

**Slip Op. 24-127**

**UNITED STATES  
COURT OF INTERNATIONAL TRADE**

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**Court No. 21-00015**

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CALIFORNIA STEEL INDUSTRIES, INC.,

*Plaintiff,*

v.

UNITED STATES,

*Defendant.*

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Before: M. Miller Baker, Judge

**OPINION**

[The court sustains the agency in part, remands in part, and grants injunctive relief.]

Dated: November 13, 2024

*Sanford Litvack*, Chaffetz Lindsey LLP, New York, NY, for Plaintiff. With him on the comments were *Andrew L. Poplinger* and *R. Matthew Burke*.

*Stephen C. Tosini*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, for Defendant. With him on the comments were *Brian M. Boynton*, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; and *Tara K. Hogan*, Assistant Director.

*Lydia C. Pardini*, Polsinelli PC, Washington, DC, for *amicus curiae* United States Steel Corporation. With her on the brief were *Alissa M. Chase* and *Joonho Hwang*.

*Baker*, Judge: In this return visit following a voluntary remand, a domestic importer asserts an Administrative Procedure Act challenge to the Department of Commerce’s refusal to exclude certain foreign-made steel from national security tariffs. For the reasons explained below, the court sustains the agency in part, remands in part, and awards injunctive relief to ensure that any exclusions issued on remand will be effectual.

## I

“Section 232 of the Trade Expansion Act of 1962 authorizes the President to restrict imports of goods ‘so that such imports will not threaten to impair the national security.’” *AM/NS Calvert LLC v. United States*, 654 F. Supp. 3d 1324, 1333 (CIT 2023) (quoting 19 U.S.C. § 1862(c)(1)(A)(ii)). In 2018, he used that authority to impose a 25 percent tariff on steel imports. *See* 83 Fed. Reg. 11,625. At the same time, he allowed Commerce to exclude (exempt) such transactions from the duties in certain circumstances, including when the products in question were not manufactured in this country “in a sufficient and reasonably available amount.” *Id.* at 11,627 cl. 3.

The Department established procedures for seeking such relief. *See* 83 Fed. Reg. 46,026; 15 C.F.R. Pt. 705 Supp. 1 (2020).<sup>1</sup> An importer “using steel in business activities . . . in the United States” may request an exclusion. *Id.* Supp. 1(c)(1). In so doing, it must explain “the basis” for the submission. *Id.* Supp. 1(c)(5).<sup>2</sup>

As relevant here, Commerce will grant an exclusion only if the steel “is not produced in the United States in a sufficient and reasonably available amount,” *id.* Supp. 1(c)(5), meaning “that the amount . . . needed . . . is not available immediately” from domestic sources, *id.* Supp. 1(c)(6)(i). For purposes of this regulation, steel is available “immediately” when it “is currently being produced or could be produced and delivered ‘within eight weeks’ in the amount needed for the

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<sup>1</sup> Commerce has amended its exclusion procedures several times. The most recent requests at issue date to April 21, 2020. Citations in this opinion to 15 C.F.R. Pt. 705 Supp. 1 therefore refer to the edition in effect on that date—which was the same as the 2018 version in all relevant ways—unless otherwise noted.

<sup>2</sup> The regulation requires importers to submit “[s]eparate exclusion requests . . . for steel products with . . . distinct critical dimensions . . . covered by a common [Harmonized Tariff Schedule of the United States] subheading.” *Id.* Supp. 1(c)(2). In plain English, importers may not lump together requests for otherwise-identical steel imports of differing sizes.

business activities described in the exclusion request.” 83 Fed. Reg. at 46,038.

Domestic manufacturers may object to exclusion requests, 15 C.F.R. Pt. 705 Supp. 1(d)(1), but have “the burden . . . to demonstrate that [a submission] should be denied because of failure to meet the specified criteria,” 83 Fed. Reg. at 46,029. An objector must “clearly identify, and provide support for, its opposition to the proposed exclusion, with reference to the specific basis identified in, and the support provided for, the . . . request.” 15 C.F.R. Pt. 705 Supp. 1(d)(4). Such an entity that is not currently producing steel “must identify how it will be able to produce the article within eight weeks,” including explaining the timeline it anticipates for commencing or restarting production. *Id.*

“If the Department denies an exclusion request based on a representation made by an objector, which is later determined to be inaccurate . . . , the requester may submit a new exclusion request that refers back to the original . . . and explains that the objector was not able to supply the steel.” *Id.* Supp. 1(c)(6)(i). There is “[n]o time limit for submitting exclusion requests,” *id.* Supp. 1(c)(4), meaning that an ostensibly “new” filing referring to a previous application can be filed “at any time,” *id.*

Absent any objections, “Commerce will grant properly filed exclusion requests which meet the

requisite criteria . . . and present no national security concerns.” *Id.* Supp. 1(h)(2)(ii).<sup>3</sup>

## II

### A

Between April 29 and July 2, 2018, California Steel Industries, Inc. (CSI) filed 170 exclusion requests claiming that “[s]teel slabs are not produced in the United States in a sufficient and reasonably available amount.” Appx06678 (internal quotation marks omitted).<sup>4</sup> It explained that it cannot make such slab, Appx06678—the “raw material” that it “roll[s] into

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<sup>3</sup> An importer tenders an exclusion—in effect, a get-out-of-tariff-free card—to U.S. Customs and Border Protection, which then applies it at liquidation. *See Calvert*, 654 F. Supp. 3d at 1334. Once granted, an exclusion is generally valid for one year. 15 C.F.R. Pt. 705 Supp. 1(h)(2)(iv). As to entries that have not finally liquidated by the time an importer presents an exclusion to Customs, *see Calvert*, 654 F. Supp. 3d at 1334–35, “retroactive relief” is available “dating back to the date of the request’s submission,” *id.* at 1334 (quoting 15 C.F.R. Pt. 705 Supp. 1(h)(2)(iii)(A)).

