

# U.S. Court of International Trade

Slip Op. 19–89

BELL SUPPLY COMPANY, LLC, Plaintiff, v. UNITED STATES, Defendant,  
and BOOMERANG TUBE LLC et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge  
Court No. 14–00066  
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce’s Remand Determination.]

Dated: July 22, 2019

*Donald B. Cameron, Julie C. Mendoza, R. Will Planert, Brady W. Mills, Mary S. Hodgins, Eugene Degnan, Sabahat Chaudhary, and Ragan W. Updegraff*, Morris, Manning & Martin, LLP, of Washington, DC, for Plaintiff.

*Douglas G. Edelschick*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Paul Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

*Roger B. Schagrin* and *Christopher T. Cloutier*, Schagrin Associates, of Washington, DC, for defendant-intervenors Boomerang Tube LLC, TMK IPSCO Tubulars, V&M Star L.P., and Wheatland Tube Company.

*Gregory J. Spak, Frank J. Schweitzer, Kristina Zissis, and Allison Kepkay*, White & Case LLP, of Washington, DC, for defendant-intervenor Maverick Tube Corporation.

*Thomas M. Beline* and *Sarah E. Shulman*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for defendant-intervenor United States Steel Corporation.

## OPINION

### Kelly, Judge:

Before the court is the U.S. Department of Commerce’s (“Commerce” or “the Department”) remand redetermination pursuant to the court’s decision in *Bell Supply Co., LLC v. United States*, 42 CIT \_\_\_, Slip Op. 18–141 (Oct. 18, 2018) (“*Bell Supply V*”). See Final Results of Redetermination Pursuant to Remand, Mar. 29, 2019, ECF No. 216–1 (“*Third Remand Results*”).<sup>1</sup> In *Bell Supply V*, the court remanded Commerce’s application of the substantial transformation

<sup>1</sup> Because Commerce’s remand redetermination applied to both the antidumping duty (“ADD”) and countervailing duty (“CVD”) orders, Commerce filed two versions of its redetermination. See Final Results of Redetermination Pursuant to Remand, Mar. 29, 2019, ECF No. 216–1; Final Results of Redetermination Pursuant to Remand, Mar. 29, 2019, ECF No. 216–2. Both versions are identical other than the document number, and all further references are to the version cited above.

test in the final determination of the scope ruling on certain oil country tubular goods (“OCTG”) from the People’s Republic of China (“PRC” or “China”). *Bell Supply V*, 42 CIT at \_\_, Slip Op. 18–141 at 24–25. In its scope ruling, Commerce applied a substantial transformation test and determined that seamless unfinished OCTG produced in China and finished in third countries had not undergone a substantial transformation and was thus within the scope of the antidumping duty (“ADD”) and countervailing duty (“CVD”) orders on OCTG from China.<sup>2</sup> See Final Scope Ruling on Green Tubes Manufactured in the [PRC] and Finished in Countries Other than the United States and the [PRC] at 24, Feb. 7, 2014, ECF 31–1 (“Final Scope Ruling”); Preliminary Scope Ruling on Green Tubes manufactured in the [PRC] and Finished in Countries Other than the United States and the PRC at 31, AD CD 48 (May 31, 2013) (“Preliminary Scope Ruling”);<sup>3</sup> see also *Certain [OCTG] From the [PRC]*, 75 Fed. Reg. 28,551 (Dep’t Commerce May 21, 2010) (amended final determination of sales at less than fair value and [ADD] order) (“*ADD Order*”); *Certain [OCTG] From the [PRC]*, 75 Fed. Reg. 3,203 (Dep’t Commerce Jan. 20, 2010) (amended final affirmative [CVD] determination and [CVD] order) (“*CVD Order*”) (collectively “Orders”). The court remanded Commerce’s application of the substantial transformation test, holding that Commerce’s findings with respect to three out of the five factors in its totality-of-the-circumstances determination were unsupported by substantial evidence. See *Bell Supply V*, 42 CIT at \_\_, Slip. Op. 18–141 at 10. Specifically, the court held that Commerce failed to ground its conclusions in substantial evidence with respect to the class or kind of merchandise, the nature/sophistication of processing in the country of exportation, and the cost

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<sup>2</sup> Specifically, Commerce determined that the seamless unfinished OCTG is within the scope of the ADD and CVD orders where “1) the finishing consists of heat treatment by quenching and tempering, upsetting and threading (with integral joint), or threading and coupling; and 2) the products are made to the following specifications and grades: API specification 5CT, grades P110, T-95 and Q-125.” Final Scope Ruling on Green Tubes Manufactured in the People’s Republic of China and Finished in Countries Other than the United States and the People’s Republic of China at 24, Feb. 7, 2014, ECF 31–1 (“Final Scope Ruling”).

<sup>3</sup> On May 14, 2014, Defendant filed on the docket the indices to the public and confidential administrative records of this review. See Administrative Record for Department of Commerce, May 14, 2014, ECF No. 31–3–6. On April 12, 2019, Defendant filed separate indices to the public and confidential administrative records for this remand redetermination. See Administrative Record for Department of Commerce Remand, Apr. 12, 2019, ECF No. 218–1–4. All references to documents from the initial administrative record are identified by the numbers assigned by Commerce in those indices and preceded by “PD” or “CD” to denote the public or confidential documents. All references to the administrative record for this remand determination are identified by the numbers assigned in these indices and preceded by “RPD” or “RCD” to denote remand public and confidential documents. Regardless of indices, all references to the administrative record for the antidumping investigation will contain “AD,” and references to the administrative record for the countervailing duties investigation will contain “CVD.”

of production/value added. *Id.*, 42 CIT at \_\_\_, Slip Op. 18–141 at 11–12, 13–14, 20–22. On remand, Commerce reexamined these three factors pursuant to its substantial transformation analysis and again concluded, based on the totality of the circumstances, that the seamless unfinished OCTG in question falls within the scope of the Orders. Because Commerce’s redetermination complies with the court’s opinion in *Bell Supply V* and is supported by substantial evidence, the court sustains the *Third Remand Results*.

### BACKGROUND

The court assumes familiarity with the facts of this case as set out in the previous opinions and now recounts the facts relevant to the court’s review of Commerce’s redetermination. See *Bell Supply Co., LLC v. United States*, 39 CIT \_\_\_, 83 F. Supp. 3d 1311 (2015) (“*Bell Supply I*”); *Bell Supply Co., LLC v. United States*, 40 CIT \_\_\_, 179 F. Supp. 3d 1082 (2016) (“*Bell Supply II*”); *Bell Supply Co., LLC v. United States*, 40 CIT \_\_\_, 190 F. Supp. 3d 1244 (2016) (“*Bell Supply III*”); *Bell Supply Co., LLC v. United States*, 888 F.3d 1222 (Fed. Cir. 2018) (“*Bell Supply IV*”); *Bell Supply V*, 42 CIT \_\_\_, Slip. Op. 18–141. On January 20, 2010 and May 21, 2010, respectively, Commerce published the CVD and ADD orders on OCTG from the PRC. See *CVD Order*, 75 Fed. Reg. 3,203; *ADD Order*, 75 Fed. Reg. 28,551. The Orders define the subject merchandise as:

certain [OCTG], which are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish (*e.g.*, whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute (“API”) or non-API specifications, whether finished (including limited service OCTG products) or unfinished (including green tubes and limited service OCTG products), whether or not thread protectors are attached. The scope of the order also covers OCTG coupling stock. Excluded from the scope of the order are: casing or tubing containing 10.5 percent or more by weight of chromium; drill pipe; unattached couplings; and unattached thread protectors.

*CVD Order*, 75 Fed. Reg. at 3,203–04; *ADD Order*, 75 Fed. Reg. at 28,553. On June 20, 2012, pursuant to a request from domestic steel companies United States Steel Corporation, TMK IPSCO Wheatland Tube Company, Boomerang Tube LLC, and V&M Star L.P, Commerce initiated a scope inquiry regarding Plaintiff’s merchandise. See *Initiation of Scope Inquiry*, AD PD 25, bar code 3082712–01 (June 20,

2012); *see also* 19 C.F.R. § 351.225(e) (2013).<sup>4</sup> Specifically, these domestic companies sought clarification on whether the Orders covered OCTG finished in third countries but made from unfinished OCTG (including green tubes) produced in the PRC.<sup>5</sup> Initiation of Scope Inquiry at 1, AD PD 25, bar code 3082712–01 (June 20, 2012). On February 7, 2014, Commerce issued a final scope ruling determining that unfinished OCTG manufactured in China and processed into finished OCTG in third countries is subject to the Orders because the merchandise is not substantially transformed during the finishing process. *See* Final Scope Ruling at 2, 16–23.

Plaintiff, Bell Supply Company, LLC (“Bell Supply”), challenged Commerce’s Final Scope Ruling in this court, arguing, *inter alia*, that Commerce’s determination unlawfully expanded the scope of the Orders and relied on a substantial transformation analysis unsupported by substantial evidence and otherwise not in accordance with law. Compl. ¶¶ 21, 25, Apr. 4, 2014, ECF No. 8; *see Bell Supply I*, 39 CIT at \_\_, 83 F. Supp. 3d at 1313–14. This court held that Commerce erred by applying the substantial transformation test, and that Commerce failed to follow the interpretive framework established in its regulations and, in doing so, unlawfully expanded the scope of the Orders to include Plaintiff’s merchandise. *See Bell Supply I*, 39 CIT at \_\_, 83 F. Supp. 3d at 1328–30. This court remanded Commerce’s scope determination with instructions to “identify actual language from the scope of the Orders that could be reasonably interpreted to include OCTG finished in third countries in order to find that the merchandise is covered by the scope of the Orders.” *Id.* at 1329.

On remand, Commerce found that the Orders cover unfinished OCTG produced in the PRC, even where the merchandise is finished in third countries. Final Results of Redetermination Pursuant to Remand at 2, Nov. 9, 2015, ECF No. 88–1 (“*First Remand Results*”). Under protest,<sup>6</sup> Commerce abandoned its substantial transformation analysis, instead invoking the plain language of the Orders. *See First Remand Results* at 2, 15, 20. This court determined that Commerce’s *First Remand Results* did not comply with the court’s remand order in

<sup>4</sup> Further citations to Title 19 of the Code of Federal Regulations are to the 2013 edition.

