintains that it is entitled to receive attorney fees under the EAJA because the government's position was not "substantially justified." *Id*. at 8–12 Plaintiff requests that the court apply a special factor in determining the attorney fees to be awarded pursuant to 28 U.S.C. § 2412(d)(2)(A). *Id*. at 12. Plaintiff requests further that this court award additional fees for paralegal services, alleges that DTT USA was forced out of business by Customs' actions and asks the court to take this alleged fact into account. *Id*. at 13–14.

On November 27, 2023, defendant filed a response in opposition to plaintiff's application, moving for the court to deny the application. *See* Def. Resp. .Defendant argues that (1) Customs' decision and position throughout the litigation was substantially justified and (2) special circumstances render attorney fees unjust. *Id.* at 1–2. Defendant contends further that even if DTT USA is entitled to attorney fees, the requested award is contrary to law and unreasonable due to: (1) DTT USA's failure to establish entitlement on the basis of a "special factor"; (2) DTT USA's failure to establish its entitlement to enhanced fees under the "Adjusted *Laffey* Matrix"; (3) DTT USA's incorrect calculation of its cost-of-living adjustment; (4) DTT USA's incorrect determination of paralegal fees; (5) DTT USA's impermissible request for attorney fees related to its unsuccessful claims; and (6) DTT USA's impermissible request of attorney fees for "excessive, irrelevant, vague, and duplicative time entries." *Id.* at 2.

This decision analyzes the first argument and concludes that the position of Customs and the government in the litigation was substantially justified, rendering improper an award of attorney fees in the instant action. Accordingly, the decision does not address the further arguments of plaintiff and defendant.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to Section 517(g)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1517(g)(1), and 28 U.S.C. § 1581(c). The court retains jurisdiction after issuing judgment to adjudicate parties' timely application for fees and expenses. *See* 28 U.S.C. § 2412(b), (d)(1)(A) (fees and other expenses awardable "in any civil action" brought against the United States "in any court having jurisdiction of that action"); USCIT R. 54.1 (applications for attorney fees and expenses "must be filed within 30 days after the date of final judgment").

Under the EAJA, the court may grant attorney fees and other expenses to the prevailing party in an action against the United States. 28 U.S.C. § 2412(a)(1), (d)(1)(A). The burden is on the government to demonstrate that the position it took in the action was substantially justified or that special circumstances exist making it unjust to grant the prevailing party fees and other expenses. *Scarborough v. Principi*, 541 U.S. 401, 414–15 (2004) (citations omitted); *Brewer v. Am. Battle Monuments Comm'n*, 814 F.2d 1564, 1569 (Fed. Cir. 1987) (citations omitted). The EAJA limits the court's review to the record of the civil action for which fees and other expenses are sought and the agency's action "upon which the civil action is based." 28 U.S.C. § 2412(d)(1)(B), (2)(D).

The EAJA provides that an application for attorney fees shall be filed "within thirty days of final judgment in the action," 28 U.S.C. § 2412(d)(1)(B), and provides further that "'final judgment' means a judgment that is final and not appealable," 28 U.S.C. § 2412(d)(2)(G); USCIT R. 54.1 (applications for attorney fees and expenses "must be filed within 30 days after the date of final judgment"). The court issued a final judgment in the instant action on July 28, 2023. *Diamond III*, 47 CIT __, 647 F. Supp. 3d. 1383. The government did not file for appeal within the sixty-day window, and plaintiff's application for attorney fees is therefore timely filed. Fed. R. App. P. 4(a)(1)(B).

DISCUSSION

I. Whether DTT is entitled to attorney fees under the EAJA

A. Legal framework

The EAJA establishes that a prevailing party in an action against the United States may recover attorney fees absent the government's showing that its position "was substantially justified." 28 U.S.C. § 2412(d)(1)(A). Specifically, the statute describes the circumstances in which attorney fees may be appropriate:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Id. The prevailing party "seeking an award of fees . . . shall also allege that the position of the United States was not substantially justified." 28 U.S.C. § 2412(d)(1)(B). The burden then shifts to the defendant, who must show that its position was substantially justified. *See Scarborough,* 541 U.S. at 404 (citing 28 U.S.C. § 2412(d)(1)(A)).

A position is "substantially justified" if it has a "reasonable basis in both law and fact." *Pierce v. Underwood*, 487 U.S. 552, 564–66 (1988). Justification does not have to be substantiated to a "high degree" but to "satisfy a reasonable person." *Id.* at 565–66 (citations omitted); *Norris v. S.E.C.,* 695 F.3d 1261, 1265 (Fed. Cir. 2012) (citations omitted). Further, if the government demonstrates that it "adopted a reasonable, albeit incorrect, interpretation of a particular statute or regulation" the position is "substantially justified." *Patrick v. Shinseki*, 668 F.3d 1325, 1330 (Fed. Cir. 2011) (citing *Pierce,* 487 U.S. at 566 n. 2); *see also Lacey v. Wilkie,* 32 Vet. App. 387, 390–91 (Aug. 18, 2020) (noting that a position taken by the government is substantially justified even when the interpretation is incorrect, so long as it was reasonable).