<sup>4</sup> The parties agree that the administrative record for request BIS-2018-0006-5348 is representative of all 170 exclusions sought in 2018. *See* ECF 103, at 4 n.2 & Appendix 1 (CSI); ECF 108, at 31 n.5 (government). CSI asserts that it made 170 bite-size submissions rather than one omnibus filing because the relevant regulation required it “to make its requests piecemeal.” ECF 121, at 6 (citing 15 C.F.R. Pt. 705 Supp. 1(c)(2)); *see also* note 2.

sheet (coil) products,” Appx06671. The company said it can manufacture around 2.7 million metric tons<sup>5</sup> of such goods per year. Appx06683. With tariff-free imported slab it hoped to increase its production from 50 percent to 85 percent of that capacity. *Id.*; Appx06685.

The company asserted that three domestic entities produce slab, but only one, Pennsylvania-based U.S. Steel Corporation, “currently makes it available on the commercial market for purchase, in minimal quantities of less than [330,693 metric tons] per year, of all possible ordered sizes.” Appx06675. According to CSI’s request, these vertically integrated producers (meaning they manufacture both slab inputs and finished products) sell little slab because their ability to make that material is “less than their capacity to hot-roll slabs into coil sheet, the final product.” Appx06683 (emphasis removed). For that reason, they also import slab. Appx06682. And even if these companies “wanted to sell slabs” to CSI, shipping “costs pose a significant hurdle” because their mills are in the central and eastern U.S., and “rail is much more expensive than ocean transport.” Appx06680.

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<sup>5</sup> The parties refer to both metric tons and net tons (the latter also known as short tons or U.S. tons) because the administrative record uses both. A metric ton (1,000 kilograms) is about 10 percent larger than a U.S. ton (2,000 pounds). This opinion converts U.S. tons, pounds, or kilograms to metric tons.

U.S. Steel objected to all 170 of the requests, stating as to each that it had “significant excess production capacity” and could provide “100% of the volume cited.” Appx06725.<sup>6</sup> It stated that it had supplied its California customer with “a wide variety of . . . slabs within the last decade,” Appx06722, and “displayed a willingness across all market conditions” to do so, *id.* Finally, it emphasized that it “has enormous incentive to sell [CSI] . . . slabs.” *Id.*

On rebuttal, CSI challenged U.S. Steel’s capability to make steel in “sufficient quantity”<sup>7</sup> and timely deliver it. Appx06760–06761. In its accompanying narrative response, the former reiterated that the latter and other domestic slab manufacturers “simply do not produce slab for commercial sales on any sustained basis with volume or price competitiveness. They elect to

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<sup>6</sup> The Pennsylvania company noted that when aggregated, the requests “exceed[ed] [30.7 million metric tons]—which is equivalent to more than eleven times [CSI’s] stated rolling capacity.” Appx06726 (emphasis removed). It did not, however, represent that it could supply that total amount or some lesser fraction of it.

<sup>7</sup> As for quantity, CSI “clarified” that it sought “tariff exclusions for a total of [2.3 million metric tons] of slabs from all combined import sources, an amount that would roughly equal 85% of [its] current rolling capacity.” Appx06762. In so reducing its original aggregate requested tonnage by more than 92 percent, the company did not explain whether it was abandoning some of its requests or instead reducing pro rata the amount at issue in each request.

use the slab themselves to produce value-added products, rather than make any real effort to sell slab to CSI as a value-added competitor.” Appx06764.

CSI acknowledged that “[f]or many years,” U.S. Steel has been its “lone domestic supplier . . . , at times offering slabs for sale and at times not.” *Id.* “Recently”—apparently around the time the former filed its exclusion requests—the two companies signed “a multi-month contract for a range of amounts equal to 8–12% of CSI’s current requirements and less than 5–7.5% of [its] goal of 85% capacity utilization.” *Id.* “This is typical of the volume offer that U.S. Steel has periodically made in the past—when it made slabs available for sale at all.” *Id.*

The California company also stressed that it wished to “buy domestic slabs under feasible economic conditions.” *Id.* Because of steep rail transportation expenses and U.S. Steel’s “significant single-domestic-supplier pricing power,” *id.*, the former was “healthier . . . by avoiding the high cost of buying from U.S. Steel,” *id.* And it wasn’t “good business” for the Pennsylvania company to “sell much slab,” as it could “make a higher return using its slabs to minimize its excess rolling capacity.” *Id.*

U.S. Steel then filed a surrebuttal. Appx06778. In response to the contention that it could “only supply a percentage of the requested volume stated in the exclusion request,” Appx06781, the Pennsylvania



company asserted that “there is significant domestic production and the product is available from [it] as well as several other domestic producers,” *id.* It also submitted proprietary data showing that its slab-manufacturing capacity exceeded the 2.3 million metric tons that CSI claimed to need. Appx06787.

As for its willingness to sell, U.S. Steel stressed that it

remains open to increasing the ongoing, monthly supply to CSI, and did not limit the contractual volume. Rather, the stated monthly volume range of [9,000–14,000 metric tons] was defined by CSI as *the amount they were willing to commit to buy*. Further, to date for the late third and fourth quarters 2018, CSI has only placed orders for the absolute minimum monthly volume, despite U.S. Steel’s urging and solicitation to increase the ordered amounts to the maximum of the agreed range and beyond through incremental sales or an increase to the agreement.

Appx06782 (emphasis in original). It elaborated on these points, noting that the monthly slab supply contract with its California customer was “through 2019” and that the latter “indicated that [it was] not comfortable with a higher volume . . . .” Appx06787. Moreover, U.S. Steel “has more steel available to sell them than the contract quantity *as early as 4th quarter 2018.*” *Id.* (emphasis added).

Finally, U.S. Steel dismissed the assertion that it was not interested in selling slab to CSI because it was not—in the latter’s words—“good business”:

To the contrary, [we] would not have solicited or consummated the monthly supply contract, if it was not “good business” from our perspective, and we would neither have made the commitment nor repeatedly requested additional ordered volume within and beyond the stated terms of the contract.

Appx06782.