<sup>5</sup> Green tube is a type of unfinished OCTG, and references to unfinished OCTG will therefore include green tubes. Final Results of Redetermination Pursuant to Remand at 1 n.2, Nov. 9, 2015, ECF No. 88–1 (“*First Remand Results*”).

<sup>6</sup> Commerce conducted the first remand redetermination under protest, noting that it “respectfully disagree[d] with the CIT that the Department improperly conducted a ‘substantial transformation’ test in this proceeding.” *First Remand Results* at 14. By adopting a position “under protest,” Commerce preserved its right to appeal; the Court of Appeals has held that Commerce preserves its right to appeal in instances where Commerce makes a determination under protest and the Court of International Trade sustains its decision after remand. *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

*Bell Supply I*, and that the results were not supported by substantial evidence and not in accordance with law. *Bell Supply II*, 40 CIT at \_\_\_, 179 F. Supp. 3d at 1090. Although Commerce identified language in the Orders that Commerce believed covered green tubes manufactured in China and finished in third countries, this court held that the language was insufficient to permit such a conclusion. See *Bell Supply II*, 40 CIT at \_\_\_, 179 F. Supp. 3d at 1091, 1094–95. The court remanded Commerce’s *First Remand Results* for further consideration and instructed that Commerce interpret the Orders pursuant to the regulatory framework enumerated by 19 C.F.R. § 351.225(k)(1) and 19 C.F.R. § 351.225(k)(2) or, alternatively, conduct a circumvention analysis pursuant to 19 U.S.C. § 1677j(b) and 19 C.F.R. § 351.225(h). *Id.* at 1098–99, 1105.

In its second remand redetermination, Commerce determined that (1) the language of the Orders does not cover unfinished OCTG manufactured in the PRC and finished in third countries, and (2) that imports of finished OCTG from Indonesia processed from unfinished green tubes from China do not circumvent the Orders pursuant to 19 U.S.C. § 1677j(b). See *Final Results of Second Redetermination Pursuant to Remand* at 1, 5, 19–20, 33–35, Aug. 11, 2016, ECF No. 132–1 (“*Second Remand Results*”). Per this court’s instruction, Commerce utilized the 19 C.F.R. § 351.225(k)(1) and (2) factors in its analysis regarding whether OCTG finished in third countries fall within the orders. See *id.* at 14–19. Commerce found that the (k)(1) and (k)(2) factors did not support a finding that the Orders covered OCTG finished in Indonesia. *Id.* at 15–19. With respect to its circumvention analysis under section 1677j, Commerce explained that “the process of assembly or completion performed . . . in Indonesia is neither minor nor insignificant.” *Id.* at 33. Commerce therefore found that unfinished OCTG produced in the PRC and finished in Indonesia fell outside the scope of the Orders. *Id.* at 35.

Defendant-Intervenors appealed Commerce’s scope ruling, and this court upheld the ruling. See *Bell Supply III*, 40 CIT \_\_\_, 190 F. Supp. 3d 1244, 1246 (2016) (holding that Commerce, in its *Second Remand Results*, complied with the court’s order in *Bell Supply II* and that Commerce’s conclusions were supported by substantial evidence). Defendant-Intervenors appealed this court’s decision to the Court of Appeals for the Federal Circuit, and the Court of Appeals vacated and remanded this court’s decision in *Bell Supply III* on the grounds that Commerce may use the substantial transformation analysis to determine country of origin prior to conducting a circumvention inquiry. *Bell Supply IV*, 888 F.3d at 1224–25, 1229. The Court of Appeals clarified that the substantial transformation analysis, used to deter-

mine country of origin, precedes the circumvention inquiry, and that the circumvention analysis enters the fray only when Commerce determines that goods are from a country not covered by the relevant ADD or CVD orders. *Id.* at 1229.

On remand, this court weighed whether Commerce’s application of the substantial transformation analysis in the Final Scope Ruling was supported by substantial evidence. *See Bell Supply V*, 42 CIT at \_\_, Slip Op. 18–141 at 8–24. The court noted that in reaching its totality-of-the-circumstances conclusion that unfinished OCTG had not undergone a substantial transformation, Commerce appeared to rely on its findings with respect to each of the five factors of its substantial transformation test. *Id.* at 10. The court held that Commerce failed to reasonably explain how three of the factors upon which Commerce relied supported its determination that no substantial transformation occurred. *Id.* Specifically, Commerce failed to provide adequate explanation with respect to the class or kind of merchandise factor, the nature/sophistication of processing factor, and the cost of production/value added factor. *Id.* at 11–12, 13–14, 20–22. On remand, Commerce reexamined the three factors described above to determine, based on the record, whether a substantial transformation occurred. As described in greater detail below, Commerce concluded that seamless unfinished OCTG produced in China and finished in third countries falls within the scope of the Orders. *Third Remand Results* at 1.

## JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction over Plaintiff’s claim under 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting determinations by Commerce regarding whether a particular type of merchandise falls within the class or kind of merchandise described in an ADD or CVD order. The court must “hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . .” 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed ‘for compliance with the court’s remand order.’” *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT \_\_, \_\_, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

## DISCUSSION

On remand, Commerce again concluded that seamless unfinished OCTG produced in China but finished in third countries is within the



scope of the Orders. *Third Remand Results* at 1. Commerce reexamined the factors in question, providing further analysis and determining based on the “totality of [its] findings” that the OCTG did not undergo a substantial transformation. *Id.* at 21–22. Plaintiff argues that Commerce’s redetermination fails to address the court’s concerns in *Bell Supply V* and that Commerce’s explanation of these factors demonstrate that its substantial transformation determination is unsupported by substantial evidence. Comments of Pl. Bell Supply Co., LLC on [Commerce’s] Redetermination Pursuant to Ct. Remand at 2, Apr. 29, 2019, ECF No. 221 (“Pl.’s Comments”). For the reasons that follow, Commerce’s totality-of-the-circumstances determination that no substantial transformation occurred is supported by substantial evidence.

An ADD or CVD order must “include[ ] a description of the subject merchandise, in such detail as the administering authority deems necessary.” 19 U.S.C. §§ 1671e(a)(2), 1673e(a)(2). This description creates the scope of the order. Issues arise regarding whether a product falls within the scope of an ADD or CVD order, in part because federal regulations require Commerce to write the descriptions in “general terms.” 19 C.F.R. § 351.225(a). Country of origin is an essential element regarding whether a product falls within the scope of an ADD or CVD order. The Court of Appeals held in *Bell Supply IV* that Commerce may use the substantial transformation analysis to determine country of origin for an imported article, *see Bell Supply IV*, 888 F.3d at 1229, noting that a “substantial transformation occurs where, ‘as a result of manufacturing or processing steps ... [,] the [product] loses its identity and is transformed into a new product having a new name, character and use.’” *Bell Supply IV*, 888 F.3d at 1228–29 (quoting *Bestfoods v. United States*, 165 F.3d 1371, 1373 (Fed. Cir. 1999)).

To determine if a substantial transformation has occurred, Commerce considers the totality of the circumstances, weighing five factors in particular: (1) the class or kind of merchandise; (2) the nature and sophistication of processing in the country of exportation; (3) the product properties, essential component of the merchandise, and intended end-use; (4) the cost of production/value added; and (5) the level of investment. *See* Preliminary Scope Ruling at 14–29; Final Scope Ruling at 16–23. Products that undergo a substantial transformation in a foreign country may be considered to originate in that country, effectively removing them from the ambit of ADD or CVD orders applying to merchandise from the original country.

In *Bell Supply V*, the court found Commerce’s findings with respect to the third and fifth factors reasonable in light of record evidence.

See *Bell Supply V*, 42 CIT at \_\_, Slip Op. 18–141 at 16–19, 22–24. The court remanded Commerce’s totality-of-the-circumstances determination, holding that Commerce’s findings with respect to the first, second, and fourth factors were unreasonable. *Id.* at 11–12, 13–14, 20–22. Commerce reexamined these factors on remand and provided further analysis regarding its overall, totality-of-the-circumstances determination.

With respect to the class or kind of merchandise factor, Commerce found in its preliminary determination that unfinished OCTG and finished OCTG fall within the same class or kind of merchandise, noting that “the clear language of the scope indicates finished and unfinished OCTG are of the same class or kind.” Preliminary Scope Ruling at 16. Commerce held its course regarding this factor in the final determination, noting that it “continued to accord the class or kind of merchandise criterion with the consideration required under the Department’s standard analysis.” Final Scope Ruling at 16. The court explained in *Bell Supply V* that Commerce failed to explain how its finding that the two products are of the same class or kind of merchandise supports its conclusion that a substantial transformation did not occur. *Bell Supply V*, 42 CIT at \_\_, Slip Op. 18141 at 11. The court noted that unfinished and finished OCTG are part of the same class only because the petitioners in the proceeding below requested that Commerce investigate the two together, and thus it was unclear how this factor contributed to Commerce’s determination. *Id.* Missing from Commerce’s determination, the court explained, was any explanation regarding how the class or kind of merchandise factor “bears any relationship to whether the downstream processing was sufficient to cause a substantial transformation.” *Id.*

On remand, Commerce maintained that the class or kind of merchandise factor contributes to its substantial transformation analysis because “it serves as an indicator of the degree of transformation.” *Third Remand Results* at 12. Commerce explained that a change to a product’s class or kind of merchandise as the result of downstream processing “is indicative of a more significant transformation than if the merchandise was of the same class or kind of merchandise both before and after processing.” *Id.* Commerce disagreed with the court’s concern that unfinished and finished OCTG are part of the same class or kind simply because the petitioners in the proceeding below requested that Commerce investigate the two together, arguing that it is ultimately Commerce’s responsibility to determine the scope of the investigation. *Id.* at 9–11. Indeed, Commerce argued, although “the ‘petition initially determines the scope of the investigation,’” it is Commerce that “has the inherent power to establish the parameters



of the investigation so that it would not be tied to an initial scope definition that . . . may not make sense in light of the information available to Commerce or subsequently obtained in the investigation.” *Id.* at 10 (quoting *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002)). Moreover, Commerce noted that it may narrow or expand the class or kind of merchandise covered to address circumvention concerns, and the fact that Commerce kept the scope language unmodified in this case carries “significance beyond the fact that the petitioners proposed” the scope language. *Id.* at 11 (citing *Torrington Co. v. United States*, 14 CIT 507, 514, 745 F. Supp. 718, 723–24 (1990)). That the OCTG belongs to the same class or kind before and after processing, Commerce concluded, “indicates a lesser degree of transformation than if the merchandise were not of the same class or kind before and after processing.” *Id.* at 12–13.