Section 2412(d)(1)(B) states further that "[w]hether or not the position of the United States was substantially justified shall be determined on the basis of the record . . . which is made in the civil action for which fees and other expenses are sought." 28 U.S.C. §

2412(d)(1)(B). Finally, when determining whether the government's position was substantially justified, the court considers the action as a whole and does not separately consider every position. *E.E.O.C. v. Memphis Health Ctr.,* 526 Fed. Appx. 607, 614 (6th Cir. 2013) (citing *Comm'r v. Jean*, 496 U.S. 154, 161–62 (1990)).

B. Analysis

The EAJA delineates the standard for the award of costs when the United States is the defendant of an action, stating that a court:

> shall award to a prevailing party . . . any costs . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

Plaintiff met its burden of demonstrating that it is a "prevailing party" under the EAJA. The court concludes that plaintiff's burden is met because plaintiff's claim that there was not a material and false statement or act, or material omission prevailed. *See Diamond I,* 45 CIT __, 545 F. Supp. 3d 1324*; Diamond II,* 46 CIT __, 609 F. Supp. 3d 1378*; Diamond III,* 47 CIT __, 647 F. Supp. 3d. 1383; Pl. App'n at 8–9.

Next, the court turns to the issue of whether the government was justified in litigating its position upon remand concerning Customs' finding of evasion and violation of EAPA upon remand. The court concludes that the government's position in the prior litigation was substantially justified because the underlying legal issues were ones of first impression. Accordingly, the court does not address the remaining factors and arguments raised by plaintiffs.

The position of the government at issue in the instant action was Customs' interpretation of EAPA. The case presented two questions of first impression for the court. The first was whether the statute was ambiguous as to "whether Customs, having referred a 'covered merchandise' matter to Commerce, is consequently bound by the timeline created by Commerce's initiation of a circumvention inquiry[.]" *Diamond I*, 45 CIT at __, 545 F. Supp. 3d at 1349. The court found that "the interaction between Customs' EAPA investigations and Commerce's scope inquiries, specifically a circumvention inquiry, [was] a novel one[.]" *Id.* Notably, the conclusion of the court in this case was not argued by plaintiff nor by any other party, including defendant. This circumstance highlights the novel nature of the legal issues presented.

The second question of first impression was whether plaintiff had made a "material and false statement or act, or material omission" within the meaning of EAPA. Pl. App'n at 9. Customs interpreted the term "false" in EAPA to mean "incorrect." First Remand Results at 4,13–14. This interpretation was not inconsistent with past rulings by Customs in other circumstances. Def. Resp. at 16 (citing *Investigation of Claims of Evasion of an Antidumping and Countervailing Duties, Interim Regulations,* 81 Fed. Reg. 56,477, 56,478 (Dep't of Homeland Security Aug. 22, 2016)).

To support its position for recovery of attorney fees, plaintiff relies on *Washington v. Heckler,* in which the Third Circuit Court of Appeals ("Third Circuit") states that "[t]he government's burden of showing substantial justification is a strong one and is not met merely because the government adduces 'some evidence' in support of its position." Pl. App'n at 10 (citing 756 F.2d 959, 961 (3d Cir. 1985)).[2] However, the *Washington* court did not rest its decision solely on the language that plaintiff invokes. *See Washington*, 756 F.2d at 962. The Third Circuit noted that "the case law has not prescribed a comprehensive formula for determining what constitutes a reasonable basis in law" and concluded that "the government's legal position clearly offends established precedent" and, therefore, "its position cannot be said to be 'substantially justified.'" *Id.* at 961–62, 968. By contrast, in the instant action, there was no court precedent with respect to the narrow circumstances presented by plaintiff's EAPA claims at the time of litigation, rendering the decision in *Washington* inapposite.

Moreover, in a more recent case, *Shock v. United States*, the First Circuit Court of Appeals held that "when the issue is a novel one on which there is little precedent, courts have been reluctant to find the government's position was not substantially justified." 254 F.3d 1, 6 (1st Cir. 2001) (citing *Washington*, 756 F.2d at 961–62 (citations omitted)). In fact, plaintiff conceded that "prior to this action, there were [sic] only a handful of cases in this Court that addressed EAPA generally and no cases that addressed the culpability requirements of that statute." Pl. App'n 12.

Customs' publication of the past interpretation in the Federal Register is more than "some evidence" and constitutes a substantially justified position because it reflected a reasonable "interpretation of a particular statute." *Washington,* 756 F. 2d at 961 (citing *Tressler,* 748 F. 2d at 150); *see also Patrick,* 668 F. 3d at 1330 (citing *Pierce,* 487 U.S. at 566).

[2] The Third Circuit stated that the government is "substantially justified" if the government's position is reasonable in both law and fact. *Tressler v. Heckler,* 748 F. 2d 146, 149 (3d Cir. 1984) (citing *Dougherty v. Lehman,* 711 F. 2d 555, 563 (3d Cir 1983)).

The government's arguments "were not ultimately persuasive"; however, "they were nevertheless reasonable arguments at the time they were advanced." *Keirton USA, Inc. v. United States*, 47 CIT __, __, 627 F.Supp.3d 1342, 1349 (2023).

CONCLUSION

For the foregoing reasons, the court denies plaintiff's application for attorney fees.

ORDERED that DTT USA's application for fees is denied.