Commerce denied all 170 requests. *See, e.g.*, Appx06667–06668. After CSI sued and the court granted the government’s request for a voluntary remand, *see Calvert*, 654 F. Supp. 3d at 1352–53, the agency again denied every application. For each, the Department relied on U.S. Steel’s representations that it “has a contractual agreement to supply slabs” to CSI, Appx01409, it “is open to producing additional volume,” *id.*, and “the contracted volume represents the maximum [its California customer] would commit to buy,” *id.*<sup>8</sup> The Pennsylvania company’s “certified statements and supporting documentation” established that it “produces or could produce a sufficient

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<sup>8</sup> Because it relied on U.S. Steel’s objections, Commerce did not evaluate submissions by two other slab producers. *See* Appx01408.

amount of the product to meet CSI's specified business activity." *Id.*

The agency gave "greater weight to U.S. Steel's statements" because that company was "in the best position to know its own production schedule and abilities" to manufacture the slab. *Id.* Commerce also noted that CSI's "economic reasons" for not buying from its Pennsylvania supplier—transportation costs and price—"are not among the [relevant] regulatory criteria." Appx01410.

Respecting U.S. Steel's ability to *timely* manufacture and ship the slab volume needed by CSI, the Department relied on the former's surrebuttal documentation "indicating that it could feasibly produce and deliver the requested quantity within eight weeks." *Id.* That material "refute[d] CSI's more-generalized allegations suggesting that" its Pennsylvania supplier "completely lacks" the capacity to make and transport slab "within eight weeks . . . in a sufficient and reasonably available amount." *Id.*

CSI's brief asserts that in 2018 it "could source only" a small fraction "of its minimum annual needs" domestically. *See* ECF 103, at 12. It imported the balance from Mexico and Japan and thereby incurred substantial Section 232 duties. *Id.* at 11–12.

## B

In April 2020, CSI submitted 23 more exclusion requests aggregating 425,000 metric tons of slab. *See id.* at 14.<sup>9</sup> It asserted that in all but one month since the tariffs began in 2018, the Pennsylvania company offered to sell “35,000 metric tons or less,” Appx22883—with “less” including, in many months, zero tonnage, *id.* From August 2018 through October 2019, U.S. Steel supplied only 23 percent of its California customer’s requirements, Appx22885, and 37 percent of that total was delivered more than eight weeks from the purchase order date, *id.*—which meant it was untimely under Commerce’s regulation. And worse yet, the Pennsylvania company had “recently announced a series of reductions in [its] . . . discrete slab production capability.” *Id.*

U.S. Steel objected to every request, claiming that it “has *never* established a maximum slab quantity available” to CSI. Appx22914 (emphasis in original). Not only that, the latter “declined to extend” the one-year contract that expired in August 2019. *Id.* All purchases since then were spot sales, which the Pennsylvania company has consistently offered. *Id.* In negotiating those spot transactions, its West Coast customer

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<sup>9</sup> The parties agree that the administrative record for Request No. 82953 is representative of all 23 exclusions sought in 2020. *See id.* at 4 n.2 & Appendix 2 (CSI); ECF 108, at 31 n.5 (government).

(1) “repeatedly indicated that most shipments . . . did not require priority [transport] ([i.e.], delivery in less than eight weeks),” *id.*, and (2) “expressly declined to buy the full volume of slab offered . . . to date in 2020,” *id.*

As to its ability to produce what CSI needed, U.S. Steel claimed that it had “an additional eight million MT of available steelmaking capacity beyond current internal demand that can be quickly restarted to facilitate commercial slab sales if the market for American-made steel increases.” *Id.* Thus, it could “provide CSI with the combined quantity of its 23 pending exclusion requests for Japanese slab.” Appx22915 n.15.

On rebuttal, the California company asserted that U.S. Steel “has never offered anywhere near 100% of the volume” it required. Appx22931. The former “agreed to purchase all spot slab offers from [the latter] in 2018 and through the third quarter 2019.” *Id.* Total slab offers in 2019 “were [293,928 metric tons], just 28%” of CSI’s slab buys. *Id.* In the first half of 2020, U.S. Steel “supplied just 10% of CSI’s needs.” *Id.* The former’s “sales team . . . stated that there is slim to no slab availability for [the latter] when the market is good and they would ideally like to supply [it] in the range of [approximately 18,000 to 36,000 metric tons] a month,” *id.*, which would not “cover 50% of CSI’s monthly slab needs,” *id.*

On surrebuttal, U.S. Steel asserted that the reason it supplied less slab to its West Coast customer in 2020 year-to-date was because the latter “declined to buy the full volume of slab offered,” Appx22949—a point not contested, *id.* It reiterated “that it has never put a cap on the volume of slab available to CSI,” which “chose not to extend its supply contract . . . beyond July 2019 and, since October 2019, has repeatedly declined the full spot sale volume offered.” Appx22951. The Pennsylvania company also proffered an email communication from October 2019 in which CSI stated that it wished to pause spot purchases “at this time.” Appx22958.

In any event, U.S. Steel reaffirmed that it was “eager to continue increasing the volume of slab it provides . . . and is immediately capable of supplying significantly more than the volume” for which its California customer sought exclusions. Appx22951. If the latter would agree to “another supply contract, rather than relying exclusively on spot sales,” *id.*, the former could factor that into its “annual operating plan and even further increase the [amount] of steel slab that is available to CSI each month,” *id.*

Regarding its ability to timely provide slab to its West Coast customer—that is, within eight weeks of order—U.S. Steel observed “that the majority” of its slab sales were delivered within that time frame. Appx22952. Moreover, in their dealings, the former “repeatedly indicated that most shipments were for

stock and, as such, did not require priority delivery.”  
*Id.*

Commerce denied all 23 requests. *See, e.g.*, Appx22870–22871. On voluntary remand from this litigation challenging those denials, *see Calvert*, 654 F. Supp. 3d at 1352–53, the Department did so again based on U.S. Steel’s objections. Appx01012.<sup>10</sup> As for the company’s willingness and capacity to provide its California customer with the needed volume of slab, the agency surveyed the evidence. *See* Appx01016. What was decisive, in its view, was that CSI didn’t address or rebut claims by its Pennsylvania supplier that it was the former’s “decision not to extend its contract with [the latter] into 2020, nor to purchase via spot sales . . . in late 2019.” Appx01017.

