Slip Op. 22-85

UNITED STATES COURT OF INTERNATIONAL TRADE

CYBER POWER SYSTEMS (USA) INC., **Plaintiff,** **v.** **UNITED STATES,** **Defendant,** **UNITED STATES,** **Counterclaimant,** **v.** **CYBER POWER SYSTEMS (USA) INC.,** **Counterclaim Defendant.**	**Before: Claire R. Kelly, Judge** **Court No. 21-00200**

OPINION AND ORDER

[Redenominating the United States' counterclaim as a defense under U.S. Court of International Trade Rule 8(d)(2) and denying Cyber Power Systems (USA) Inc.'s motion to dismiss the counterclaim as moot.]

Dated: July 20, 2022

John M. Peterson and Richard F. O'Neill, Neville Peterson, LLP, of New York, NY, and Patrick B. Klein, Neville Peterson, LLP, of Seattle, WA, argued for plaintiff Cyber Power Systems (USA) Inc.

Beverly A. Farrell, Senior Trial Attorney, and Elisa S. Solomon, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of New York, NY, argued for defendant United States. Also on the brief were Brian M. Boynton, Principal Deputy Assistant Attorney General, Patricia M. McCarthy, Director, and Justin R. Miller, Attorney-in-Charge, International Trade Field Office.

Kelly, Judge: Before the court is Plaintiff/Counterclaim Defendant Cyber Power Systems (USA) Inc.'s ("Cyber Power") motion to dismiss Defendant/Counterclaimant United States' ("Defendant") counterclaim. Pl.'s Mot. to Dismiss Def.'s Countercl., Jan. 11, 2022, ECF No. 17 ("Pl. Mot."); see also Memo. of Points and Authorities in Supp. of [Pl. Mot.], Jan. 11, 2022, ECF No. 17-2 ("Pl. Br."); Ans. & Countercl. of [Def.], Dec. 21, 2021, ECF No. 14 (the "Counterclaim"). In the Counterclaim, Defendant asks the court to re-classify under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 8544.42.90 subject merchandise entered by Cyber Power and order U.S. Customs and Border Protection ("CBP") to reliquidate the merchandise at a rate of 2.6% ad valorem.[1] Countercl. ¶¶ 18, Prayer for Relief.

Cyber Power argues the court should dismiss the Counterclaim because (i) Defendant fails to allege a cause of action; (ii) the liquidation of the subject merchandise is final; and (iii) allowing Defendant to prosecute the Counterclaim, violates Cyber Power's rights under the Equal Protection Clause of the United States Constitution. Pl. Br. at 3–25. Defendant argues that Cyber Power's motion should be denied because (i) the Counterclaim states a claim for increased duties under 19 U.S.C. §§ 1202, 1503, and 1514(a); and (ii) liquidation is not final because Cyber Power protested the classification of the subject merchandise and the amount of

[1] CBP liquidated the subject merchandise under HTSUS subheading 8544.42.20. Countercl. ¶ 7. Merchandise classified under HTSUS subheading 8544.42.20 normally enter the United States duty free. Id. at ¶ 9.

duties assessed. [Def.'s] Memo. in Opp'n to [Pl. Mot.], 4–5, 11 n.4, Mar. 15, 2022, ECF No. 25 ("Def. Br."). For the following reasons, the Counterclaim is redenominated as a defense under United States Court of International Trade Rule 8(d)(2) and Cyber Power's motion to dismiss the Counterclaim is denied as moot.