Dated: March 1, 2024
New York, New York

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

Slip Op. 24–28

STAR PIPE PRODUCTS, Plaintiff, v. UNITED STATES, Defendant, and ASC ENGINEERED SOLUTIONS, LLC, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Court No. 17–00236

[Sustaining a decision that certain ductile iron flanges are not within the scope of an antidumping duty order on certain cast iron pipe fittings]

Dated: March 6, 2024

Francis J. Sailer, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, Washington, D.C., for plaintiff. With him on the brief were *Ned H. Marshak*, New York, N.Y., and *Kavita Mohan*, Washington, D.C.

Joshua E. Kurland, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel was *David W. Richardson*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Daniel L. Schneiderman, King & Spalding LLP, of Washington, D.C., for defendant-intervenor. With him on the brief was *J. Michael Taylor*.

OPINION

Stanceu, Judge:

Plaintiff Star Pipe Products ("Star Pipe") commenced this action in 2017 to contest a decision of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") that a group of imported products, certain "flanges" made of ductile cast iron, are within the scope of an antidumping duty order.

Before the court is the Department's fourth decision issued in response to court orders (the "Fourth Remand Redetermination"), which Commerce submitted to the court in response to the opinion and order in *Star Pipe Prods. v. United States*, 46 CIT __, 607 F. Supp. 3d 1192 (2022) (*"Star Pipe IV"*). The court sustains the Department's decision in the Fourth Remand Redetermination that Star Pipe's flanges are outside the scope of the Order.

I. BACKGROUND

Background, set forth in the court's prior opinions, is summarized and supplemented briefly herein. *Id.*, 46 CIT at __, 607 F. Supp. 3d at 1194; *Star Pipe Prods. v. United States*, 45 CIT __, __, 537 F. Supp. 3d 1362, 1365—67 (2021) ("*Star Pipe III*"); *Star Pipe Prods. v. United States*, 44 CIT __, __, 463 F. Supp. 3d 1366, 1368—70 (2020) (*"Star Pipe II"*); *Star Pipe Prods. v. United States*, 43 CIT __, __, 365 F. Supp. 3d 1277, 1278—79 (2019) ("*Star Pipe I*").

The contested administrative decision, the "Final Scope Ruling," is entitled *Final Scope Ruling on the Antidumping Duty Order on Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Request by Star Pipe Products* (Aug. 17, 2017) (P.R. Doc. 13) ("*Final Scope Ruling*")[1]. *See Notice of Scope Rulings*, 84 Fed. Reg. 9,295, 9,296 (Int'l Trade Admin. Mar. 14, 2019). The Final Scope Ruling concluded that Star Pipe's ductile iron flanges are within the scope of an antidumping duty order issued in 2003 (the "Order"). *See Notice of Antidumping Duty Order: Non-Malleable Cast Iron Pipe [Fittings] From the People's Republic of China*, 68 Fed. Reg. 16,765 (Int'l Trade Admin. Apr. 7, 2003) ("*Order*"). The Order resulted from an antidumping duty petition (the "Petition") filed in 2002. *See Petition for Imposition of Antidumping Duties: Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China* (Feb. 21, 2002) (P.R. Docs. 30–32, Ex. 1) ("*Petition*").

In the first and second remand decisions in response to the court's decisions in *Star Pipe I* and *Star Pipe II*, respectively, Commerce placed Star Pipe's flanges within the scope of the Order. As it did in the decision now before the court, Commerce determined under protest in the third remand redetermination (in response to *Star Pipe III*) that the Order does not apply to Star Pipe's flanges. Commerce submitted the Fourth Remand Redetermination to the court on December 19, 2022. Final Results of Redetermination Pursuant to Court Remand (Dec. 19, 2022), ECF No. 102 ("*Fourth Remand Redetermination*").

While agreeing with the Department's determination that its flanges are not within the scope of the Order, Star Pipe objects to aspects of the Fourth Remand Redetermination, including the Department's issuing its redetermination "under protest." Star Pipe Products's Comments on the Fourth Final Remand Redetermination (Jan. 12, 2023), ECF No. 107 ("Star Pipe's Comments").

Defendant-intervenor ASC Engineered Solutions, LLC ("ASC," formerly "Anvil International" or "Anvil") opposes the Fourth Remand Redetermination, arguing that it is "unsupported by substantial record evidence and is otherwise not in accordance with law." Def.-Intervenor's Comments on the Final Results of Remand Redetermination 1 (Jan. 10, 2023), ECF No. 106 ("ASC's 2023 Comments").

Responding to the comment submissions, defendant United States takes the position that "the Court should sustain the Fourth Remand Results and enter final judgment for the Government because . . . the

[1] Citations to documents from the Remand Joint Appendix (October 22, 2019), ECF No. 68 are referenced herein as "P.R. Doc. __". All information disclosed in this Opinion and Order is public information.

Fourth Remand Results are supported by substantial evidence and otherwise lawful." Def.'s Resp. to Comments on the Fourth Remand Results 1 (Jan. 23, 2023), ECF No. 108 (Def.'s Resp.).