With respect to U.S. Steel’s ability to timely supply slab, Commerce acknowledged that the two companies agreed that almost 50 percent of the shipments to CSI took more than eight weeks, *id.*, but it also noted the former’s argument about its customer not needing “priority delivery,” *id.* (quoting Appx22952). Most conveyances were timely, *id.*, and “there is nothing in CSI’s documentation that demonstrates that current and future production and deliveries are impacted by any past delivery issues,” *id.*

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<sup>10</sup> As a result, the agency did not evaluate objections by another slab producer. Appx01014.

The California company now asserts that because it was “unable to secure the slabs it needed” in 2020, ECF 103, at 14, it “once again had to import slabs” and pay “million[s]” of dollars in tariffs, *id.* at 15.

### C

Invoking the court’s jurisdiction under 28 U.S.C. § 1581(i)(1)(B) and (D),<sup>11</sup> *see* ECF 2, ¶ 18, CSI brought this suit challenging the Department’s original denials of the 193 exclusion requests as arbitrary and capricious under the APA, *id.* ¶¶ 60, 64, 68, 72, 76.<sup>12</sup> The government moved for voluntary remands in this case and its companion actions without confessing error. *See Calvert*, 654 F. Supp. 3d at 1335–36. After first disposing of mootness and other questions about the availability of relief as to finally liquidated entries, *see id.* at 1338–49, the court ultimately granted remands subject to various conditions, *see id.* at 1352–53.

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<sup>11</sup> The court previously found this invocation proper. *See Calvert*, 654 F. Supp. 3d at 1337–38.

<sup>12</sup> Concurrent with CSI’s suit, several other importers brought similar challenges to Commerce’s denials of their exclusion requests. The court consolidated these actions for purposes of resolving overlapping intervention motions by U.S. Steel and other objectors, which the court denied. *See N. Am. Interpipe, Inc. v. United States*, 519 F. Supp. 3d 1313 (CIT 2021), *aff’d sub nom. Cal. Steel Indus., Inc. v. United States*, 48 F.4th 1336 (Fed. Cir. 2022).



As outlined above, Commerce again denied each of CSI's 193 requests. The company now challenges 45 denials—those applicable to its actual imports of slab made to compensate for the alleged unavailability of domestic sources. *See* ECF 103, at 4 n.2 & Appendices 1 & 2.<sup>13</sup> The government defends those denials, *see* ECF 108, as does *amicus curiae* U.S. Steel, *see* ECF 117.

By properly invoking § 1581(i) jurisdiction, CSI “challenge[s] agency action under the cause of action created by the APA’s general statutory review provisions.” *Calvert*, 654 F. Supp. 3d at 1340 n.15 (citing 28 U.S.C. § 2631(i)). APA § 706 therefore applies. *See* 28 U.S.C. § 2640(e) (“In [§ 1581(i) cases], the Court of International Trade shall review the matter as provided in section 706 of title 5.”). That provision allows the court to “set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

This standard of review “is narrow and a court is not to substitute its judgment for that of the agency.” *Motor Veh. Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). That said, “the agency must examine the relevant data and articulate

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<sup>13</sup> By not challenging Commerce’s other 148 denials, CSI has abandoned those requests. The court therefore sustains those agency actions.

a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Id.*

### III

Before turning to the merits, the court first considers whether CSI exhausted its administrative remedies. At the time of Commerce’s denials, the relevant regulation provided:

If the Department denies an exclusion request based on a representation made by an objector, *which later is determined to be inaccurate (e.g., if the objector was not able to meet the requirement of being able to “immediately” supply the steel that was included in a denied exclusion request in the quantity needed), the requester may submit a new exclusion request that refers back to the original denied exclusion request and explains that the objector was not able to supply the steel. . . . Commerce would take that into account in reviewing a subsequent exclusion request.*

15 C.F.R. Pt. 705 Supp. 1(c)(6)(i) (emphasis added).

In December 2020, Commerce revised the regulation to eliminate the express language allowing for the filing of exclusion requests “referring back” to a previous submission, but that amendment did not make a substantive change:

Ultimately, if an exclusion request is not approved because of an objection, *the exclusion requester will be able to determine definitively whether an objector is in fact able to provide the steel or aluminum article in question by attempting to obtain the product from the objector.* Should all objectors be unable to produce a requested product as they represented in their objections, the requester may submit a new request with documentation evidencing this refusal.

85 Fed. Reg. 81,060, 81,065 (emphasis added). And because requesters have such a right to submit a new application based on an objector's failure to follow through with promised steel, it was unnecessary—as one commentator proposed—that “[o]bjecting parties should be required to fill orders.” *Id.* at 81,066 (Comment (d)(5)). “The current process” thus “addresse[d] . . . sufficiently” the concern that producers might “object[] to an exclusion request and then refus[e] to fill orders.” *Id.*

Putting all this together with the related provision that there is “[n]o time limit for submitting exclusion requests,” 15 C.F.R. Pt. 705 Supp. 1(c)(4), the administrative scheme appears to allow—but does not mandate—an importer to effectively renew a denied sub-

mission.<sup>14</sup> It can do so by filing an ostensibly “new” application presenting evidence that the objector failed to deliver, figuratively and literally. The court therefore directed the parties to address whether it should dismiss this action because of CSI’s failure to avail itself of that optional remedy. *See* ECF 128 (order); 28 U.S.C. § 2637(d) (providing that in civil actions “not specified in this section”—thus including APA actions such as this brought under 28 U.S.C. § 1581(i)—the CIT “shall, *where appropriate*, require the exhaustion of administrative remedies”) (emphasis added).