BACKGROUND[2]

Cyber Power is the importer of record of the ten entries at issue in this action covering seven types of cables (the "Subject Cables") entered at the Port of Minneapolis, Minnesota in 2019, and classified by CBP at the time of liquidation under HTSUS subheading 8544.42.20.[3] Countercl. ¶¶ 3, 5–7; see also Compl. ¶ 6, Oct. 22, 2021, ECF No. 11. However, pursuant to Section 301 of the U.S. Trade Act of 1974, merchandise classified under HTSUS subheading 8544.42.20 originating from the People's Republic of China ("China") may also be further classified under temporary HTSUS subheading 9903.88.03 and assessed additional duties at a rate of 10 percent ad valorem if entered before May 10, 2019, and 25 percent ad valorem if entered on or after May 10, 2019 (the "Section 301 Duties"). Countercl. ¶ 9; see also

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[2] The facts set forth in this background section are taken from the Counterclaim and are assumed to be true for the purposes of this motion.

[3] HTSUS subheading 8544.42.20 covers:

> Insulated (including enameled or anodized) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors; optical fiber cables, made up of individually sheathed fibers, whether or not assembled with electric conductors or fitted with connectors: Other electric conductors, for a voltage not exceeding 1,000 V: Fitted with connectors: Other: Of a kind used for telecommunications.

Countercl. ¶¶ 8.

Def. Br. at 2–3 (summarizing events leading to the creation and assessment of the Section 301 Duties). CBP imposed Section 301 Duties on the Subject Cables. Countercl. ¶ 10.

On September 11, 2020, Cyber Power protested the liquidation of the Subject Cables under temporary HTSUS subheading 9903.88.03 and the assessment of the Section 301 Duties.[4] Memo. of Points and Authorities in Supp. of Protest of [Cyber Power], July 9, 2021, ECF No. 9-1 ("Protest"); Countercl. ¶ 11. In its protest, Cyber Power argued that the Subject Cables fall within an exclusion to the Section 301 Duties and are therefore properly classified under temporary HTSUS subheading 9903.88.33,[5] not temporary subheading 9903.88.03. Compl. ¶¶ 8–14; Countercl.; Answer ¶¶ 8–14; Protest at 5–11; see also Def. Br. at 1–2. On November 4, 2020, CBP denied Cyber Power's Protest, stating that Cyber Power failed to demonstrate that the Subject Cables meet the definition of telecommunications cables for HTSUS subheading 8544.42.20, and "[t]herefore CBP has determined that the correct

[4] Cyber Power did not challenge CBP's classification of the Subject Cables under HTSUS subheading 8544.42.20. Memo. of Points and Authorities in Supp. of Protest of [Cyber Power] 10, July 9, 2021, ECF No. 9-1 ("Protest").

[5] Goods classified under HTSUS subheading 8544.42.20 are excluded from the assessment of the Section 301 Duties if they are "[i]nsulated electric conductors for a voltage not exceeding 1,000V, fitted with connectors of a kind used for telecommunications, each valued over $0.35 but not over $2." Protest at 25; see also Countercl. ¶ 18.

classification for the [Subject] [C]ables is HTSUS 8544.42.9090."[6] Countercl. ¶ 12. Merchandise classified under HTSUS subheading 8544.42.90 is subject to a duty rate of 2.6% ad valorem in addition to applicable Section 301 Duties. See id. ¶¶ 17–20. The parties do not allege that CBP reclassified or re-liquidated the Subject Cables under HTSUS subheading 8544.42.90 when CBP denied Cyber Power's protest. See generally Countercl.; Compl.; see also Def. Br. at 3 (stating CBP did not reclassify or re-liquidate the Subject Cables under HTSUS subheading 8544.42.90).

On April 28, 2021, Cyber Power commenced this action by filing a summons challenging CBP's denial of Cyber Power's protest. Countercl. ¶ 13; see also Summons, Apr. 28, 2021, ECF No. 1. On December 21, 2021, Defendant filed the Counterclaim. See Countercl. On January 11, 2022, Cyber Power filed the present motion to dismiss the Counterclaim. See Pl. Mot. Parties briefed the motion and Cyber Power requested oral argument. Def. Br.; Pl.'s Reply in Supp. of [Pl. Mot.], Apr. 5, 2022, ECF No. 27; Pl.'s Mot. for Oral Arg. on [Pl. Mot.], Apr. 7, 2022, ECF No. 28. The court heard oral argument on May 25, 2022. See Oral Arg., May 25, 2022, ECF No. 32.