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction according to 28 U.S.C. § 1581(c), which vests in the Court of International Trade exclusive jurisdiction of a civil action commenced under section 516A of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1516a.[2] Decisions reviewable under section 516A include "a determination by the administering authority [Commerce] as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing . . . antidumping . . . duty order." 19 U.S.C. § 1516a(a)(2)(B)(vi). Upon judicial review, the determinations, findings, and conclusions in the Fourth Remand Redetermination will be upheld unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

B. Description of Star Pipe's Flanges

Star Pipe stated in its request to Commerce for a scope ruling (the "Scope Ruling Request") that "[a] flange is an iron casting used to modify a straight end pipe to enable its connection either to a flanged pipe, a flanged pipe fitting or another flange attached to the otherwise straight end of another pipe, in order to connect pipes, valves, pumps and other equipment to form a piping system." *Star Pipe Products Scope Ruling Request: Ductile Iron Flanges* at 3 (June 21, 2017) (P.R. Docs. 1—3) ("*Scope Ruling Request*"). Star Pipe stated, further, that its flanges "are made from ductile iron, and meet the American Water Works Association ('AWWA') Standard C115." *Id.* The Scope Ruling Request added that the flanges "are for the water and wastewater industries." *Id.* at 10; *see also id.* at 18 ("Star Pipe's ductile iron flanges are sold for use in water or waste waterworks projects. The majority of sales . . . are sold to fabricators to fabricate the products into flanged pipes.").

Each Star Pipe flange, which is disc-shaped, has in the thicker center portion (the "hub") a large hole with tapered thread allowing

[2] Statutory citations are to the 2012 edition of the United States Code, and regulatory citations are to the 2017 edition of the Code of Federal Regulations.

threading of the flange onto the end of a threaded pipe. *See id.* at Ex. 1. The outer, thinner portion of each flange is drilled with holes, either tapped or untapped, arranged in a circle for the insertion of fasteners. *Id.* Photographs in the Scope Ruling Request illustrate how two pipes to which flanges have been assembled can be joined using bolts and nuts through the eight holes, with a gasket fitted between the two flanges to seal the joint. *Id.* at Ex. 8.

C. The Scope Language of the Order

The Order addresses non-malleable cast iron pipe fittings in the first paragraph of the scope language, as follows:

> The products covered by this order are finished and unfinished non-malleable cast iron pipe fittings with an inside diameter ranging from 1/4 inch to 6 inches, whether threaded or unthreaded, regardless of industry or proprietary specifications. The subject fittings include elbows, ells, tees, crosses, and reducers as well as flanged fittings. These pipe fittings are also known as "cast iron pipe fittings" or "gray iron pipe fittings." These cast iron pipe fittings are normally produced to ASTM A-126 and ASME B.16.4 specifications and are threaded to ASME B1.20.1 specifications. Most building codes require that these products are Underwriters Laboratories (UL) certified. The scope does not include cast iron soil pipe fittings or grooved fittings or grooved couplings.

Order, 68 Fed. Reg. at 16,765. Star Pipe's flanges, which are made from ductile cast iron, and not from non-malleable cast iron ("gray iron"), are not described by this paragraph. *See Star Pipe I*, 43 CIT at__, 365 F. Supp. 3d at 1281. The second paragraph addresses ductile iron fittings, as follows:

> Fittings that are made out of ductile iron that have the same physical characteristics as the gray or cast iron fittings subject to the scope above or which have the same physical characteristics and are produced to ASME B.16.3, ASME B.16.4, or ASTM A-395 specifications, threaded to ASME B1.20.1 specifications and UL certified, regardless of metallurgical differences between gray and ductile iron, are also included in the scope of this petition.[3] These ductile fittings do not include grooved fittings or grooved couplings. Ductile cast iron fittings with mechanical joint ends (MJ), or push on ends (PO), or flanged ends and

[3] "The reference to 'this petition' is incorrect and probably should read 'this order.'" *Star Pipe Prods. v. United States*, 43 CIT __, __, 365 F. Supp. 3d 1277, 1281 n.4 (2019).

produced to the American Water Works Association (AWWA) specifications AWWA C110 or AWWA C153 are not included.

Order, 68 Fed. Reg. at 16,765.

D. Positions of the Parties on the Fourth Remand Redetermination

ASC argues that the Fourth Remand Redetermination is "unsupported by substantial record evidence and is otherwise not in accordance with law." ASC's 2023 Comments 1. ASC urges the court to "remand once again for Commerce to reconsider its decision." *Id*. at 2. ASC incorporated by reference the comments it submitted to the court in response to the preceding (third) redetermination upon remand. *Id*. (incorporating Def.-Intervenor's Comments on the Final Results of Remand Redetermination (Jan. 21, 2022), ECF No. 97 ("ASC's 2022 Comments")).

ASC opposes the Fourth Remand Redetermination on four grounds. It argues that "Star Pipe's flanges clearly fall within the plain language of the scope" and, therefore, that "[t]here being no ambiguity, that should have been the end of the matter; there was no justification to consider the '(k)(1)' [19 C.F.R. § 351.225(k)(1)] materials." ASC's 2022 Comments 2—3 (citing *OMG, Inc. v. United States*, 972 F.3d 1358, 1363 (Fed. Cir. 2020)). ASC also argues that, the court not having directed Commerce to exclude Star Pipe's flanges from the Order, Commerce failed to comply with the court's directive in *Star Pipe III* to conduct a comprehensive reevaluation of the record evidence. *Id*. at 2. According to ASC, the record evidence does not support a determination that Star Pipe's flanges are outside the scope of the Order. *Id*. Third, ASC asserts that the scope language of the Order, contrary to the Department's analysis, does not contain an "end use" limitation. ASC's 2023 Comments 2; ASC's 2022 Comments 3. Fourth, ASC maintains that fittings made to AWWA C115 specifications are not excluded from the scope. ASC's 2023 Comments 2; *see also* ASC's 2022 Comments 4.