Commerce fails to reasonably explain how its findings on this factor contribute to its conclusion that no substantial transformation occurred. Commerce’s explanation that it ultimately delineates the scope definition in the order does not address the fundamental problem with this factor.<sup>7</sup> The class or kind of merchandise is a determination made by Commerce regarding what the final order should cover, and it is unclear on the facts of this case how such a determination is relevant to Commerce’s country of origin analysis.<sup>8</sup> Indeed, as Commerce acknowledged, if it determined in the investigation that

<sup>7</sup> Commerce’s invocation of *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096 (Fed. Cir. 2002) is unavailing. There, the Court of Appeals for the Federal Circuit reversed the Court of International Trade’s holding that the proper method by which Commerce must interpret the scope of an ADD or CVD order is to “first consider whether the underlying petitions cover the product.” *Id.* at 1096 (quoting *Duferco Steel, Inc. v. United States*, 25 CIT 493, 500, 146 F. Supp. 2d 913, 921–22 (2001)). The Court of Appeals held that the proper inquiry is whether the final scope order, defined by Commerce, includes the subject merchandise. *Id.* at 1096. The Court explained that

[t]he critical question is not whether the petition covered the merchandise or whether it was at some point within the scope of the investigation. The purpose of the petition is to propose an investigation. A purpose of the investigation is to determine what merchandise should be included in the final order. Commerce’s final determination reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order.

*Id.* The court’s holding in the present action does not run afoul of *Duferco Steel*. Here, the determination does not turn on what the petition covered versus what the final order covered. As explained above, with respect to the class or kind of merchandise factor in Commerce’s substantial transformation analysis, it is of no moment that Commerce is ultimately responsible for defining the scope of the Orders. The factor does not appear to do any work with respect to informing Commerce’s substantial transformation determination in this case.

<sup>8</sup> Commerce acknowledged that this court has questioned the relevance of the class or kind of merchandise factor with respect to Commerce’s substantial transformation analysis. *Third Remand Results* at 8–9 (citing *Peer Bearing Company-Changshan v. United States*, 36 CIT \_\_, \_\_, 884 F. Supp. 2d 1313, 1320 (2012)). Commerce reasons that *Peer Bearing* did not preclude Commerce from weighing this factor, so long as it explains the relevance of the

the merchandise was not of the same class or kind of merchandise, it would divide the class in accordance with the various classes or kinds of merchandise. *Third Remand Results* at 10–11 (explaining that Commerce “may narrow [the class or kind of merchandise covered] if Commerce determines a proposed scope includes multiple classes or kinds of merchandise”). In that scenario, the need for a country of origin determination—and thus a substantial transformation analysis—would cease. Conversely, where Commerce elects in the investigation to keep the class together, Commerce’s subsequent consideration of this factor in its substantial transformation inquiry amounts to “we decided they were the same, therefore they are the same.”<sup>9</sup> Commerce’s reasoning is circular. This factor seems to do little work as a general matter,<sup>10</sup> and more importantly, Commerce has not demonstrated that it supports its determination on this record. It neither detracts from nor supports Commerce’s totality-of-the-circumstances analysis.

As for the nature/sophistication of processing in the country of exportation, the court held in *Bell Supply V* that Commerce’s approach in the final determination was unreasonable, noting that Commerce changed its methodology from the Preliminary Scope Ruling to the Final Scope Ruling. 42 CIT at \_\_, Slip Op. 18–141 at 13. Specifically, in the Preliminary Scope Ruling, Commerce examined the extent and complexity of the downstream processing and any changes imparted to the product by that processing. *Id.* The court noted that Commerce abandoned that approach in the Final Scope Ruling in favor of a strict comparative methodology, examining the importance of the unfinished OCTG product relative to the contribu-

factor as it relates to the substantial transformation analysis. *Third Remand Results* at 9. As discussed above, however, Commerce fails to explain how on this record the class or kind of merchandise contributes to its conclusion that no substantial transformation occurred.

<sup>9</sup> Commerce reasons—and Defendant argues—that if Bell Supply believed Commerce erred by including both unfinished and finished OCTG within the same class or kind of merchandise, Bell Supply should have submitted comments challenging Commerce’s scope definition in the investigation, and it failed to do so, thus further illustrating that the class or kind of merchandise bears on the similarity of the products. Def.’s Resp. to Comments on Remand Redetermination at 11, May 31, 2019, ECF No. 224; see also *Third Remand Results* at 24 (noting that “Bell Supply could have argued that finished and unfinished OCTG are of different classes or kinds”). Commerce’s argument misses the mark for the reasons described above. That Bell Supply could have submitted comments regarding the scope definition does not explain how the class or kind of merchandise contributes to Commerce’s substantial transformation analysis in this case. Even if it would have been prudent of Bell Supply to submit comments disputing Commerce’s scope definition, Bell Supply’s purported misstep sheds no light on how the class or kind of merchandise factor reasonably affects Commerce’s substantial transformation analysis.

<sup>10</sup> In the final determination, Commerce arguably acknowledged the problem with this factor, conceding that “[u]ltimately, while in some situations, the issue of class or kind may have a lesser importance than other situations.” Final Scope Ruling at 16.

tion of the finishing process and concluding that the heat treatment process conducted in Indonesia was not more sophisticated than the complex production process used to create unfinished OCTG in the PRC. *Id.* at 13–14. The court held that Commerce’s approach strayed from the primary inquiry of whether a substantial transformation occurred as a result of the downstream processing. *Id.* 13–14.

On remand, Commerce reexamined the nature/sophistication of third-country processing and continued to find that this factor weighs against a finding of substantial transformation. *Third Remand Results* at 13–17. Commerce maintained “that an analysis of the upstream versus downstream processes is warranted,” but considers this analysis “within the context of [its] overall analysis of the nature and sophistication of production factor,” and asserted that it did not intend to abandon its analysis from the preliminary determination. *Id.* at 13. Commerce explained that many of the basic physical characteristics remain unchanged by the processing, and that the third country processing is “common and uses standard equipment.” *Id.* at 16. Commerce thus concluded that “the extent and complexity of the downstream processing, and any changes imparted to the product by that processing, do not indicate that the product in question is substantially transformed.” *Id.*

Commerce’s redetermination reasonably explains how the nature and sophistication of the third-country processing inform its substantial transformation determination. Commerce supported its finding that the heat treatment process is common and uses standard equipment by highlighting record evidence showing that a number of OCTG producers provide heat treatment.<sup>11</sup> See *Third Remand Results* at 15 (citing Tianjin Pipe (Group) Corporation Schematic [at-

<sup>11</sup> Plaintiff argues that Commerce’s conclusion that the processing is standard is unsupported by record evidence because “Citra Tubindo employs either the proprietary NSCT premium thread connection or the CTK-6 integral joint premium thread connection on the OCTG sold in the United States,” and such connections “meet more rigorous requirements than the standard API 5CT connections.” Pl.’s Comments at 9. Commerce explains, however, that the fact that “Citra Tubindo uses certain proprietary threading connections . . . does not contradict that threading is [a] common process with various standards for types of thread joints.” *Third Remand Results* at 28. Moreover, Commerce explains, “the record does not establish that the thread connections used by Citra Tubindo are part of a more involved production process or a more transformative process than the production of similar thread connections.” *Id.* at 29–29. To the contrary, Commerce points to record evidence describing Citra Tubindo’s proprietary [ ] tubing as “an integral joint upset pipe conforming to the [ ] grade requirements,” and describing an integral connection as one “threaded directly onto the pipe body.” *Third Remand Results* at 29 (citing Respondents’ Feb. 1, 2013 Questionnaire Resp. at 4, 12 AD CD 12–17 (Feb. 1, 2013)). Such descriptions are consistent, Commerce argues, with the ITC’s description of the manufacturing of OCTG, which discusses both the upsetting process and the process of threading directly onto pipe, thus indicating that these processes are not unique to Citra Tubindo’s processes. *Id.* (citing *Certain [OCTG] from China*, USITC Pub. 4124 (Jan. 2010) (final) [attached as Ex. 1 to Petitioner’s Feb. 19, 2013 New Factual Information Submission] at

tached as Ex. 15 to Scope Ruling Request], AD PD 1–3 (Mar. 26, 2012) (showing schematic of tubular product production that includes quenching and tempering); Metal Bulletin Article [attached as Ex. 17 to Scope Ruling Request], AD PD 1–3 (Mar. 26, 2012) (describing Laguna Tubular Products Corp.’s opening of an OCTG production facility that will include heat-treated products); ArcelorMittal Document [attached as Ex. 21 to Scope Ruling Request], AD PD 1–3 (Mar. 26, 2012) (detailing ArcelorMittal’s production facilities that conduct heat treatment of tubular products)). Commerce explained that the heat treatment process heats unfinished green tubes at a controlled temperature, prior to quenching and tempering, upsetting (for certain merchandise), threading, and coupling (for some merchandise), and that nothing distinguishes the equipment used for these steps from what is commonly used throughout the industry, and no party points to record evidence detracting from this assertion.<sup>12</sup> *Id.* at 14–15. Indeed, Commerce highlighted record evidence indicating that Citra Tubindo’s facilities maintain [ ] for heat treatment, and that the primary variations in the finishing process are between the threaded and coupled NSCC premium connections and the [ ] connections, from which it is reasonably discernible that Commerce did not find these variations to be significant or to constitute highly sophisticated processes. *Id.* at 27–28 (citing Respondents’ Feb. 1, 2013 Questionnaire Resp. at 3–4, AD CD 12–17 (Feb. 1, 2013)). Further supporting Commerce’s assessment is that Citra Tubindo’s description of its heat treatment equipment comports with ITC findings describing heat treatment as a typical function of I-20, AD PD 87–98 (Feb. 19, 2013)). It is thus clear that Commerce weighed the evidence potentially detracting from its conclusion that the nature and sophistication of the processing did not indicate a substantial transformation and came to a reasonable conclusion.