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[6] HTSUS subheading 8544.42.90 covers

> Insulated (including enameled or anodized) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors; optical fiber cables, made up of individually sheathed fibers, whether or not assembled with electric conductors or fitted with connectors: Other electric conductors, for a voltage not exceeding 1,000 V: Fitted with connectors: Other: Other.

Id. ¶ 16.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over the Counterclaim pursuant to 28 U.S.C. § 1583, which grants the U.S. Court of International Trade jurisdiction over counterclaims involving the imported merchandise that is the subject matter of a civil action pending in the Court. 28 U.S.C. § 1583. Rule 8(a)(2) of the Rules of the U.S. Court of International Trade (collectively, the "Rules", and individually, "Rule") requires that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a)(2). Further, Rule 8(d)(2) provides that when a party mistakenly designates a defense as a counterclaim, the "court must, if justice requires, treat the pleading as though it were correctly designated." Rule 8(d)(2).

To survive a motion to dismiss for failure to state a claim upon which relief can be granted brought under Rule 12(b)(6), a pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).[7] When considering a motion to dismiss a counterclaim, the court assumes all well-pleaded factual allegations in the counterclaim to be true and

[7] Twombly and Iqbal discuss the standard courts use on motions to dismiss under the Federal Rules of Civil Procedure, not the Rules; however, Rules 8(a)(2) and 12(b)(6) are identical in both the Rules and the Federal Rules of Civil Procedure, so Supreme Court decisions analyzing the Federal Rules of Civil Procedure apply to analyzing the Rules. Compare Fed. R. Civ. P. 8(a)(2), 12(b)(6) with Rules 8(a)(2), 12(b)(6); see also Sioux Honey Ass'n v. Hartford Fire Ins. Co., 672 F.3d 1041, 1062–63 (Fed. Cir. 2012) (applying Twombly and Iqbal to the Rules).

draws all reasonable inferences in favor of the non-moving party. Wanxiang Am. Corp. v. United States, 12 F.4th 1369, 1373 (Fed. Cir. 2021).

DISCUSSION

Cyber Power's motion to dismiss asks the court to answer one question: What statutory authority does Defendant have for asserting the Counterclaim? Defendant argues that 19 U.S.C. §§ 1202, 1503, and 1514(a) give it authority to assert the Counterclaim and to seek reliquidation from CBP under a different classification. Def. Br. at 4–5, 11 n.4. Yet none of the sections of the U.S. Code cited by Defendant provide a basis for the Counterclaim. Section 1202 only sets forth the HTSUS; nothing in Section 1202 can be read to imply a cause of action for the United States to assert a counterclaim.[8] See 19 U.S.C. § 1202. Section 1503 provides that "if reliquidation is required pursuant to a final judgment or order of the U.S. Court of International Trade which includes a reappraisement of imported merchandise, the basis for such assessment shall be the final appraised value determined by such court." Id. § 1503. Section 1503 relates to the value of merchandise, not the classification, and, in any event, that section only states that the Court has the power to order reliquidation based on a reappraisement of the value of imported merchandise; nothing in Section 1503 grants the United States a cause of action to assert a counterclaim. Id. Finally, Section 1514(a) provides importers with a

[8] Even if one could view Section 1202 as implicitly empowering CBP to reclassify merchandise, the statutory scheme explicitly requires CBP to do so prior to liquidation or reliquidation. See 19 U.S.C. §§ 1501, 1504.

mechanism to protest liquidation; it does not provide the government with an avenue to assert counterclaims contesting CBP's classification. Id. § 1514(a). That a timely protest suspends the finality of liquidation for all parties, including the United States, does not imply that the United States may assert a counterclaim. Id.