Both parties argue that Commerce’s scheme does not permit an importer to so renew an exclusion request or otherwise seek reconsideration. *See* ECF 129, at 2–6 (government); ECF 131, at 2–6 (CSI). Although the court disagrees, it nevertheless concludes that demanding exhaustion of this optional intra-agency appeal is not “appropriate” because the APA itself preempts any such mandate. Under section 10(c) of that statute, 5 U.S.C. § 704,<sup>15</sup> “courts may not require

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<sup>14</sup> There is no dispute here that Commerce’s denial of an exclusion request is “final agency action” for APA purposes. *See* 5 U.S.C. § 704, discussed below.

<sup>15</sup> This “somewhat difficult” provision, 33 Wright & Miller, *Federal Practice and Procedure* § 8363 (2d ed. June 2024 update), states as follows:

Agency action made reviewable by statute and final agency action for which there is no other adequate

exhaustion of administrative remedies upon appeal from final agency action, except where exhaustion is expressly required by statute or rule.” *Martinez v. United States*, 333 F.3d 1295, 1305 (Fed. Cir. 2003) (en banc). Thus, while the APA “explicitly requires exhaustion of all intra-agency appeals mandated either by statute or by agency rule,” *Darby v. Cisneros*, 509 U.S. 137, 147 (1993), “it would be inconsistent with the plain language of § 10(c) for courts to require litigants to exhaust *optional* appeals as well,” *Martinez*,

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remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. 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 (emphasis added). “The last sentence . . . indicates that, subject to two exceptions, the availability of intra-agency review does not affect whether an action is ‘final’ for purposes of applying the APA’s cause of action.” 33 Wright & Miller, § 8363. Those exceptions are when (1) “some other statute governing review of a particular agency’s actions might provide otherwise,” and (2) “the agency requires” an intra-agency appeal “by rule” and “also provides that the action will not take effect during the pendency of such . . . appeal.” *Id.*

333 F.3d at 1305 (emphasis added) (quoting *Darby*, 509 U.S. at 147).

Given the APA’s categorical preclusion of requiring exhaustion of optional administrative remedies, it can hardly be “appropriate” under § 2637(d) for the CIT to do so in such cases. To read the latter otherwise would invest authority in this tribunal that no district court possesses, and thereby render the CIT an island unto itself in the sea of APA law—to say nothing of creating an unnecessary conflict between the two statutes. *Cf.* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, at 252 (2012) (“[L]aws dealing with the same subject—being *in pari materia* (translated as ‘in a like manner’)—should if possible be interpreted harmoniously.”).

The better reading of § 2637(d) is that whether demanding exhaustion in any given case is “appropriate” turns on the legal regime governing the asserted cause of action, insofar as it speaks to the question. *Cf.* *Darby*, 509 U.S. at 144–45 (“Whether courts are free to impose an exhaustion requirement as a matter of judicial discretion depends, at least in part, on whether *Congress has provided otherwise*, for ‘of “paramount importance” to any exhaustion inquiry is congressional intent.’”) (emphasis added and quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)); see also *Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir. 2007) (“Where the issue of exhaustion of administrative remedies *is not* governed by a partic-

ular statutory provision or an overall statutory scheme, the decision whether to require exhaustion in a particular case is a matter committed to the discretion of the trial court . . . .” (emphasis added).<sup>16</sup> Such a reading harmonizes § 2637(d), which only requires exhaustion “where appropriate,” with the relevant statutory framework.

Where, as here, that framework does provide otherwise, § 2637(d) is no license—much less a directive—for the CIT to compel exhaustion.<sup>17</sup> *Cf. Calvert*, 654

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<sup>16</sup> In *Corus Staal*, an antidumping case—where the relevant statutory regime is silent about exhaustion—the Federal Circuit observed that § 2637(d) “indicates a congressional intent that, *absent a strong contrary reason*, the [CIT] should insist that parties exhaust their remedies before the pertinent administrative agencies.” 502 F.3d at 1379 (emphasis added). When the statutory cause of action expressly precludes requiring exhaustion of optional administrative remedies, as the APA does, that’s more than a “strong contrary reason”—it’s a command.

<sup>17</sup> *But see Ninestar Corp. v. United States*, 687 F. Supp. 3d 1308, 1323–25 (CIT 2024), where in a careful and thoughtful opinion the court reached the contrary conclusion. It reasoned that “Section 2637 is the statute here that ‘expressly requires’ exhaustion and, therefore, exempts CIT cases from the APA default rule of no prudential exhaustion.” *Id.* at 1325 (brackets omitted; citing *Corus Staal*, 502 F.3d at 1379, and quoting 5 U.S.C. § 704).

The former statute, however, only requires exhaustion “where *appropriate*.” 28 U.S.C. § 2637(d) (emphasis added).

F. Supp. 3d at 1346 (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014) (“Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates.”)).

But when the statutory framework creating the cause of action is silent, it is long settled that “parties [must] exhaust prescribed administrative remedies before seeking relief from the federal courts.” *McCarthy*, 503 U.S. at 144–45 (citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 & n.9 (1938)).

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The APA’s preclusion of compelling exhaustion of optional administrative remedies resolves whether it’s “appropriate” to do so. Moreover, rather than harmonizing the two statutes, reading 2637(d) as overriding the APA’s prohibition negates the latter altogether. It also produces the anomalous result of suspending—uniquely in the CIT—the laws of jurisprudential physics that govern APA cases in district courts nationwide.

Finally, *Ninestar*’s reliance on the general/specific canon to interpret § 2637(d) as overriding 5 U.S.C. § 704, *see* 687 F. Supp. 3d at 1325, is misplaced. That canon only applies “when conflicting provisions simply *cannot* be reconciled . . . .” Scalia & Garner, at 193 (emphasis added). As discussed above, it *is* possible to reconcile the two statutes by reading “where appropriate” in § 2637(d) as pointing to the applicable substantive law—here, the APA—to determine whether requiring exhaustion is “appropriate.”