<sup>12</sup> Plaintiff attempts to counter Commerce’s determination by arguing that the production process is “significant” and “imparts critical properties to the pipe that are essential to its use as P-110, T95, and Q-125 grade OCTG. Pl.’s Comments at 8. Plaintiff avers that only heat-treated OCTG may be used in the applications for which P-110, T-95, and Q-125 grade OCTG are employed “due to the much greater burst and collapse ratings required.” *Id.* at 8 (citing Bell Supply Comments on Preliminary Scope Ruling at 25–26, AD PD 151 (June 24, 2013)). As the court explained in *Bell Supply V*, these properties, important as they may be, do not impact the physical or chemical properties of the product, all of which Commerce properly considered. 42 CIT \_\_, Slip Op. 18–141 at 17. Moreover, the intended end-use—oil and gas extraction—remains the same regardless of changes to the API certification. Preliminary Scope Ruling at 23. Finally, it is reasonably discernible that Commerce concluded that the final properties of the product, though not insignificant, do not bear on the nature or sophistication of the processing that achieved those properties. Indeed, Commerce determined that the processing is “easily performed through the use of standardized equipment and techniques that are widely available to companies that make heat treated tubular products.” *Third Remand Results* at 14 (quoting Preliminary Scope Ruling at 19–20). Therefore, although the downstream processing results in mechanical alterations, Commerce’s conclusion that the processing does not change the essential component and intended end-use is reasonable.

U.S. pipe mills. *Id.* at 28 (citing *Certain [OCTG] from China*, USITC Pub. 4124 (Jan. 2010) (final) [attached as Ex. 1 to Petitioner’s Feb. 19, 2013 New Factual Information Submission] at I-15, PD 87–98 (Feb. 19, 2013)). And although the processing changes the mechanical structure of the steel, Commerce explained that no chemical changes take place. *Id.* at 16. Further, Commerce supported its conclusion that the basic physical properties remain unchanged, pointing to record evidence indicating that the “essential physical characteristics of OCTG such as overall straightness, diameter, and wall thickness are imparted in the forming stage when the steel is shaped into a steel tube suitable for use in the extraction of oil and gas.” *Id.* at 14 (citing Scope Ruling Request at 16, AD PD 1–3 (Mar. 26, 2012)). For these reasons, Commerce’s findings with respect to the nature and sophistication of the third-country processing reasonably support its conclusion that no substantial transformation occurred.<sup>13</sup>

Plaintiff argues that Commerce failed to support its finding that Citra Tubindo’s processing operation consists of a standardized process easily performed by others in the industry, Pl.’s Comments at 8–10, contending that Citra Tubindo employs proprietary thread connections for the OCTG sold in the United States. *Id.* at 9. Commerce considered this evidence, however, and reasonably explained that Citra Tubindo’s use of proprietary threading connections does not detract from its conclusion that threading is a common process in the industry with various standards for different types of thread joints. *Third Remand Results* at 28. Indeed, Commerce explained that the record does not demonstrate that Citra Tubindo’s thread connections require a more involved production process than that of similar thread connections. *Id.* at 28–29.<sup>14</sup> Commerce observed that Plaintiff described Citra Tubindo’s proprietary [[ ] tubing as “an integral joint upset pipe conforming to the [[ ] grade requirements and described an integral connection as one “threaded directly onto the pipe body.” *Id.* at 29 (citing Resp’ts’ Feb. 1, 2013 Questionnaire Resp. at 4, AD CD 12–17 (Feb. 1, 2013)). Commerce reasonably observed that such descriptions align with the ITC’s description of both the upsetting process and the process of threading directly onto pipe, thus indicating that such processes are

<sup>13</sup> Commerce includes in its analysis a reference to the upstream production process, which consists of the production of steel and the shaping of the steel into tubular form, but does not rely entirely on a comparative approach. *Third Remand Results* at 14–15; see also *Bell Supply V*, 42 CIT at \_\_, Slip Op. 18–141 at 13–14 (explaining that a strict comparative methodology was not reasonable on the facts of this case).

<sup>14</sup> Commerce explains that its review of the record demonstrates “that the production of Citra Tubindo’s proprietary thread connections [[ ]].” *Third Remand Results* at 29.

not unique to Citra Tubindo's production.<sup>15</sup> Commerce also noted that its review of the record did not demonstrate that Citra Tubindo's NSCC connections are more transformative than what is common.<sup>16</sup> *Id.* at 29. Commerce therefore considered the relevant record evidence and supported its determination with record evidence that the processing in question is standard and easily performed by others in the industry.

With respect to the cost of production/value added factor, the court found in *Bell Supply V* that although it is reasonably discernible that Commerce views the percentage of value added as a proxy for the degree of transformation, and that such an approach is reasonable, it was not reasonably discernible why Commerce found the percentage of value added in this case to be insignificant. 42 CIT at \_\_, Slip Op. 18–141 at 20–22. The court also noted that it was not clear the extent to which this factor was of greater or lesser importance here relative to other cases. *Id.* at 20. Although Commerce does not have an established threshold for determining the point at which a certain value-added figure constitutes a substantial transformation, the court reasoned, without establishing such a threshold or providing further explanation regarding the specific facts of the case, Commerce's determination that the percentage of value added here is insignificant lacked any rationale. *Id.* at 21. Accordingly, the court held that Commerce failed to reasonably explain how the cost of production/value added factor supported its substantial transformation determination.

On remand, Commerce reexamined the cost of production/value added in light of record evidence, concluding that although the cost of manufacturing determined here “may weigh toward a finding of substantial transformation,” this figure “is not dispositive in and of itself” and that an “analysis, of all the factors, taken together, does not indicate substantial transformation.” *Third Remand Results* at 20. In response to the court's concern that Commerce failed to indicate this factor's relative importance in the final determination, Commerce reiterated its “finding that the cost of production/value added factor is

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<sup>15</sup> The ITC, in its description of the manufacturing process of OCTG, describes the upsetting process and the process of threading directly onto pipe. See *Certain [OCTG] from China*, USITC Pub. 4124 (Jan. 2010) (final) [attached as Ex. 1 to Petitioner's Feb. 19, 2013 New Factual Information Submission] at I-20, AD PD 87–98 (Feb. 19, 2013) (“In the upsetting process, the end of the pipe is heated to forging temperature, then inserted endwise into an upsetting machine. The machine pushes the hot metal back, creating a thicker wall at the end of the pipe.”).

<sup>16</sup> Commerce notes that the Manufacturing and Inspection Plans for the products using NSCC connections [

]]. *Third Remand Results* at 29 (citing Respondents' Feb. 1, 2013 Questionnaire Resp. at Ex. 4, Attachments C–F, AD CD 12–17 (Feb. 1, 2013)). Commerce reasonably inferred from these plans that the processing required for the NSCC connections is not significantly different from that performed by other OCTG producers. *Id.* at 29.



not as critical in this proceeding as the other factors examined.” *Id.* at 18. Commerce again declined to define a threshold at which the value added/cost of manufacture would indicate a substantial transformation, instead opting to reexamine this factor in light of its prior determinations and concluding that although the processing costs could indicate a substantial transformation, the other factors outweigh this factor in this case. *Id.* at 18–20.

Commerce’s approach regarding the cost of production/value added factor on remand is reasonable. Commerce noted that in the preliminary determination, it calculated the cost of services provided by Citra Tubindo to be between [[ ]]% of the total cost of production of finished OCTG.<sup>17</sup> *Third Remand Results* at 19. Moreover, Commerce explained that it previously determined in *Resin Thermal Transfer Ribbon* that third-country processing services accounting for 34% of the total cost did not indicate a substantial transformation, as this figure was outweighed by Commerce’s findings on other factors. *Id.* at 19 (citing *Wax and Wax/Resin Thermal Transfer Ribbon from the Republic of Korea*, 69 Fed. Reg. 17, 645, 17,646 (Dep’t Commerce Apr. 5, 2004) (notice of final determination of sales at not less than fair value)). On the other hand, Commerce explained, previously it held that third-country cost of production accounting for 38% of total cost of manufacture supported a finding that a substantial transformation had occurred. *Id.* at 20 (citing *Peer Bearing Company-Changshan v. United States*, 39 CIT \_\_, \_\_, 128 F. Supp. 1286, 1296 (2015)). Thus, despite Commerce acknowledging that the calculated cost of production here “may weigh toward a finding of substantial transformation,” Commerce concluded that, on this record, this fact is outweighed by the fact that the “essential component of both the unfinished OCTG and finished OCTG is inherent in the green tube manufactured in the PRC,” and that the physical and chemical characteristics determine the product’s use as OCTG. *Id.* at 18 (quoting Preliminary Scope Ruling at 25). Commerce properly reexamined its findings in light of record evidence and its prior determinations, and despite the cost of production falling at a point that could potentially weigh in favor of substantial transformation, Commerce came to a reasonable conclusion based on the evidence. Accordingly, the court will not disturb Commerce’s findings

<sup>17</sup> Commerce described the cost of production by Citra Tubindo as between [[ ]] on page 19 of its redetermination, but later stated the range as [[ ]] on page 20. *Third Remand Results* at 19, 20. The court presumes the former range is the accurate statement, as it matches the figure stated in the Preliminary Scope Ruling. Preliminary Scope Ruling at 25.

on this factor. See *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (explaining that “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence”).

Indeed, when examined in light of Commerce’s findings with respect to the other factors, Commerce’s totality-of-the-circumstances determination is supported by substantial evidence. Specifically, Commerce reasonably found that the physical and chemical characteristics of the merchandise are unchanged by the downstream processing. Preliminary Scope Ruling at 22. Notably, the “steel tubular form of the unfinished OCTG remains a steel tubular form, of the same size and shape, after the completion of the downstream production process.” *Third Remand Results* at 21. These findings dovetail with the nature and sophistication of the processing, as well as the product properties, the essential component of the merchandise, and the intended end-use. See Preliminary Scope Ruling at 22–23; Final Scope Ruling at 19. Commerce found that the physical characteristics are unchanged by the processing, which it reasonably characterized as an indication that the processing is not particularly extensive or sophisticated. *Third Remand Results* at 21. Moreover, such findings align with Commerce’s determination that the major physical and chemical properties of both finished and unfinished OCTG are imparted during the steel forming process, that the essential component of the merchandise is the green tube produced in the PRC, and that it is the physical and chemical characteristics of green tube that determine the product’s ultimate use as OCTG. Preliminary Scope Ruling at 22–23; Final Scope Ruling at 19. Commerce also considered the level of investment in the third-country processing, concluding that the investment was small compared to that required to build a complete pipe mill, and thus indicated that no substantial transformation occurred. Preliminary Scope Ruling at 27.<sup>18</sup> And although the court fails to see how Commerce’s findings regarding the class or kind of merchandise contribute to its analysis, on balance Commerce’s totality-of-the-circumstances determination that no substantial transformation occurred, and thus the seamless unfinished OCTG falls within the scope of the Orders, is supported by substantial evidence.