Congress enacted a comprehensive scheme governing import duties, including multiple provisions, detailing specific remedies, allowing CBP to classify, re-classify, and collect duties on goods imported into the United States. See 19 U.S.C. §§ 1500, 1501, 1504, 1505, 1509, 1515, 1581–1631; 28 U.S.C. § 1592; see generally Title 19, Ch. 4 of the U.S. Code. Nowhere in that comprehensive scheme did Congress explicitly authorize the United States to assert a counterclaim challenging CBP's classification. Furthermore, a counterclaim contesting CBP's classification of merchandise upon liquidation requires the United States to make a claim against itself. CBP, a federal agency, classified and liquidated the entry that the defendant, United States, now seeks to have reliquidated. In light of the multitude of specific remedies available to CBP to classify merchandise and to fix and collect duties, the court declines to read into the applicable statutes an implied cause of action to assert a counterclaim challenging CBP's classification. See Consol. Edison Co. of N.Y. v. O'Leary, 117 F.3d 538, 543–44 (Fed. Cir. 1997) (refusing to read implied rights of action into the Economic Stabilization Act because of the specific remedies set forth in the Act).

In its opposition, Defendant attempts to cobble together an implied cause of action based on three statutory provisions, 19 U.S.C. §§ 1202, 1503, and 1514(a).[9] See Def. Br. at 4–5, 11–12. Nothing in the provisions of the statute upon which Defendant relies gives the United States a cause of action to assert a counterclaim challenging CBP's classification.[10] See 19 U.S.C. §§ 1202, 1503, and 1514(a). Indeed, none of those sections of the statute was materially amended at the time Congress granted the U.S. Court of International Trade jurisdiction to hear counterclaims and the power to determine the correct classification of merchandise. See Customs Courts Act of 1980, Pub. L. 96-417, 94 Stat. 1727, 1744–45, §§ 601(4)–(5), 605(a)–(b).

Defendant primarily relies on 19 U.S.C. § 1202, which Defendant contends "charge[s CBP] with enforcing the tariff in accordance with its terms, which includes

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[9] Defendant also asserts that 19 U.S.C. § 1505(b) authorizes CBP to collect increased duties after reliquidation. Def. Br. at 5 n.2. However, as Defendant concedes, that section authorizes CBP to collect such duties as part of CBP's "administrative responsibilities," and is relevant only after the U.S. Court of International Trade orders reliquidation. See id.; 19 U.S.C. § 1505(b). Nothing in 19 U.S.C. § 1505(b) authorizes the United States to assert a counterclaim for increased duties resulting from a different classification.

[10] As discussed below, the legislative history of 28 U.S.C. § 1583 demonstrates that Congress intended to give the U.S. Court of International Trade jurisdiction over counterclaims, but this Court's jurisdiction is not disputed. Moreover, Congress' stated intent in legislative history cannot overcome the unambiguous meaning of the statutes it enacts. See Bull v. United States, 479 F.3d 1365, 1376 (Fed. Cir. 2007); see also Sharp v. United States, 580 F.3d 1234, 1238 (Fed. Cir. 2009) ("To overcome the plain meaning of the statute, the party challenging it by reference to legislative history must establish that the legislative history embodies 'an extraordinary showing of contrary intentions'" (some internal quotation marks omitted) (emphasis in original)). Sections 1583 and 2643 unambiguously grant powers to the Court, not to litigants before the Court. 28 U.S.C. §§ 1583, 2643.

collecting the proper amount of duties based on the correct classification of imported merchandise." Def. Br. at 4. However, Section 1202 sets forth the provisions of the HTSUS.[11] See 19 U.S.C. § 1202. Nothing in the plain, unambiguous terms of Section 1202 permits the United States to challenge CBP's classification via a counterclaim. Therefore, Section 1202 does not provide Defendant with a cause of action.