As there is no indication to the contrary, § 2637(d) must be read as ratifying that preexisting doctrine.<sup>18</sup> See *United States v. Baxter Int’l, Inc.*, 345 F.3d 866, 900 (11th Cir. 2003) (“We presume that Congress legislates against the backdrop of established principles of state and federal common law, and that when it wishes to deviate from deeply rooted principles, it will say so.”) (citing *United States v. Texas*, 507 U.S. 529, 534 (1993)). And that body of law, of course, is subject to various defined exceptions, see *McCarthy*, 503 U.S. at 145–47, which determine whether exhaustion is “appropriate” in such cases.

In short, § 2637(d) neither adds to nor subtracts from the applicable substantive law (statutory, as with the APA, or judge-made doctrine where the statute creating the cause of action does not speak to the question) governing exhaustion in any given context. Instead, that substantive law necessarily determines whether requiring exhaustion is “appropriate.”<sup>19</sup> Here,

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<sup>18</sup> Congress enacted § 2637(d) in 1980. See Pub. L. 96–417, § 301, 94 Stat. 1727, 1735 (Oct. 10, 1980).

<sup>19</sup> Thus, § 2637(d) is analogous to 28 U.S.C. § 2643(c)(1), which enables the CIT to grant injunctive relief “that is appropriate in a civil action.” As explained in *Calvert*, whether such relief is “appropriate” must be determined by reference to “the specific ‘requirements of equity practice with a background of several hundred years of history’” rather than unpredictable idiosyncratic considerations. 654 F. Supp. 3d at 1346 (quoting *Hecht Co. v. Bowles*, 321 U.S.

the APA tells us that the answer is “no” when the relevant regulations allow, but do not require, a party to seek reconsideration of final agency action.

But even if § 2637(d) were read to countermand the APA, the court would still find it inappropriate to require exhaustion here because doing so would deny CSI any remedy. As explained in *Calvert*, Customs will not honor an exclusion with respect to entries that have finally liquidated by the time an importer tenders it to the agency. *See* 654 F. Supp. 3d at 1334–35. Because all the California company’s relevant entries have done so, *see id.* at 1336 n.8, even if on reconsideration Commerce were to reverse its denials based on evidence that U.S. Steel’s promises were empty, the exclusions would be “worthless—the administrative equivalent of bounced checks.” *Id.* at 1348. Insofar as § 2637(d) might otherwise mandate exhaustion despite the APA, that doctrine has no application when (as here) there is “some doubt as to whether the agency [is] empowered to grant effective relief.” *McCarthy*, 503 U.S. at 147. The court therefore turns to the merits.

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321, 329 (1944)). Neither statute imbues the CIT with authority to deviate from statutory law and doctrine governing district courts. *Cf.* 28 U.S.C. § 1585 (stating that the CIT “shall possess all the powers in law and equity of, or as conferred by statute upon, a district court”).

## IV

## A

Post-remand, CSI only contests Commerce’s denials of 31 of its 2018 requests, which total 1.373 million metric tons. *See* ECF 103, at 4 n.2 & Appendix 1 (identifying challenged denials); ECF 144, at Annex p. 1 (stipulation by the parties regarding tonnage). It argues that the Department ignored evidence that U.S. Steel could not supply most of this amount because the latter “needed the slab capacity to meet its *own* needs.” ECF 103, at 22 (emphasis in original). To meet those internal requirements, the latter itself “import[ed] slab in 2017 and 2018.” *Id.*

The government and *amicus* do not directly respond to this point. Instead, they argue at length that Commerce only needed to consider each request in isolation and it reasonably concluded that U.S. Steel could supply the amount of slab specified in any given application. *See* ECF 108, at 27–31 (government); ECF 117, at 15 (*amicus*). As the government puts it, “CSI does not contest that [the Pennsylvania company] had capacity to produce enough steel to cover any *individual* request.” ECF 108, at 29 (emphasis added). That is, the California company didn’t dispute the obvious.

But “what is reasonable depends on the context.” *Coal. of Am. Mfrs. of Mobile Access Equip. v. United States*, Ct. No. 22-00152, Slip Op. 24-66, at 11, 2024

WL 2796654, at \*4 (CIT May 31, 2024) (quoting *United States v. R. Enters., Inc.*, 498 U.S. 292, 299 (1991)). Here, CSI clarified to Commerce that it sought exclusions for 85 percent of its production capacity (2.3 million metric tons). By not considering whether U.S. Steel carried its burden of showing that it could and would supply *that* amount, the Department acted unreasonably.

The applicable regulation reinforces this conclusion. It required the Pennsylvania producer to demonstrate that it could provide slab “in a sufficient and *reasonably available* amount.” 15 C.F.R. Pt. 705 Supp. 1(c)(5) (emphasis added).<sup>20</sup> Highly relevant to whether it could do so is the extent to which it “overcomitt[ed]” its “current or future capacity” to “*users of the article other than the applicant,*” 83 Fed. Reg. at 46,037 (Comment (f)(6)(iii)(A) and agency response) (emphasis added)—necessarily including itself as well as its other customers. According to CSI, U.S. Steel’s own internal demands for slab prevented it from selling significant

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<sup>20</sup> Commerce was surely correct that an objector’s refusal to buy otherwise-available slab based on “economic reasons” such as price and transportation costs is not a reason to grant an exclusion. Appx01410. After all, the entire purpose of the Section 232 tariffs is to encourage the purchase of domestic steel. But CSI argues, *see* ECF 103, at 21 n.46—and the court agrees—that slab is not “reasonably available” insofar as an objector simply declines to put it on the market.

quantities in the American market, Appx06683, which is why the latter's total sales in that market were only 330,693 metric tons, Appx06675—a small fraction of the 2.3 million metric tons for which the former sought exclusions.

By not addressing these questions, Commerce “entirely failed to consider . . . important aspect[s] of the problem,” *State Farm*, 463 U.S. at 43, which requires a remand for it to undertake that analysis. The agency must step back and consider not just the individual trees (each submission in isolation) but also the forest (the aggregate of those applications). In so doing, it must ask whether U.S. Steel carried its burden of showing that it could and would provide the total amount represented by CSI's requests (now reduced to 1.373 million metric tons).