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<sup>18</sup> The court affirmed Commerce’s findings regarding the product properties, essential component, and intended end-use, as well as the level of investment, in *Bell Supply V*, 42 CIT at \_\_, Slip Op. 18–141 at 14–24.

## CONCLUSION

For the foregoing reasons, Commerce’s redetermination complied with the court’s remand order in *Bell Supply V* and is supported by substantial evidence. Therefore, the court sustains the *Third Remand Results*. Judgment will enter accordingly.

Dated: July 22, 2019

New York, New York

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



Slip Op. 19–94

FANUC ROBOTICS AMERICA, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge  
Court No. 04–00197

[Determining the tariff classification of certain imported printed circuit assemblies]

Dated: July 26, 2019

*Michael S. O'Rourke*, Sandler, Travis & Rosenberg, P.A., of New York, NY for plaintiff FANUC America Corporation f/k/a FANUC Robotics America, Inc.

*Amy M. Rubin*, Assistant Director, International Trade Field Office, Civil Division, U.S. Department of Justice, of New York, NY, for defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Marcella Powell*, Trial Attorney. Of counsel on the brief was *Yelena Slepak*, Senior Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection. With them on the response was *Joseph H. Hunt*, Assistant Attorney General.

## OPINION

### Stanceu, Chief Judge:

Plaintiff FANUC America Corporation f/k/a FANUC Robotics America, Inc. (“FANUC”) commenced this action to contest the denial by U.S. Customs and Border Protection (“Customs”) of its administrative protests. FANUC claims that Customs incorrectly determined the tariff classification of its imported printed circuit assemblies (“PCAs”), which were manufactured for use as components in FANUC’s programmable “controllers” that are used in conjunction with FANUC’s industrial robots.

Before the court are cross-motions for summary judgment. Concluding that there are no genuine issues of material fact, the court awards summary judgment in favor of defendant United States.

### I. BACKGROUND

FANUC imported the subject PCAs on 24 entries made at the port of Detroit, Michigan during a period beginning January 22, 2002 and

ending August 23, 2002. Summons (May 14, 2004), ECF No. 1. Customs liquidated the entries at various dates from December 6, 2002 to July 7, 2003 inclusive, and FANUC contested the liquidations in three protests filed at the Port of Detroit on February 19, July 21, and August 19, 2003.<sup>1</sup> *Id.* The Port Director in Detroit denied the three protests on November 28, 2003. *Id.*

FANUC initiated this action on May 14, 2004, *id.*, and filed its complaint on November 30, 2005, Compl. (Nov. 30, 2015), ECF No. 4. The parties originally cross-moved for summary judgment in 2010. Pursuant to numerous requests by the parties, the court issued orders staying this action to allow the parties to conduct additional discovery and to pursue possible settlement. Following an oral argument and additional stays, the parties withdrew their original summary judgment motions. The final stay granted by the court expired on February 9, 2017. *See* Order (Nov. 14, 2016), ECF No. 134.

The summary judgment motions now before the court, which pertain to a narrower set of issues, were filed in 2017 and 2018. Def.'s Mot. for Summ. J. & Mem. in Supp. of Def.'s Mot. for Summ. J. ("Def.'s Br.") (Oct. 12, 2017), ECF No. 150; Pl.'s Reply to Def.'s Mot. for Summ. J. & Mem. in Supp. of Pl.'s Cross-Mot. for Summ. J. ("Pl.'s Br.") (Apr. 9, 2018), ECF Nos. 160 (motion), 161 (brief). On October 10, 2018, defendant filed a response in opposition to plaintiff's cross-motion for summary judgment and a reply in further support of its own motion. Def.'s Br. in Opp'n to Pl.'s Mot. for Summ. J. & in Further Supp. of Def.'s Mot. for Summ. J. (Oct. 10, 2018), ECF No. 176. On December 21, 2018, plaintiff filed a reply to defendant's response and in further support of its own cross-motion for summary judgment. Pl.'s Reply to Def.'s Br. in Opp'n to Pl.'s Mot. for Summ. J. & in Further Supp. of Pl.'s Cross-Mot. for Summ. J. (Dec. 21, 2018), ECF No. 181.

## II. DISCUSSION

### A. Subject Matter Jurisdiction

The court exercises jurisdiction according to 28 U.S.C. § 1581(a) (2000), which provides the Court of International Trade exclusive jurisdiction over any civil action commenced to contest the denial of a protest under section 515 of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1515 (2000).<sup>2</sup>

### B. Scope and Standard of Review

Actions to contest the denial of a protest are adjudicated *de novo*. *See* 28 U.S.C. §2640(a)(1) (directing the Court of International Trade

<sup>1</sup> Protest numbers 3801-03-100078, 3801-03-100304, and 3801-03-100355, respectively.

<sup>2</sup> All citations to the United States Code herein are to the 2000 edition.

to “make its determinations upon the basis of the record made before the court”).

### *C. Awards of Summary Judgment*

The court will award summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” USCIT R. 56(a). In a tariff classification dispute, “summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is.” *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (citing *Nissho Iwai Am. Corp. v. United States*, 143 F.3d 1470, 1472–73 (Fed. Cir. 1998)). A factual dispute is material if it potentially affects the outcome under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In ruling on a motion for summary judgment, the court credits the non-moving party’s evidence and draws all inferences in that party’s favor. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (quoting *Anderson*, 477 U.S. at 255).

### *D. Description of the Merchandise at Issue*

The facts set forth below, obtained from the parties’ statements of facts and documentary exhibits to their cross-motions, are undisputed except where otherwise noted. See Def.’s Statement of Material Facts as to Which No Genuine Issue Exists (“Def.’s Facts”) (Oct. 12, 2017), ECF No. 150; Pl.’s Resp. to Def.’s Statement of Material Facts as to Which No Genuine Issue Exists (“Pl.’s Facts”) and Pl.’s Additional Material Facts (“Pl.’s Additional Material Facts”) (Apr. 9, 2018), ECF No. 162; Def.’s Resp. to Pl.’s Additional Material Facts Not in Dispute (“Def.’s Resp. to Additional Facts”) (Oct. 10, 2018), ECF No. 176; Pl.’s Resp. to Def.’s Additional Material Facts Not in Dispute (“Pl.’s Resp. to Additional Facts”) (Dec. 21, 2018), ECF No. 182.

The term “printed circuit assembly,” or “PCA,” is used in this Opinion to refer to a printed circuit board populated with active elements. Ten general types of PCAs are at issue in this case, each of which is manufactured for use as a component within a programmable “controller” that is linked by cable to an industrial robotic “arm” (also referred to as the “manipulator arm”).

The components of a FANUC industrial robotic system typically consist of the programmable controller containing various PCAs, a manipulator (i.e., robotic) arm, an end “effector” or end-of-arm tooling, a power supply, and means for programming the controller. The user programs the controller by one of two means: by means of a

separate keyboard that is linked by cable to the controller, or by means of a separate “teach pendant” that is also linked by cable to the controller. Depending on the configuration and programming, the robotic arm may perform any of several types of industrial functions, e.g., spot welding, arc welding, laser welding, material handling, and painting. The manipulator arm is connected by cable to the programmable controller, and the end-of-arm tooling (the “effector”) is attached to the end of the manipulator arm as the robot’s “hand.”

The ten general PCA types at issue in this case, as identified by plaintiff, are as follows: (1) “Main Board (includes CPU Board)”;

(2) “Memory Board”;

(3) “Axis Control Board”;

(4) “Option Boards”;

(5) “I/O [input/output] Boards”;

(6) “Power Supply Unit Board”;

(7) “Backplane”;

(8) “Operator Panel Board”;

(9) “E-Stop Unit Board”;

and (10) “Control Circuit Board.” The PCAs at issue in this case are made for use in one of four models of FANUC’s controllers (“R-J 3iB,” “R-J 2,” “R-J 3,” and “R-H”). While each controller typically will contain one of each of the ten PCAs, some controllers may be configured with more than one Option Board and more than one I/O Board. The particular PCAs at issue in this case were imported for use as spare parts for incorporation into FANUC controllers. The function or functions of each PCA, as discerned from plaintiff’s own submissions and according to the uncontested facts, is described later in this Opinion.

#### *E. Tariff Classification under the HTSUS*

Tariff classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) is governed by the General Rules of Interpretation (“GRIs”) and the Additional U.S. Rules of Interpretation, both of which are part of the legal text of the HTSUS.<sup>3</sup> The GRIs are applied in numerical order, beginning with GRI 1, which provides that “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” GRI 1, HTSUS. GRIs 2 through 5 apply “provided such headings or notes do not otherwise require.” *Id.* Once merchandise is determined to be correctly classified under a particular heading of the HTSUS, a court then looks to the HTSUS subheadings to determine the correct classification of the merchandise in question. *See* GRI 6, HTSUS; *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998).

In cases involving a disputed tariff classification, the court first considers whether “the government’s classification is correct, both

<sup>3</sup> Because all entries of the merchandise at issue occurred in 2002, all citations herein to the Harmonized Tariff Schedule of the United States (“HTSUS”) are to the 2002 version.



independently and in comparison with the importer’s alternative.” *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). Plaintiff has the burden of showing the government’s classification to be incorrect. *Id.* at 876. If plaintiff meets that burden, the court has an independent duty to arrive at “the *correct* result, by whatever procedure is best suited to the case at hand.” *Id.* at 878 (footnote omitted).

“Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings.” *La Crosse Tech., Ltd. v. United States*, 723 F.3d 1353, 1358 (Fed. Cir. 2013) (quoting *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)). In interpreting the HTSUS, the court “may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources.” *Carl Zeiss*, 195 F.3d at 1379 (citing *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1338 (Fed. Cir. 1999)). The court may also refer to the Explanatory Notes (“ENs”) for the Harmonized Commodity Description and Coding System (“Harmonized System”) maintained by the World Customs Organization. Although not legally binding, the ENs “may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision.”<sup>4</sup> *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (citing *Motorola, Inc. v. United States*, 436 F.3d 1357, 1361 (Fed. Cir. 2006)).