Likewise, Section 1503 does not give Defendant a cause of action. Section 1503 covers reliquidations ordered by the U.S. Court of International Trade including reappraisements of the value of imported merchandise. Id. § 1503. Section 1503 relates to valuation, not classification; thus, Section 1503 is not relevant to Defendant's claim that the merchandise should be classified differently. Moreover, even if Section 1503 did apply to classification instead of valuation, that section does not grant Defendant a cause of action to assert a counterclaim for a different classification. Section 1503 states that CBP must reliquidate merchandise based on the U.S. Court of International Trade's judgment. Id. Given that the Court has the power to order all appropriate relief, including reliquidation, it is unsurprising that Congress directed CBP to follow the Court's instructions. See 28 U.S.C. § 2643.

Defendant's reliance on Section 1514(a) is also misplaced. Although Defendant is correct that Cyber Power's protest suspended the finality of liquidation for all

[11] CBP is charged with fixing the classification and duty rate of imported merchandise pursuant to 19 U.S.C. § 1500(b). See id. § 1500(b). However, nothing in Section 1500(b) implies that the United States may assert a counterclaim challenging the classification and duty rate determined by CBP for imported merchandise. See id.

parties, including Defendant, that fact is merely a truism. Liquidation is not final as to the United States and its officers because when an importer protests liquidation and/or challenges a denial of such protest, the possibility remains that CBP made an error and the imported merchandise must be liquidated at a different rate than CBP initially determined. If liquidation were final as to the United States and its officers, then those same officers would potentially be powerless to fix any such error.[12] Thus, liquidation is not final when an importer challenges CBP's determinations. However, it does not follow that Section 1514(a) authorizes Defendant to assert a counterclaim challenging CPB's classification.[13] Section 1514(a) provides importers with the right

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[12] Indeed, here, upon review of the protest, CBP concluded that the Subject Cables should be classified under HTSUS subheading 8544.42.90 when it considered the Protest, but did not grant in part, and deny in part the Protest, in order to reclassify the Subject Cables even though at that time of the Protest, liquidation was not final. See Def. Br. at 3. At oral argument Plaintiff' argued that the protest mechanism only permits challenges that would lower the duty rate; therefore, despite the suspension of liquidation pending the determination of a protest, CBP would be without authority to reclassify the Subject Cables under HTSUS subheading 8544.42.90. Oral Arg. at 38:00–40:52. Because CBP did not reclassify the Subject Cables after reviewing the Protest, the court cannot address CBP's authority to do so here.

[13] Defendant's theory that it is authorized to challenge CBP's classification via the Counterclaim rests in part on Defendant's unsupported assertion that "[i]f, in reaching th[e] correct result, the Court determines that a different classification requiring additional duties is applicable, it could only award relief to the Government if the Government has asserted a counterclaim." Def. Br. at 11. Defendant cites no support for this assertion. Although it is not necessary to the court's conclusion that Defendant lacks authority to assert a counterclaim, Defendant's theory seems to be contradicted by 28 U.S.C. § 2643(b)–(c)(1). Section 2643(b) mandates that the U.S. Court of international Trade must "reach the correct decision" in any civil action. Id. § 2643(b). Section 2643(c)(1) states that the U.S. Court of International Trade "may . . . order any other form of relief that is appropriate in a civil action." Id. § 2643(c)(1).

(footnote continued)

to protest CBP's determinations, and Section 1515 provides that CBP must review and either "allow or deny" the protest. 19 U.S.C. §§ 1514(a), 1515. There is nothing in the language of Section 1514 or 1515 that gives rise to an implied right of the United States to assert a counterclaim. Defendant's attempt to impute an additional right from these sections —the right to bring a cause of action against itself—simply because liquidation is not final, fails.