Star Pipe comments that it agrees with the Department's conclusion that its products are outside the scope of the antidumping duty order but objects to the Fourth Remand Redetermination on the ground that "the Department should not issue its decision 'under protest' as substantial record evidence and the Court's decisions in *Star Pipe I*, *Star Pipe II*, *Star Pipe III*, and *Star Pipe IV* support such a determination." Star Pipe's Comments 2—3. Star Pipe states, further, that it "disagrees with assertions made by the Department that the record could support an alternate conclusion" and "[t]hus, the Department has failed to follow the Court's instruction that it reach

its conclusion based on '***a more comprehensive review*** of the relevant record evidence.'" *Id*. at 2 (quoting *Star Pipe IV*, 46 CIT at __, 607 F. Supp. 3d at 1199). According to Star Pipe, "[t]he Department has simply re-asserted its prior arguments and issued its decision under protest, without providing any new analysis considering, or according weight to, the substantial record evidence that Star Pipe's ductile iron flanges are not within the scope of the Order." *Id*.

Defendant disagrees with the positions of ASC and Star Pipe. Taking issue with ASC's position, defendant argues that "the Court should sustain the Fourth Remand Results and enter final judgment for the Government because Commerce has complied with the Court's remand order and because the Fourth Remand Results are supported by substantial evidence and otherwise lawful." Def.'s Resp. 1. Defendant explains that "Commerce reviewed the evidence on the record, in conjunction with the Court's decisions, and found that the record lacks the necessary evidentiary support in the scope language, the petition, the [International Trade Commission's] determination in its investigation, and prior scope determinations to support a finding that [Star Pipe's] flanges are within the scope of the order."[4] *Id*. at 6—7 (citations omitted).

Responding to Star Pipe's objection that Commerce should not have designated the Fourth Remand Redetermination as a decision reached "under protest," defendant argues that it is a "well-settled legal principle . . . that Commerce is entitled to issue a remand 'under protest.'" *Id*. at 8 (citing *Meridian Prods., Ltd. v. United States*, 890 F.3d 1272, 1276—77 (Fed. Cir. 2018); *Viraj Grp. Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003)). Nevertheless, defendant maintains that the Fourth Remand Redetermination is supported by substantial evidence, is otherwise lawful, and should be sustained by the entry of judgment in favor of the United States. Def.'s Resp. 1. Responding to Star Pipe's objection that Commerce failed to comply with the court's directive, defendant argues that "Commerce explained that it has followed the Court's instructions by conducting a 'more comprehensive review of the relevant record evidence' in view of *Star Pipe I*, *Star Pipe II*, *Star Pipe III*, and *Star Pipe IV*, as demonstrated by the final results of Commerce's fourth redetermination." *Id*. at 8 (citations omitted).

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[4] The quoted sentence from the comment submission erroneously referred to "Crane's flanges" instead of "Star Pipe's flanges." *See* Def.'s Resp. to Comments on the Fourth Remand Results 7 (Jan. 23, 2023), ECF No. 108. "Crane's flanges" are the subject of a different judicial review proceeding. *MCC Holdings dba Crane Resistoflex v. United States*, 46 CIT __, 607 F. Supp. 3d 1201 (2022).

E. Commerce Was Required to Consider the Factors in 19 C.F.R. § 351.225(k)(1)

ASC is incorrect in arguing that the scope language unambiguously includes Star Pipe's flanges. Although the scope language of the Order mentions "flanged fittings," it does not mention flanges, nor does it define the term "fitting" (or "pipe fitting") so as to resolve the issue of whether flanges generally fall within the meaning of that term as used therein. Nor does it resolve the specific issue of whether ductile iron flanges such as Star Pipe's were intended to be within the scope.

At the time the Scope Ruling was issued, the Department's regulations required Commerce to consider: "the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the [U.S. International Trade] Commission." 19 C.F.R. § 351.225(k)(1).[5] As the court previously held in *Star Pipe I*, the Scope Ruling erred in failing to consider the merchandise descriptions in the Petition and in disregarding certain evidence contained in the "ITC Report," which was the report of the affirmative determination of threat to the domestic industry issued by the U.S. International Trade Commission ("ITC" or the "Commission") during the antidumping duty investigation. *See Non-Malleable Pipe Fittings from China*, Inv. No. 731-TA-990 (Final), USITC Pub. No. 3586 (Mar. 2003).

F. Substantial Record Evidence Supports the Conclusion in the Fourth Remand Redetermination that Star Pipe's Flanges Are Not Subject to the Order

The court next considers ASC's position, opposed by defendant, that the Fourth Remand Redetermination is unsupported by substantial record evidence. The court rejects ASC's position in light of the substantial record evidence that supports a determination that Star

[5] An amendment to 19 C.F.R. § 351.225(k), effective as to scope applications filed on or after November 4, 2021, does not apply to this proceeding. *See Regulations To Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws; Final Rule*, 86 Fed. Reg. 52,300, 52,327 (Sept. 20, 2021).

The regulatory provision applicable here does not identify the *only* considerations, as the Department's inquiry must interpret the scope language of the antidumping or countervailing duty order. *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1095 (Fed. Cir. 2002) ("Commerce cannot interpret an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." (Internal quotation marks and citation omitted)). Commerce considers additional factors if the (k)(1) factors do not allow it to reach a decision. 19 C.F.R. § 351.225(k)(2). Moreover, to be sustained upon judicial review, the determination must be supported by the record evidence considered on the whole. As a practical matter, this must include consideration of the record information contained in the scope ruling request, which ordinarily will include, *inter alia*, "[a] detailed description of the product, including its technical characteristics and uses." 19 C.F.R. § 351.225(c)(1)(i).