The government and *amicus* both point to evidence that CSI declined to buy the maximum available under the companies' contract. See ECF 108, at 34 (government); ECF 117, at 19 (*amicus*). That evidence supports Commerce's denial of the exclusions for the quantity covered by that agreement. But it also begs the question whether U.S. Steel, in view of its *own* internal needs, its relatively limited sales in the domestic market, and its commitments to other customers, demonstrated that it could and would sell the California company *all* the tonnage for which the latter now

seeks relief. On remand, the agency must consider these issues.<sup>21</sup>

CSI also challenges the finding that U.S. Steel could timely provide slab. It points to the latter's sur-rebuttal admission that it could not supply any more than the contract amount of 9,000–14,000 metric tons per month until the "4th quarter 2018." *See* ECF 102, at 23 (citing Appx06787 n.1).<sup>22</sup> Thus, the Pennsylvania company "implicitly acknowledged that it could not 'produce and deliver' any new steel slabs 'within eight weeks' of its June 2018 objections as required by the regulation." *Id.* at 28 (quoting 15 C.F.R. Pt. 705 Supp. 1(d)(4); 83 Fed. Reg. at 46,038).<sup>23</sup> Commerce failed to

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<sup>21</sup> It must do in light of an objector's burden of "clearly identify[ing], and provid[ing] support for, its opposition to the proposed exclusion, *with reference to the specific basis identified in*, and the support provided for, the . . . request." 15 C.F.R. Pt. 705 Supp. 1(d)(4) (emphasis added).

<sup>22</sup> U.S. Steel stated that it "has established a slab supply contract with [CSI] for [9,000–14,000 metric tons per month] through 2019. [The latter] indicated that they were not comfortable with a higher volume commitment in the contract. [The former] *has more steel available to sell them than the contract quantity as early as the 4th quarter 2018.*" Appx06787 n.1 (emphasis added).

<sup>23</sup> The parties have since stipulated that CSI submitted the 31 requests still at issue between April 29, 2018, and May 8, 2018, and that U.S. Steel filed the corresponding objections between June 14, 2018, and July 5, 2018. *See* ECF 144, Annex p. 1.

address this concession, which bore on another vital aspect of the problem—U.S. Steel’s ability, whatever its capacity to produce and willingness to sell slab, to *timely* deliver the 1.373 million metric tons for which CSI seeks exclusions.

Neither the government nor the *amicus* confronts this issue, even though it’s front and center in CSI’s brief. *See* ECF 103, at 23, 27–28. The court therefore remands for the Department to reconsider its denials for tonnage beyond the companies’ contract limit given U.S. Steel’s acknowledgment that it could not deliver beyond that amount until the fourth quarter of 2018—more than eight weeks after its California customer sought the exclusions.

## B

As to its 14 requests now at issue for 2020, CSI argues that “the uncontroverted evidence . . . established that U.S. Steel could not provide [it] with 425k MTs of slab in 2020.” ECF 103, at 29.<sup>24</sup> In support of this proposition, it asserts that its Pennsylvania supplier “could not and did not provide the slab [it] needed” in 2019. ECF 103, at 30. As a result, that year it “was only able

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<sup>24</sup> As described above, in 2020 CSI submitted 23 exclusion requests for 425,000 metric tons of slab. Now, however, it states that it only seeks relief concerning 14 of them, *see id.* at 4 n.2 & Appendix 2, which according to the parties total 278,800 metric tons, *see* ECF 144, at Annex p. 2.

to procure [317,000] MTs of slab—13 percent of its utilization target—from U.S. Steel.” *Id.* (citing Appx22883).<sup>25</sup>

But as Commerce explained, CSI did “not address or rebut U.S. Steel’s claims that it was [the former’s] decision not to extend its contract . . . into 2020, nor to purchase via spot sales . . . in late 2019.” Appx01017. This evidence, on which the Department reasonably relied, supports the inference that the California company *chose* to limit the slab obtained from its Pennsylvania supplier to 317,000 metric tons in 2019.

CSI’s argument that U.S. Steel would only sell limited quantities of slab in 2020 fares no better. The former contends that “from January 2020 through June 2020, [the latter] only supplied [it] with 82k MTs of slabs—a miniscule [portion] of its needs for target utilization.” ECF 102, at 30 (citing Appx22957). But the cited record page does not explain *why* the Pennsylvania company’s sales were so limited. The record supports Commerce’s finding that it was because of “CSI’s decision to not purchase the full volume offered by U.S.

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<sup>25</sup> CSI’s brief uses the figure of 294,000 metric tons, but the cited record page does not support that assertion. Later, however, it contends that in 2019 U.S. Steel supplied it with 317,000 metric tons of slab. ECF 102, at 32 (citing Appx22956–22957). The cited material supports that number. The court accordingly substitutes 317,000 metric tons for the figure used on page 30 of CSI’s brief.



Steel in 2020.” Appx01016. As the California customer’s own rebuttal filing said, it agreed to “all spot slab offers from U.S. Steel in 2018 *and through the third quarter 2019.*” Appx22931 (emphasis added). The unstated implication, confirmed by an email communication in the record, *see* Appx22958, is that the former *stopped* agreeing to “all spot offers” in the fourth quarter of 2019 and beyond.

Relatedly, CSI asserts that historical data confirmed that U.S. Steel “could not furnish 425k MTs . . . in 2020.” ECF 103, at 32. Given the former’s abandonment of nine of its exclusion requests for that year, however, the relevant question now is whether the latter could have provided 278,800 metric tons of slab. *See* note 24.

But Commerce looked at the historical data, *see* Appx01016–01017, which showed that U.S. Steel sold CSI 317,000 metric tons of slab in 2019, ECF 102, at 32. As the Department explained, that number would have been considerably higher if the latter had *not* declined to renew the contract in August 2019 and had *not* declined spot offers in the fourth quarter. *See* Appx01016–01017. But even with those CSI-imposed limitations, that total exceeds the 278,800 metric tons for which the company now seeks exclusions. Thus, the agency reasonably explained the basis for its conclusion that “U.S. Steel produces or could produce” what CSI needed in 2020.