#### F. Claims of the Parties

Upon liquidation, Customs classified all the PCAs at issue in subheading 8538.90.30, HTSUS (“Parts suitable for use solely or principally with the apparatus of heading 8535, 8536 or 8537: Other: Printed circuit assemblies: Other”), subject to duty at 3.5% *ad val.* Summons. Defendant argues that the PCAs were liquidated under the correct tariff provision.

Plaintiff’s primary claim is that the PCAs should be classified in subheadings under heading 8471, HTSUS (“Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included”), free of duty. In brief summary, plaintiff’s argument in favor of classification under heading 8471 is that the PCAs at issue in this case are an automatic data processing machine (or machines) or are

<sup>4</sup> All citations to the World Customs Organization’s Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) in this Opinion are to the 2002 edition.

“units” of an automatic data processing machine. Acknowledging that the PCAs are designed and used as parts of a FANUC controller, plaintiff maintains that each of the controllers contains an “automatic data processing machine” composed of the PCAs at issue in this case.

Plaintiff claims in the alternative that the PCAs should be classified under heading 8473, HTSUS as “parts” of automatic data processing machines. Plaintiff points specifically to subheading 8473.30.10, HTSUS (“Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings 8469 to 8472: Parts and accessories of the machines of heading 8471: Not incorporating a cathode ray tube: Printed circuit assemblies”), free of duty.

Defendant’s argument on summary judgment is that the controller, if imported, would be classified under heading 8537, HTSUS, which, in pertinent part, includes the tariff term “[b]oards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity.” Defendant argues that, according to the uncontested facts (which plaintiff does not dispute), the controller is equipped with at least two apparatus of heading 8536, HTSUS (“Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1,000 V”). The controller contains, *inter alia*, switches and a circuit breaker. Defendant argues that each of the PCAs at issue, being parts suitable for use solely with an article classified under heading 8537, must be classified under the parts heading associated with that heading, i.e., heading 8538, HTSUS. In response to plaintiff’s claimed classifications, defendant argues that the PCAs are excluded from headings 8471 and 8473 because they do not satisfy the conditions for classification under either of these headings.

#### *G. The Headings for Consideration According to GRI 1, HTSUS*

Because GRI 1, HTSUS directs that classification be determined, in the first instance, “according to the terms of the headings and any relative section or chapter notes,” the court first considers the headings that might merit consideration. The parties identify the following candidate headings, which are presented below with their respective article descriptions:

- 8471 Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included.
- 8473 Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings 8469 to 8472.
- 8538 Parts suitable for use solely or principally with the apparatus of heading 8535, 8536 or 8537.

The court has not identified additional candidate headings.

*H. FANUC's Controllers Would Be Classified under Heading 8537, HTSUS*

Heading 8537, HTSUS pertains to “[b]oards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of chapter 90, and numerical control apparatus, other than switching apparatus of heading 8517.”<sup>5</sup>

The controllers contain electrical components that transform and modulate electrical signals for use within an industrial robotic system. They distribute electrical signals to the manipulator arm, the end-of-arm tooling, and other peripheral machines, such as a conveyor, that may be linked to the controller. They also receive electronic signals from these machines, further to the function of controlling the equipment in a factory environment (or “work cell”).

As required under heading 8537, HTSUS, the controller is equipped with at least two apparatus of heading 8536, HTSUS, which covers “[e]lectrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1,000 V.” The controller contains, for example, a circuit breaker, switches, and the backplane, which is an electrical connector. Therefore, the controllers conform to the terms of heading 8537. EN 85.37 confirms the broad scope intended for the heading:

The goods of this heading vary from small switchboards with only a few switches, fuses, etc. (*e.g.*, for lighting installations) to complex control panels for machine-tools, rolling mills, power stations, radio stations, etc., including assemblies of several of the articles cited in the text of this heading.

<sup>5</sup> The exclusion for switching apparatus of heading 8517, HTSUS, inapplicable here, is for “[e]lectrical apparatus for line telephony or line telegraphy.” Heading 8517, HTSUS.

The heading also covers . . . “Programmable controllers” which are digital apparatus using a programmable memory for the storage of instructions for implementing specific functions such as logic, sequencing, timing, counting and arithmetic, to control, through digital or analog input/output modules, various types of machines.

FANUC’s controllers conform to the definition in the EN of “programmable controllers.”

FANUC’s controllers are excluded from the scope of heading 8471, HTSUS because they are not “automatic data processing machines” within the meaning of that heading term, as defined in note 5 to chapter 84, HTSUS under which it is not sufficient for classification thereunder that a machine depend on automatic data processing for its functioning. Even if it were presumed, as plaintiff argues, that a FANUC controller “incorporates” an “automatic data processing machine,” the controller would be excluded from heading 8471 by note 5(E) to chapter 84, HTSUS. That chapter note provides as follows: “Machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.”<sup>6</sup> Note 5(E) to ch. 84, HTSUS. The drafters of the Harmonized System intended that the words “classified in the headings appropriate to their respective functions,” as used in Note 5(E) to chapter 84 of the Harmonized System, would not refer to the automatic data processing function itself. That much is clear from the Explanatory Notes. *See* EN(E)(1) to § XVI; *see also* EN 84.71(I) (“[T]he heading **excludes** machines, instruments or apparatus incorporating or working in conjunction with an automatic data processing machine and performing a specific function.”).

#### *I. The PCAs Are Described by the Terms of Heading 8538, HTSUS*

The article description for heading 8538, HTSUS, is “[p]arts suitable for use solely or principally with the apparatus of heading 8535, 8536 or 8537.” Heading 8538, HTSUS. It is uncontested that the PCAs at issue in this litigation are imported for use as spare parts to be incorporated into FANUC controllers, models R-J 3iB, R-J 2, R-J 3, and R-H. Def.’s Facts ¶ 16; Pl.’s Facts ¶ 16. Due to the interfaces on the PCAs, they are not suitable for installation in any type of machine

<sup>6</sup> The “working in conjunction with” reference is inapplicable here. The machine plaintiff describes as an automatic data processing machine is not a machine that is physically separate from the controller.

other than a FANUC controller. Def.'s Facts ¶ 18; Pl.'s Facts ¶ 18. Therefore, whatever else they may be, these PCAs are parts suitable for use solely with an apparatus of heading 8537, HTSUS and accordingly must be considered to be articles described by the terms of heading 8538.

The question this case poses with respect to GRI 1, HTSUS is whether, according to the terms of the headings, and any relative section or chapter notes, of the HTSUS, there is another heading that merits consideration for the classification of the PCAs. As discussed above, headings 8471 and 8473, HTSUS are possible candidate headings, and plaintiff asserts claims under each of these headings. If GRI 1 does not preclude classification of the PCAs under either of these headings, then the choice of the correct heading must be ascertained according to GRIs following GRI 1. If GRI 1 precludes consideration of these other headings, then heading 8538 is the correct heading of the HTSUS for the PCAs.

Acknowledging that a FANUC controller must be classified outside of heading 8471, HTSUS, *see* Pl.'s Br. 17, plaintiff bases its claim for classification of the PCAs under heading 8471 or 8473 on an argument that there is a machine *within* a FANUC controller that meets the definition of "automatic data processing machines" provided in note 5 to chapter 84, HTSUS. Although not disputing that the controllers would be classified under heading 8537, HTSUS, plaintiff argues that the PCAs at issue form a machine within each of the four models of programmable controllers that handles the digital and informational aspects of the industrial robot system separately from the other PCAs and components of a controller, thereby meeting the requirements of note 5 to chapter 84. *See* Pl.'s Br. 4, 8–18, 21. Further to this argument, plaintiff refers to the ten PCAs at issue as the "ADP Parts" of a FANUC controller. *See id.* at 4. FANUC views them as separate from the "Power/Control Parts" of the controller, which, it posits, include a "Power Circuit Board" and other components within the controller. *See id.* Plaintiff argues, variously, that the "ADP Parts" constitute an "automatic data processing machine" within the scope of heading 8471, are "units" of such a machine that also are within the scope of heading 8471, or are "parts" of such a machine that fall within the scope of heading 8473, HTSUS.

*J. The "ADP Parts" Do Not Constitute an "Automatic Data Processing Machine" for Purposes of Tariff Classification under the HTSUS because they Perform a Function Beyond Data Processing*

In substance, FANUC argues that for tariff classification purposes each of its controllers consists of two "machines," i.e., an "automatic

data processing machine” that performs automatic data processing and a “power/control” machine that powers and controls the robotic arm and associated industrial equipment.

An uncontested fact is that the two “machines” plaintiff posits are not physically separate: if these two machines exist, both reside within the housing of the controller. *See* Def.’s Ex. G, Diagram of the PCAs at Issue When Assembled in a Controller Cabinet. This fact, by itself, does not defeat plaintiff’s classification argument. As provided in note 5 to section XVI, HTSUS, “[f]or the purposes of these notes [i.e., the notes to section XVI], the expression ‘machine’ means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of chapter 84 or 85.” Note 5 to § XVI, HTSUS (emphasis omitted). Arguably, what plaintiff terms the “ADP Parts” are “machinery” or “equipment.” Moreover, an automatic data processing “machine” may consist of a “system” of interconnected separate components. Note 5(B) to ch. 84, HTSUS. The court, therefore, must look to other provisions of the HTSUS.

Note 5(A) to chapter 84, HTSUS defines the heading term “automatic data processing machines” as follows:

- (A) For purposes of heading 8471, the expression “*automatic data processing machines*” means:
- (a) Digital machines, capable of (1) storing the processing program or programs and at least the data immediately necessary for execution of the program; (2) being freely programmed in accordance with the requirements of the user; (3) performing arithmetical computations specified by the user; and, (4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run;
  - (b) Analog machines capable of simulating mathematical models and comprising at least: analog elements, control elements and programming elements;
  - (c) Hybrid machines consisting of either a digital machine with analog elements or an analog machine with digital elements.

Note 5(A) to ch. 84, HTSUS. There can be no genuine dispute that the function of the controllers is to control robotic arms and associated industrial equipment (such as conveyors) by means of the storage and processing of digital data, that the controllers store and execute programs, and that, further to enabling the automated robotic control



function, they are programmable by the user. Beyond these facts, the parties disagree as to whether the controllers, and specifically the PCAs within the controllers, are capable of “being freely programmed in accordance with the requirements of the user,” and “performing arithmetical computations specified by the user,” as required by note 5(A)(a) to chapter 84, HTSUS. Plaintiff argues that they are.