Pipe's flanges are outside the scope of the Order. The record evidence is discussed in the court's previous opinions, but in this Opinion it will suffice to highlight certain evidence that is highly probative on, and sufficient to support, the Department's conclusion to exclude Star Pipe's products.

One of the sources of information identified in § 351.225(k)(1), "determinations of the Commission," consisted of the affirmative determination of threat to the domestic industry as published in the ITC Report. The court concluded earlier in this litigation that "[r]ead in the entirety, the ITC Report contains evidence lending weight to a conclusion that Star Pipe's flanges are not subject merchandise." *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1286. That evidence included language in the ITC Report indicating that the ITC considered all flanged fittings made of ductile cast iron to be excluded from the scope of the ITC's investigation. As the court reasoned, "[b]ecause ductile flanged fittings are excluded from the scope of the domestic like product (which the ITC defined as identical to the scope of the investigation), it cannot be concluded that the ITC reached an affirmative injury or threat determination as to them." *Id.*, 43 CIT at __, 365 F. Supp. 3d at 1285. The court reasoned, further, that "[t]his aspect of the ITC's investigation strongly cautions against an interpretation of the scope language to include ductile flanged fittings, of any specification." *Id*. (citing *Atkore Steel Components, Inc. v. United States*, 42 CIT __, __, 313 F. Supp. 3d 1374, 1381—82 (2018)). As the court also stated previously, "[t]his evidence strongly supports the view that the ITC excluded ductile flanged fittings from the unfairly traded imports that it found to threaten to injure the domestic industry." *Star Pipe III*, 45 CIT at __, 537 F. Supp. 3d at 1375 (footnote omitted).

Throughout this litigation, Commerce has taken the position that Star Pipe's products are "flanges" and also are "fittings" within the meaning of that term as used in the scope language of the Order yet are not "flanged fittings." A conclusion that flanges and flanged fittings are different classes of goods is supported by certain record evidence, including evidence in the ITC Report, *see Star Pipe II*, 44 CIT at __, 463 F. Supp. 3d at 1376, and, as discussed later in this Opinion and Order, evidence pertaining to established standards for the water works industry, under which ductile iron flanges are not considered to be "fittings" or "pipe fittings." As the court pointed out previously, "[t]he absence of any mention of ductile iron flanges, as opposed to ductile flanged fittings, in the ITC Report . . . casts doubt on the premise that ductile iron flanges were contemplated as part of either the scope of the investigation or the scope of the domestic like product." *Star Pipe I*, 43 CIT at __, 365 F. Supp. 3d at 1286.

The court previously addressed certain evidence in the Petition relevant to the issue of whether flanges were intended to be included in the scope of the requested investigation. The court noted that certain brochures attached to the Petition supported a finding that petitioners considered flanges to be a type of "pipe fitting," *Star Pipe II*, 44 CIT at __, 463 F. Supp. 3d at 1372—73, but the court further noted that "the absence of any mention of flanges in the body of the Petition detracts from an inference that petitioners intended for flanges to be subject to the investigation." *Id*., 44 CIT at __, 463 F. Supp. 3d at 1373.

Additionally, the Petition identified the industries for which "virtually all" of the "subject fittings" were used, as discussed below. That the Petition specifically identified two industries other than the water works industry is an indication, among other evidence, that ductile iron flanges manufactured for use in the water works industry were not intended to be within the scope of the investigation.

G. Commerce Did Not Base the Fourth Remand Redetermination on an "End Use" Limitation

The Scope Ruling Request stated that Star Pipe's flanges "are for the water and wastewater industries." *Scope Ruling Request* at 10. In contrast, the Petition stated that "[v]irtually all subject fittings are used in fire protection systems and in the steam heat conveyance systems used in older cities." *Petition* 4 (placed on the record as "new factual information" ("NFI"), Ex. 1, by Star Pipe Products; *see Star Pipe II*, 44 CIT at __, 463 F. Supp. 3d at 1370).

ASC argues that Commerce erroneously imposed an "end use" limitation not found in the scope language. ASC's 2023 Comments 2; ASC's 2022 Comments 3. This argument misreads the Fourth Remand Redetermination, which Commerce did not base on a general conclusion that *all* products produced for water works are excluded from the scope of the Order. *See Fourth Remand Redetermination* 6. Instead, this case presented the narrower issue of whether a *specific* class or kind of merchandise, as shown by evidence in the sources described in 19 C.F.R. § 351.225(k)(1), was intended to be within the scope of the investigation conducted by Commerce and the ITC. That merchandise consisted of threaded flanges that were made of ductile iron, that shared a physical characteristic with ductile iron flanged fittings (which the ITC considered outside the scope of its investigation), that were produced for use in the water works industry and, as discussed below, that are not considered to be "pipe fittings" according to standards for that industry.