CSI also attacks what it characterizes as Commerce's failure to address evidence that plant shut-downs compromised U.S. Steel's ability to produce slab. It points to record pages showing that its Pennsylvania supplier idled production at three plants that the latter "stated in its objections would be the source of the slabs it claimed it could [provide]." ECF 103, at 30–31 (citing Appx22885, Appx22912, Appx22908). But the Department did consider this material, explaining that the former did not provide any information showing that "U.S. Steel cannot manufacture the requested quantity of the product at the three plants it has listed." Appx01016–01017. The agency gave "greater weight" to the latter's certification that it could produce the slab at these facilities because the company was "in a better position than CSI to know the limits of its own production schedule and ability to produce the full volume of the requested product." Appx01017.

Finally, as for whether U.S. Steel could timely supply the slab that CSI needed in 2020, recall that there is no dispute on this record that "[a]lmost 50%" of the former's deliveries in 2018–2019 were delivered more than eight weeks after the order was placed. Appx22928. The latter attacks Commerce's reliance on the Pennsylvania company's "you didn't ask for priority delivery' defense," ECF 103, at 35, indignantly characterizing it as "ridiculous," *id.*

Ridiculous it may be, but the place to assert that argument was before the Department. Instead, even though U.S. Steel raised its priority-delivery defense in its objection, *see* Appx22914, CSI's rebuttal didn't respond. Given that the latter didn't contest that defense, the agency reasonably relied on it, and it's too late now to complain that it did so. "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Deseado Int'l, Ltd. v. United States*, 600 F.3d 1377, 1380–81 (Fed. Cir. 2010) (quoting *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952)).<sup>26</sup>

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<sup>26</sup> CSI also challenges Commerce's statement that the company failed to present any evidence "that demonstrates that current and future production and deliveries are impacted by any past delivery issues." ECF 103, at 35–36 (quoting Appx01017). The court agrees that this "impermissibly shifts the burden" of demonstrating that the exclusion should be denied from the objector to the requester. *Id.* at 36. But because the Department also reasonably relied on U.S. Steel's uncontested "priority-delivery" defense, the agency's burden-shifting is harmless error. *See* 5 U.S.C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error."); *Oracle Am., Inc. v. United States*, 975 F.3d 1279, 1290–91 (Fed. Cir. 2020) ("[P]rinciples of harmless error apply to judicial review of agency action generally. A

Regarding its denials of the 14 exclusion requests for 2020 that CSI still contests, the agency reviewed all the relevant evidence before it and reasonably explained the basis for finding that U.S. Steel carried its burden of showing that it could and would timely supply 278,800 metric tons those submissions encompass. The court therefore sustains those denials.

## V

Where, as here, the court finds that “agency action violates the APA, ‘the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.’” *Calvert*, 654 F. Supp. 3d at 1349 n.28 (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). But even if on remand Commerce reverses itself and grants CSI’s 31 requests from 2018 that the court returns to the Department today, those exclusions will be useless. That’s because the company’s entries have all long since liquidated, *see id.* at 1336 n.8, and under the administrative regime, “Customs will not honor an exclusion as to entries that have finally liquidated by the time an importer seeks relief,” *id.* at 1335.

Commerce, however, “may not structure its scheme to administer Section 232 exclusions to thwart

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remand is unnecessary when . . . there is no reason to believe that the decision would have been different” even without the error.).

effectual judicial review of unlawful agency action.” *Id.* at 1348. Under the APA, the court can “fashion[] equitable relief [to] ensure the vindication” of a plaintiff’s rights. *Id.* at 1349 (quoting *Cobell v. Norton*, 240 F.3d 1081, 1108 (D.C. Cir. 2001)). CSI seeks such relief. *See* ECF 2, at 20.

An injunction is “appropriate” under 28 U.S.C. § 2643(c)(1) when (1) a plaintiff is “threatened with irreparable injury”; (2) it “ha[s] no adequate remedy at law for that loss”; (3) “considering the balance of hardships, a remedy in equity [is] warranted”; and (4) “the public interest would not [be] disserved by such relief.” *Calvert*, 654 F. Supp. 3d at 1348 (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). “When the defendant is the government, factors (3) and (4) merge.” *Anatol Zukerman & Charles Krause Reporting, LLC v. United States Postal Serv.*, 64 F.4th 1354, 1364 (D.C. Cir. 2023) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

CSI’s request for an injunction satisfies the *eBay* elements. Absent such relief requiring Commerce to direct Customs to honor any exclusions granted on remand, the company will be unable to recover its Section 232 duties, an irreparable injury. It has no other adequate remedy at law for that loss. The harm is self-evident, and the government “has no legitimate interest in collecting [duties]” to which it has no legal claim. *Oman Fasteners, LLC v. United States*, Ct. No. 22-00348, Slip Op. 23-17, at 38, 2023 WL 2233642, at \*13

(CIT, as amended Feb. 22, 2023), *appeal pending*, No. 23-1661 (Fed. Cir.); *cf. Am. Signature, Inc. v. United States*, 598 F.3d 816, 830 (Fed. Cir. 2010) (“The public interest is served by ensuring that governmental bodies comply with the law, and interpret and apply trade statutes uniformly and fairly.”). Thus, the government would suffer no cognizable harm from refunding money owed to the company.

The court therefore awards injunctive relief in addition to remanding for reconsideration. Insofar as Commerce grants any exclusions on remand, it must instruct Customs to honor them by reliquidating entries and restoring CSI “to the position[ it] would have occupied had [its] original requests been granted.” *Calvert*, 654 F. Supp. 3d at 1349.

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The court sustains 162 of Commerce’s exclusion denials and remands the remaining 31 for reconsideration. A separate order and injunction will issue. *See* USCIT R. 58(a).

Dated: November 13, 2024      /s/ M. Miller Baker  
New York, NY                      Judge