As to the “freely programmable” requirement, the submissions show that the user can program the controller to perform robotic functions unique to that user’s requirements. Defendant disagrees that the controllers or PCAs meet the “*freely* programmable” requirement of note 5(A)(a) but nevertheless “[a]dmits that FANUC robot controllers can be programmed to instruct the robot to perform material handling, spot welding, arc welding, painting, and dispensing” and “can accept new applications that instruct the robot to perform tasks programmed by the robot user.” Def.’s Resp. to Additional Facts ¶ 69. It would not appear unreasonable to interpret the words “requirements of the user,” as used in note 5(A)(a), to refer to the manufacturing requirements of the user of the robotic system. The parties also disagree as to whether the controllers, or the PCAs within, meet the “arithmetic function” capability specified by note 5(A)(a) to chapter 84, HTSUS. Nevertheless, the court does not consider it necessary to decide whether a FANUC controller, or any group of components within one, possesses the “freely programmable” and “arithmetic function” capabilities. For even were the court to presume that these capabilities are present, it could not conclude that the PCAs at issue in this case are described by the terms of either heading 8471 or 8473, HTSUS, as interpreted according to relative section and chapter notes.

The aforementioned note 5(E) to chapter 84, HTSUS addresses machines that incorporate an “automatic data processing machine” as defined in note 5. Plaintiff argues that the effect of note 5(E) is to exclude the controller from the scope of heading 8471 but not the ADP parts within: “In this case, this Note applies to the Controller because the Controller is the ‘[machine] incorporating or working in conjunction with automatic data processing machine’ (the ADP Parts), and the Controller is the machine ‘performing a specific function other than data processing’ (the transmission and distribution of electric power and the control of robot motors).” Pl.’s Br. 17. Plaintiff adds that “[t]his note does not apply to the ADP Parts because they *are* the automatic data processing machines.” *Id.*

The court disagrees with plaintiff’s analysis. The court not only must consider the effect of note 5(E) to chapter 84, HTSUS as applied

to the controller but also must consider the effect of that note as applied to the “machine” (or equivalently, the “system”) plaintiff describes as comprising the “ADP Parts.” If the court were to accept, *arguendo*, the premise that the “ADP Parts” constitute a “machine” or “system,” they could constitute an “automatic data processing machine” as defined by note 5 only if they satisfy the requirements of note 5, including paragraph (E) thereof. The question presented, then, is whether, for purposes of note 5(E), any “machine” that could be composed of the “ADP Parts” is an “automatic data processing machine,” a “machine incorporating an automatic data processing machine,” or neither. Note 5(E) imposes a “sole function” requirement on the machine in question. If it “performs a specific function other than data processing,” the most that could be said, at this point in the analysis, is that this machine might “incorporate” an automatic data processing machine but itself is not one.<sup>7</sup> According to the uncontested facts, some of the ADP Parts in fact perform automatic data processing. But with one possible exception (the Memory Board, discussed later in this Opinion), those same parts, as plaintiff describes them, also perform the function of controlling robotic and associated factory equipment.

The “Main Board” includes the “CPU [“Central Processing Unit”] Board” and the “Axis Control Board.” Def.’s Ex. F, Pl.’s Resp. to Def.’s First Interrogs. and Req. for Produc. ¶ 12 (May 15, 2009) (“Pl.’s Resp. to Def.’s First Interrogs.”). The Main Board “contains a processor for many of the functions of the controller (e.g. Ethernet communications),” and the CPU Board “contains a processor for the remaining functions.” *Id.* The CPU Board can connect to the Main Board by means of a “bus” (i.e., data path) connector and may be mounted on the Main Board at the time of importation. Pl.’s Facts ¶¶ 24–26. Plaintiff refers to the CPU on the CPU Board as the “main CPU” because the controller contains other CPUs. *See id.* ¶¶ 25–26. Significantly, the purpose of the main CPU is stated by plaintiff as follows: “The main CPU performs calculations as to how the robot arm axes are programmed to move.” *Id.* ¶ 33.

The “Axis Control Board” “can be located on the main board or it can be connected to the main board.” *Id.* ¶ 32 (emphasis omitted). “The axis control board receives the motion command from the main CPU.” *Id.* ¶ 33.

The “Memory Board” “is on the Main Board and contains the software programs.” Pl.’s Additional Material Facts ¶ 74. It can store program instructions. Pl.’s Facts ¶ 28. While it may or may not be

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<sup>7</sup> Later in this Opinion, the court considers the question of whether the “ADP Parts” can be described as “incorporating” an automatic data processing machine.

referring specifically to this board, a user manual for the R-J 3iB controller states that “[c]ontroller memory stores the software in addition to any user-defined programs and data.” Def.’s Ex. H, FANUC user manual for RJ3iB Controller, Sec. 1.3.1 Controller Overview.

The “I/O [Input/Output] Board” “allows for signals to and from equipment outside of the controller by converting the signals received from the outside equipment (inputs) and converting the signals to the outside equipment (outputs).” Pl.’s Facts ¶ 35. “The I/O Board does not amplify any power, but only converts input and output signals, e.g. to and from serial and parallel, and to and from digital and analog.” *Id.* ¶ 37. “The I/O Boards . . . are connected to the Main Board . . . through the Backplane . . . for the purpose of processing data to and from other input and output devices, similar to a USB hub.” Pl.’s Additional Material Facts ¶ 74.

The “Option Boards” contained within the controller can vary “depending on the option that is ordered” and may include auxiliary axis control boards and a “Line Tracking Interface Board,” which plaintiff describes as containing an “input device for feedback from a conveyor encoder, and a processor for processing this data.” Pl.’s Resp. to Def.’s First Interrogs. ¶ 12. Other boards “for specific communication options that process the data for that option and format it for communication” also may be present. *Id.*

The “Power Supply Board” (or “Power Supply Unit Board”) transmits power to the CPU, the I/O Board, and other boards in the controller. Pl.’s Facts ¶ 38. It “converts 200V AC (in) into DC (e.g. 24V) out.” Pl.’s Resp. to Def.’s First Interrogs. ¶ 12. It serves as an “adaptor” for the power supplied to these boards, which perform automatic data processing. Pl.’s Additional Material Facts ¶ 74. It does not supply or adapt the electric power to the robot, which is a function performed by other components in the controller. Pl.’s Facts ¶ 38.

The “Backplane” is a connector for several of the PCAs within the controller. *Id.* ¶ 39. “The Backplane board is present so that other boards can plug into it.” Pl.’s Resp. to Def.’s First Interrogs. ¶ 12.

The “Operator Panel Board” transmits signals to the Main Board from the “operator panel” that is located on the outside of the controller, which contains “buttons and switches used in the operation of the robot.” Pl.’s Facts ¶ 40.

The “E-stop Unit Board” enables the “E-stop” (emergency stop) function of the controller, which ceases robotic activity in the event of an emergency. *Id.* ¶ 42. “[T]he E-stop board receives digital signals from the Main Board CPU and converts them into a form that can be used for the E-stop function.” *Id.*

The “Control Circuit Board” “is connected to the Servo Amplifier [not at issue in this case] and to the Axis Control Board for the purpose of converting signals between the Axis Control Board . . . and the Power Circuit Board.” Pl.’s Additional Material Facts ¶ 74. “The Power Circuit Board . . . is not at issue as Plaintiff agrees that this board’s essential function is Power Amplification and, therefore, is properly classifiable under subheading 8538.90.30.” Pl.’s Facts ¶ 17.

The uncontested facts, as summarized above, are inconsistent with a conclusion that the ten PCAs together constitute a machine or system with no function beyond automatic data processing. The Main Board and CPU Board (which are mounted or connected together and which plaintiff describes together with respect to function) perform calculations by processing digital data, but in plaintiff’s own words these are “calculations *as to how the robot arm axes are programmed to move.*” *Id.* ¶ 33 (emphasis added). The desired “output” of these PCAs, therefore, is not data or information but electrical signals that are intended, after further operations performed within the controller, including amplification, to control the motion of a robotic arm and related equipment. The Main Board and CPU Board (which contains the “main CPU”) perform this robotic control function in conjunction with the Axis Control Board, which “receives the motion command from the main CPU.” *Id.*

In contrast, it can be argued that the Memory Board, which stores programs that are instructions for the operation of the robot and associated equipment, is limited in function to the storage of data and in that respect can be described as performing only an automatic data processing function. But because of its limited function, the Memory Board is not, in and of itself, an automatic data processing machine as defined in note 5(A)(a) to chapter 84: it performs only one of the functions listed therein. But like the other boards, it cannot be used in any machine other than a FANUC controller. Def.’s Facts ¶ 18; Pl.’s Facts ¶ 18. Therefore, the “machine” of which plaintiff claims the Memory Board is a part or unit does not have automatic data processing as its sole function.

The I/O Board or Boards send output signals and receive input signals and convert those signals, e.g., from serial to parallel and from digital to analog. Pl.’s Facts ¶ 37. They are connected to the Main Board (and, therefore, to the main CPU) by means of the Backplane. Pl.’s Additional Material Facts ¶ 74. Because the input and output signals are for robotic control, the function of an I/O Board cannot accurately be described as separate from the robotic control function. *See* Def.’s Facts ¶ 12; Pl.’s Facts ¶¶ 12 (controller receives input from sensors on the manipulator and end-of-arm tooling), 15

(controller has closed-loop system, which involves feedback from sensors and encoders that are transmitted back to the controller). Similarly, the Option Boards allow individualized control of robotic and related equipment in the factory environment. *See* Pl.’s Resp. to Def.’s First Interrogs. ¶ 12. The I/O boards, which are connected to the Main Board and main CPU, form part of the closed loop in which signals are transmitted from the robotic equipment back to the controller, further to accomplishing the robotic control function. This is yet another fact dispelling the premise that the common function or purpose of the PCAs plaintiff identifies as the “ADP Parts” is limited to automatic data processing.

The Power Supply Board and Backplane are not described by plaintiff as performing automatic data processing functions. The former powers the CPU Board, I/O Board and other boards that plaintiff views as composing an automatic data processing machine. But the principal purpose and function served by those boards, as discussed previously, is robotic control. The Backplane is described as providing connections with other boards.