H. Record Evidence that Threaded Ductile Iron Flanges Meeting American Water Works Association Standard C115 Are Not Subject to the Order

ASC commented that "Commerce, acting under protest, erred by . . . finding that fittings made to AWWA C115 specifications are excluded from the scope." ASC's 2023 Comments 1—2. This comment is not an accurate paraphrase of the Department's finding, and it is misguided in its use of the word "fittings": according to uncontradicted record evidence, there *are* no "fittings" made to AWWA C115 specifications. The record evidence on the AWWA standards, placed on the record by Star Pipe, supported Star Pipe's position that AWWA C115 does not apply to "fittings" and instead applies to "flanges" and combinations of flanges and pipes. *See Star Pipe III*, 45 CIT at __, 537 F. Supp. 3d at 1376—79.

The scope language in the Order contains an exclusion for ductile cast iron fittings with flanged ends that are produced to AWWA specification C110 or C153. *Order*, 68 Fed. Reg. at 16,765. The Scope Ruling Request stated that Star Pipe's flanges "meet the American Water Works Association ("AWWA") Standard C115." *Scope Ruling Request* at 3. Star Pipe placed evidence on the record supporting a finding that AWWA C110/AWWA C153 and AWWA C115 are complementary standards. As discussed in detail in *Star Pipe III*, 45 CIT at __, 537 F. Supp. 3d at 1376—79, there is "uncontradicted record evidence," including evidence on the history of the development of AWWA C115, that flanges produced to AWWA C115 must conform to the chemical and physical properties required by AWWA C110. The court also identified record evidence that, for purposes of the AWWA standards applying to the water works industry, flanges are not considered to be pipe fittings as well as record evidence supporting Star Pipe's contention that ". . . AWWA C115 is a complementary standard to AWWA C110 and C153; the only difference is that C115 covers flanges while C110 and C153 are for flanged fittings." *Id*., 45 CIT at __, 537 F. Supp. 3d at 1378.

As the court previously ruled, Commerce was required to consider "evidence that the type of flange at issue in this case, which is a threaded flange produced for attachment to a threaded pipe produced for the water works industry, is *not* considered to be a pipe fitting by the AWWA standards that apply to products produced for that industry." *Star Pipe III*, 45 CIT at __, 537 F. Supp. 3d at 1372. In the second redetermination that it submitted in response to *Star Pipe II*, Commerce decided that Star Pipe's flanges are not excluded by the AWWA specification because, although they are "flanges" and, in the view of

Commerce, "fittings," they are not "flanged fittings." *See id*., 45 CIT at __, 537 F. Supp. 3d at 1378. The court considered this analysis illogical:

> This reasoning overlooks the plain fact that Commerce itself drafted the exclusion in terms of AWWA standards. Having done so, Commerce must be presumed to have been familiar with those standards, including, in particular, the distinction the AWWA standards draw between threaded "flanges" used to manufacture flanged pipe, addressed by AWWA C115, and the "fittings" addressed by AWWA C110. As a result, Commerce did not address or explain the contradiction underlying its conclusion: Commerce placed Star Pipe's flanges under the Order because it considered these goods to be pipe fittings (but not flanged pipe fittings) and because, according to Commerce, Star Pipe's products are not produced to AWWA specifications C110 or C153—specifications according to which Star Pipe's flanges are *not* pipe fittings.

Id. The court concluded, further, that Commerce failed to address the uncontradicted record evidence that flanges produced to AWWA C115 must conform to the chemical and physical properties required by AWWA C110. *Id*., 45 CIT at __, 537 F. Supp. 3d at 1378—79. In the second remand redetermination, Commerce overlooked the uncontradicted record evidence demonstrating that Star Pipe's threaded ductile iron flanges could not conform to AWWA C110 because, in the view of the AWWA, they are not pipe fittings.

In the Fourth Remand Redetermination, Commerce found, under protest, that "Star Pipe's AWWA C115 flanges are covered by the AWWA C110 exclusion language contained in the scope of the *Order*." *Fourth Remand Redetermination* 9—10. This finding is technically imprecise, as the C110 specification does not apply to flanges. The court previously rejected the Department's conclusion that *Star Pipe III* expanded the AWWA C110 standard, *Star Pipe IV*, 46 CIT at __, 607 F. Supp. 3d at 1200, and the court does not interpret this imprecisely-stated finding as such an expansion. Instead, the court views the finding as supported by the substantial record evidence that AWWA C110 and AWWA C115 are closely interrelated, including the evidence on the history of the development of AWWA C115. *See Star Pipe III*, 45 CIT at __, 537 F. Supp. 3d at 1376–79. A finding that a flange conforms to AWWA C115 cannot also constitute a finding that the flange conforms to C110 (because no flange can do so) but instead is a finding, among others, supporting a determination that such a product is outside the intended scope of the Order.

The court previously noted that AWWA C115, "which the evidence shows is closely interrelated with AWWA C110, parallels the 3-inch nominal minimum size specification for fittings by applying only to threaded pipes that are 3 inches or larger in nominal pipe size." *Star Pipe III*, 45 CIT at __, 537 F. Supp. 3d at 1379 (citation omitted). Nine of the eleven flanges identified in the Scope Ruling Request are produced for threaded pipes larger than 3 inches in nominal diameter; two are for smaller pipes (2.5 inches in outer diameter). The court noted that, as a result, the two Star Pipe flanges for smaller pipes are not within the defined scope of the AWWA C115 standard. *Id*. In the Fourth Remand Redetermination, Commerce nevertheless ruled that these two flanges, like the other nine, are outside the scope of the Order, based on other record evidence present in the Petition and the ITC Report. *Fourth Remand Redetermination* 10.