Finally, Defendant relies in part on 28 U.S.C. § 1583. See Def. Br. at 12; Countercl. ¶ 1 ("Defendant brings this counterclaim pursuant to 28 U.S.C. §§ 1583(1) & 2643(b)"). However, Section 1583 does not provide Defendant with a cause of action to assert the Counterclaim. Congress appears to have believed that 28 U.S.C. § 1583 would provide the United States with the ability to assert counterclaims arguing for a higher rate of duty. See, e.g., H.R. Rep. No. 96-1235, 36, 1980 U.S.C.C.A.N. 3729, 3748 (1980) (stating that Section 1583 would permit the United States to "assert[] a claim that would allow the court to make the proper determination and accordingly

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The U.S. Court of Appeals for the Federal Circuit interpreted 28 U.S.C. § 2643(b) to require the U.S. Court of International Trade to determine the correct classification of protested entries of merchandise. See Jarvis Clark, Inc. v. United States, 733 F.2d 873, 877–78 (Fed. Cir. 1984). Indeed, it would seem if the court were to accept Defendant's interpretation of the statute, then the Court would not be permitted to "reach the correct decision" or order "appropriate" relief unless Defendant chose to assert a counterclaim. See 28 U.S.C. § 2643(b)–(c)(1). This interpretation cannot be correct, as the Court's statutory mandates would be dependent on a discretionary decision by the United States. This problem is illustrated by Jarvis Clark, in which the court rejected both parties' proposed classifications. Jarvis Clark, 733 F.2d at 880. Cases contesting classifications are decided de novo by this Court. See 28 U.S.C. § 2640(a)(1).

would enable the Government to collect the full amount of duties"). However, the plain language of Section 1583 establishes that it is jurisdictional. It provides "[i]n any civil action in the Court of International Trade, the court shall have exclusive jurisdiction to render judgment upon any counterclaim . . . ." 28 U.S.C. § 1583. It does not create any substantive cause of action that did not exist before Congress enacted the Customs Courts Act of 1980.[14] Thus, although Congress may have intended Section 1583 to provide the United States with an avenue to assert counterclaims for higher rates of duty, Congress only provided the U.S. Court of International Trade with jurisdiction to hear such counterclaims, to the extent such claims are properly brought as counterclaims. As explained above, Congress did not

[14] Defendant does not contend that Section 1583 provides it with a cause of action. See Def. Br. at 18. However, Defendant in its responsive brief asks the court for leave to amend or to submit additional briefing on the issue of whether Section 1583 is solely jurisdictional. Id. ("Our counterclaim does not request the Court to interpret section 1583 as creating a separate cause of action. Therefore, we do not address Cyber Power's speculative and premature argument. See Mot. at 20-25. However, should the Court find that our counterclaim fails to state a claim, we respectfully request an opportunity to amend our counterclaim to address the Court's findings, including, if appropriate, whether section 1583 provides a cause of action"). Cyber Power dedicated approximately one quarter of its moving brief to this issue. See Pl. Br. at 14–20. Defendant chose not to address Plaintiff's argument in its opposition and thus waived its opportunity to present argument on the issue. See Promega Corp. v. Life Technologies Corp., 875 F.3d 651, 661 (Fed. Cir. 2017). At oral argument Defendant proposed that Section 1583 gave the United States "a jurisdictional right in a counterclaim to seek a different classification." Oral Arg. at 10:50–10:55. When pressed at to what exactly that statement meant counsel conceded that "arguably it doesn't create a cause of action, it provides an opportunity for the government to file a counterclaim." Id. 12:17–12:24. As discussed, the plain meaning of Section 1583 is clear and the statute is purely jurisdictional.

provide the United States with any statutory authority to assert counterclaims challenging the liquidated classification and duty rate.[15]