In summary, Commerce considered evidence in the Petition and the ITC Report that supported a conclusion that ductile iron flanges in general were not within the scope of the antidumping duty investigations. The record evidence as a whole was sufficient to allow Commerce to conclude that threaded ductile iron flanges in particular, produced for the water works industry and conforming to AWWA specification C115 pertaining to that industry, are not subject to the Order.

I. Star Pipe's Objection that Commerce Issued the Fourth Remand Redetermination Under Protest

Star Pipe "agrees with the Department's conclusion that all of the ductile iron flanges subject to Star Pipe's scope request are outside the scope of the Order on non-malleable cast iron pipe fittings from the People's Republic of China." Star Pipe's Comments 1. Star Pipe objects that Commerce issued the Fourth Remand Redetermination under protest, but it does not go so far as to advocate that the court issue another order of remand to the agency. Instead, Star Pipe urges the court to "affirm Commerce's conclusion in its Fourth Remand Results, though not Commerce's reasoning to issue this decision under protest." Star Pipe's Comments 3.

The court rejects Star Pipe's argument that the court should disallow the Department's submitting the Fourth Remand Redetermination under protest. The qualification that the decision is "under protest" may maintain defendant's right to appeal a judgment the court enters to sustain the agency's decision that Star Pipe's flanges are outside the scope of the Order, should defendant choose to do so despite its acknowledgments that the Fourth Remand Redetermination is supported by substantial evidence on the record. Commerce reasonably concluded that the record evidence, interpreted in con-

junction with the court's prior opinions (which disallowed certain findings as unsupported by the record evidence), does not contain sufficient evidence for the opposite conclusion. At the same time, the court need not, and does not, hold that *every* statement Commerce made in the Fourth Remand Redetermination to explain its ultimate conclusion is necessarily correct, so long as that conclusion is adequately explained, as it is in this instance.

Star Pipe IV held that the Department's previous remand redetermination incorrectly stated that the court reached factual findings and was not in a form that could go into effect through the entry of a judgment. *See Star Pipe IV*, 46 CIT at __, 607 F. Supp. 3d at 1200. The court ruled, specifically, that the third remand redetermination impermissibly concluded "that the court reached certain 'findings,' expanded the AWWA C110 standard, and ordered Commerce to exclude Star Pipe's flanges from the Order." *Id*. The Fourth Remand Redetermination addressed the shortcomings the court identified.

Applying the standard of review, the court rules that the decision reached by the Fourth Remand Redetermination—i.e., that Star Pipe's flanges are outside the scope of the Order—is supported by substantial evidence and adequate reasoning, complies with law by applying 19 C.F.R. § 351.225(k)(1), and complies with *Star Pipe IV* by correcting the errors the court identified in that decision. Contrary to the viewpoint Star Pipe expresses in its comment submission, the standard of review requires no more than that.

Star Pipe objects, further, to what it characterizes as "assertions made by the Department that the record could support an alternative conclusion" and to what it considers to be the Department's failure to perform a more comprehensive review of the record evidence. Star Pipe's Comments 2. This objection is unpersuasive in light of defendant's taking the position in this litigation that "Commerce reviewed the evidence on the record, in conjunction with the Court's decisions, and *found that the record lacks the necessary evidentiary support* in the scope language, the petition, the ITC's determination in its investigation, and prior scope determinations to support a finding that [Star Pipe's] flanges are within the scope of the order." Def.'s Resp. 6—7 (emphasis added).

Had Commerce, upon a comprehensive review of the record evidence, reached valid findings that it considered sufficient to support an ultimate conclusion to include some or all of Star Pipe's flanges within the scope of the Order, presumably it would have stated and relied upon those findings in the Fourth Remand Redetermination. The court's previous decisions, rather than precluding Commerce from reaching such a conclusion, disallowed only those findings Com-

merce made previously, as stated in the Final Scope Ruling and previous remand redeterminations, for which the record lacked substantial evidence. *See, e.g.*, *Star Pipe IV*, 46 CIT at __, 607 F. Supp. 3d at 1200 ("Commerce must issue a new determination that decides the issue of whether or not Star Pipe's flanges are within the scope of the Order based on findings that are supported by the evidence on the record considered as a whole, including evidence detracting from its findings."); *Star Pipe III*, 45 CIT at __, 537 F. Supp. 3d at 1380 ("The court does not reach its own conclusion as to whether some or all of Star Pipe's flanges must be determined to be within or outside the scope of the Order, as that is a matter for Commerce to determine upon remand."). It is the role of the agency, not the court, to reweigh the evidence considered on the whole, and Commerce has done so in deciding that Star Pipe's flanges are not subject to the Order.

III. CONCLUSION

The Department's most recent decision that Star Pipe's flanges are not within the scope of the Order is supported by substantial evidence on the record considered as a whole, is otherwise consistent with law, and is adequately explained. Judgment sustaining the Fourth Remand Redetermination will enter accordingly. Consistent with the Fourth Remand Redetermination, the Judgment will direct Commerce to publish a Federal Register notice of the Department's determination that Star Pipe's ductile iron flanges are outside the scope of the Order and to issue, at that time, relevant instructions to Customs and Border Protection effectuating that determination. *Fourth Remand Redetermination* 24.

Dated: March 6, 2024
New York, New York

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

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