Although this court has previously sanctioned the government's use of a counterclaim to assert a cause of action for reliquidation under a different classification, it has not squarely faced the question of the authority for such a claim. See Tomoegawa (U.S.A.), Inc. v. U.S., 15 CIT 182 (1991) ("Tomoegawa II"). In Tomoegawa II, the government sought to amend its answers to add a counterclaim in cases removed from the suspension calendar, following an earlier decision in the designated test case. Id. at 183; see generally Tomoegawa (U.S.A.), Inc. v. U.S., 12 CIT 112 (1988) ("Tomoegawa I"). In Tomoegawa I, the government amended its answer to include a counterclaim without objection from the plaintiff. Tomoegawa II, 15 CIT at 183; see generally Tomoegawa I, 12 CIT 112 aff'd in part, vacated in part sub nom. Tomoegawa U.S.A., Inc. v. United States, 861 F.2d 1275 (Fed. Cir. 1988) (holding that the imported merchandise was classifiable in accordance with the counterclaim asserted by the government). Subsequently, in Tomoegawa II, the plaintiff objected to the government's effort to amend its answer to add a counterclaim

[15] Defendant's reliance on Cormorant Shipholding Corp. v. United States is unpersuasive because that court analyzed whether the U.S. Court of International Trade had jurisdiction over the United States' counterclaim pursuant to 28 U.S.C. § 1583. See Def. Br. at 12 (citing Cormorant Shipholding Corp. v. United States, 33 CIT 440, 447 n.17 (2009)). As discussed, the Court's jurisdiction is clear and undisputed; the only issue is whether the Counterclaim states a claim. Thus, cases such as Cormorant that analyze the extent of the U.S. Court of International Trade's jurisdiction under Section 1583 are irrelevant.

as untimely. Tomoegawa II, 12 CIT at 185. The court ruled that the addition of the counterclaim was timely and therefore did not address the authority for the counterclaim. Id. at 190. The court referenced, without analysis, Section 1583 as the statutory basis for the counterclaims, noting that the legislative history of the Customs Court Act of 1980 contemplated that the United States could recover "the proper amount of import duties." Id. In the very next sentence, the court invoked Jarvis Clark and its admonition that the court find the correct result. Id. Thus, the issue of the government's statutory authority to assert a counterclaim does not appear to have been squarely before the court. Instead, the concern appears to have been the right of the United States to recover duties owed as a result of the Court's obligation to reach the correct result, a right addressed by Jarvis Clark. Thus, Tomoegawa II does not address the lack of authority to assert counterclaims for classifications with higher rates of duty.

Nonetheless, the rules of this Court recognize that the Court must, if justice requires, redenominate a mistaken designation in a pleading. Rule 8(d)(2) ("If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so"). Here, Defendant seeks reliquidation pursuant to a classification with a higher rate of duty.[16] The court

[16] Defendant is not barred from arguing for a different classification at a higher duty

(footnote continued)

treats the Counterclaim as a defense within its Answer; therefore, the motion to dismiss is denied as moot.

CONCLUSION

In accordance with the foregoing, it is

ORDERED that the Counterclaim is redenominated as a defense; and it is further

ORDERED that the motion to dismiss is DENIED as moot.

/s/ Claire R. Kelly
Claire R. Kelly, Judge

Dated: July 20, 2022
New York, New York

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rate. See, e.g., Dollar Trading Corp. v. United States, 67 Cust. Ct. 308, 315–16 (1971). Even prior to the Customs Courts Act of 1980, the United States repeatedly argued for alternative classifications. See, e.g., id. at 315–16 (citing United States v. White Sulphur Springs Co., 21 C.C.P.A. 203 (1933); United States v. R.J. Saunders & Co., 42 C.C.P.A. 128 (1955); Bendix Corp. v. United States, 57 Cust. Ct. 184 (1966); J.M. Rodgers Inc. v. United States, 59 Cust. Ct. 91 (1967), judgment amended on other grounds, 60 Cust. Ct. 42 (1968)). Although the dual burden of proof generally resulted in dismissal of cases where the plaintiff failed to prove the correctness of its proffered classification, there has never been any ban on the United States arguing for classifications different from CBP's.