Plaintiff describes the Operator Panel Board as transmitting signals to the Main Board from the “operator panel” on the outside of the controller, which features “buttons and switches used in the operation of the robot.” Pl.’s Facts ¶ 40. The Operator Panel Board, therefore, is instrumental in controlling the robot. Similarly, the E-Stop Unit Board has a robotic control function that enables the interruption of robotic activity in the event of an emergency. Def.’s Facts ¶ 42; Pl.’s Facts ¶ 42.

Finally, the Control Circuit Board works in conjunction with the Servo Amplifier, the Axis Control Board, and the Power Circuit Board and performs signal conversion. Pl.’s Additional Material Facts ¶ 74. All three of these components are involved in robotic operation and control, which, as plaintiff acknowledges, is the principal function of the controller. Pl.’s Facts ¶ 9.

*K. The Ten PCAs Are Not Correctly Classified under Heading 8471 as Automatic Data Processing Machines or Units Thereof*

Having considered the functions of each of the subject PCAs, the court now can answer the question of whether the “ADP Parts” can be said to “incorporate” an automatic data processing machine. According to the uncontested facts, they cannot. The common purpose of those of the subject PCAs that rely upon data processing (other than the Memory Board) is to provide the electronic signals required for the control of a robot and, where fitted, auxiliary factory equipment.

These signals, and not data or other information *per se*, are the desired output. EN 84.71(I) explains that “[d]ata processing consists in handling information of all kinds” and that “[a]utomatic data processing machines are machines which, by logically interrelated operations performed in accordance with pre-established instructions (program), *furnish data which can be used as such* or, in some cases, serve in turn as *data for other data processing operations.*” EN 84.71(I) (emphasis added).

The Memory Board is the only PCA that arguably could be described as performing solely an automatic data processing function. But as the court discussed above, it performs only one of the four functions described by note 5(A)(a) to chapter 84, HTSUS, i.e., “storing the processing program or programs and at least the data immediately necessary for execution of the program.” In short, there is no single component within the collection plaintiff groups together as “ADP Parts” that qualifies as an automatic data processing machine according to note 5 to chapter 84, HTSUS, which applies a “four part” test in paragraph (A)(a) and a “sole function” test in paragraph (E). Accordingly, the court must reject plaintiff’s argument that for tariff classification purposes each of its controllers consists of two “machines,” i.e., an “automatic data processing machine” that performs automatic data processing and a “power/control” machine that powers and controls the robotic arm and associated industrial equipment. According to plaintiff’s descriptions of the functions of the PCAs at issue, when considered according to the requirements of note 5 to chapter 84, these two functions are intertwined and not performed by separate machines within a FANUC controller.

Nor is any of the ten PCAs correctly described as a “unit” of an automatic data processing machine.<sup>8</sup> Although “[s]eparately presented units of an automatic data processing machine are to be classified in heading 8471,” note 5(C) to ch. 84, HTSUS, there is no automatic data processing machine within a FANUC controller of which the PCAs at issue, or any combination of them, could be described by the heading term “unit thereof.” Moreover, as explained by EN 84.71(D), “[i]f the unit performs a specific function other than data processing, it is to be classified in the heading appropriate to

<sup>8</sup> Note 5(B) to chapter 84, HTSUS, provides as follows:

Automatic data processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all of the following conditions:

- (a) It is of a kind solely or principally used in an automatic data processing system;
- (b) It is connectable to the central processing unit either directly or through one or more other units; and
- (c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.



that function or, failing that, in a residual heading (see Note 5(E) to this Chapter [84]).” EN 84.71(D). The court, therefore, eliminates from consideration heading 8471, HTSUS.

*L. The Ten PCAs Are Not Correctly Classified under Heading 8473 as Parts of Automatic Data Processing Machines*

Because the ten PCAs at issue in this litigation, whether viewed individually or in any combination, do not constitute an “automatic data processing machine” as defined by note 5 to chapter 84, HTSUS, the court also eliminates heading 8473, HTSUS from consideration. Note 2 to section XVI, HTSUS, establishes rules for the classification of parts within the section. Note 2(b), read as it pertains here, provides that “parts, if suitable for use solely . . . with a particular kind of machine . . . are to be classified . . . in heading . . . 8473 . . . or 8538 as appropriate.” Note 2(b) to § XVI, HTSUS.<sup>9</sup> Classification under heading 8473 is not “appropriate” for any of the PCAs at issue in this case because that heading, by its express terms, is limited to “[p]arts . . . suitable for use solely or principally with the machines of headings 8469 to 8472.” Heading 8473, HTSUS. None of the ten PCAs is suitable for use solely or principally with an automatic data processing machine of heading 8471, HTSUS because the controller contains no such machine. The Memory Board is not an exception because, like the other nine PCAs, it is not part of a machine that qualifies as an automatic data processing machine under note 5 to chapter 84 and is not suitable for use in any machine other than a FANUC controller.

*M. Application of GRI 6, HTSUS to Determine the Correct Subheading of the HTSUS*

The court next examines heading 8538, HTSUS for the proper subheading. *See* GRI 6, HTSUS. The first subheading, 8538.10.00 (“Boards, panels, consoles, desks, cabinets and other bases for the goods of heading 8537, not equipped with their apparatus”), does not describe the merchandise in this case. Nor does the second subheading, 8538.90.10 (“Other: Printed circuit assemblies: Of an article of heading 8537 for one of the articles described in additional U.S. note 12 to chapter 85”), describe the PCAs under consideration. Additional U.S. note 12 to chapter 85, HTSUS contains numerous article descriptions that do not apply to the subject PCAs.<sup>10</sup> The court concludes that the subsequent subheading is correct: 8538.90.30 (“Other:

<sup>9</sup> Note 2(a) to section XVI, HTSUS is not applicable to the question presented because it expressly excludes from its scope the issue of the classification of parts that might be described as included in headings 8473 or 8538, HTSUS.

<sup>10</sup> Additional U.S. note 12 to chapter 85, HTSUS provides:

Printed circuit assemblies: Other”), subject to duty at 3.5% *ad val.* Because this is the tariff provision under which the goods at issue were liquidated, plaintiff has failed to demonstrate that the government’s classification is incorrect.

### III. CONCLUSION

For the reasons discussed in the foregoing, the court will grant defendant’s summary judgment motion, concluding that the merchandise at issue is classified properly in subheading 8538.90.30, HTSUS (“Parts suitable for use solely or principally with the apparatus of heading 8535, 8536 or 8537: Other: Printed circuit assemblies: Other”), subject to duty at 3.5% *ad val.* The court will deny plaintiff’s cross-motion. Judgment will enter accordingly.

Dated: July 26, 2019

New York, New York

*/s/ Timothy C. Stanceu*

TIMOTHY C. STANCEU, CHIEF JUDGE

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For the purposes of subheading 8538.90.10, the expression “articles described in additional U.S. note 12 to chapter 85” means any of the following goods: spin dryers of subheading 8421.19.30; deflash machines of subheading 8424.30 for cleaning or removing contaminants from the metal leads of semiconductor packages prior to electroplating (deflash by projectile beads); spraying appliances of subheading 8424.89.30; machines or appliances of subheading 8424.89.50; automated machinery of subheading 8428.20, 8428.33, 8428.39 or 8428.90 for transport, handling and storage of semiconductor wafers, wafer cassettes, wafer boxes and other materials for semiconductor devices; machines of subheading 8456.10.60; machines of subheading 8456.91; machines of subheading 8456.99.10; machines of subheading 8456.99.70; machines of subheading 8462.21.40 or 8462.29.40; machines of subheading 8464.10 for sawing monocrystal semiconductor boules into slices, or wafers into chips; machines of subheading 8464.20.10; machines of subheading 8464.90.10 or 8464.90.60; deflash machines of subheading 8465.99.40; articles of subheading 8469.11, heading 8470 or heading 8471; automatic teller machines of subheading 8472.90.10; machines of subheading 8477.10.70, 8477.40.40 or 8477.59.40; machines of subheading 8479.89.85 for processing of semiconductor materials or for production and assembly of diodes, transistors and similar semiconductor devices and electronic integrated circuits; machines of subheading 8479.89.87; furnaces and ovens of subheading 8514.10 or 8514.20 for the manufacture of semiconductor devices on semiconductor wafers; furnaces and ovens of subheading 8514.30.60; die attach apparatus, tape automated bonders and wire bonders of subheading 8515.80 for assembly of semiconductors; articles of heading 8517; articles of subheading 8520.20; transmission apparatus of subheading 8525.10.10 or 8525.10.90; articles of subheading 8525.20; digital still image video cameras of subheading 8525.40.40; article of subheading 8527.90.40; paging receivers of subheading 8527.90.85; ion implanters of subheading 8543.11 designed for doping semiconductor materials; articles of subheading 8543.89.10; articles of subheading 8543.89.92; photocopying apparatus of subheading 9009.11 or 9009.21; apparatus of subheading 9010.41, 9010.42 or 9010.49; apparatus of subheading 9010.50.60 for the projection or drawing of circuit patterns on flat panel displays; plotters of subheading 9017.10.40 or 9017.20.70; pattern generating apparatus of subheading 9017.20.50; instruments and apparatus of heading 9026; instruments and apparatus of heading 9027 except of subheading 9027.10, 9027.40 or 9027.90.20; instruments and apparatus of subheading 9030.40; instruments and apparatus of subheading 9030.82; optical instruments and appliances of subheading 9031.41; optical instruments and appliances of subheading 9031.49.70; articles of subheading 9031.80.40.

Slip Op. 19–95

MOEN, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge  
Court No. 15–00161

[Granting plaintiff's motion to dismiss and denying as moot other pending motions]

Dated: July 26, 2019

*William R. Rucker*, Drinker Biddle & Reath, LLP, of Chicago, IL, for plaintiff Moen, Inc.

*Jamie L. Shookman*, Trial Attorney, International Trade Field Office, Civil Division, U.S. Department of Justice, of New York, NY, for defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Michael H. Heydrich*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

**OPINION**

**Stanceu, Chief Judge:**

Plaintiff Moen, Inc. (“Moen”) moves to dismiss its action against the United States challenging the denial by U.S. Customs and Border Protection (“Customs” or “CBP”) of its administrative protest pertaining to the tariff classification of various models of showerheads imported from the People’s Republic of China.

Before the court are plaintiff’s motion for voluntary dismissal under USCIT Rule 41(a) and other motions (plaintiff’s motion to exclude an expert opinion, plaintiff’s motion for leave to file a reply in support of the motion to exclude the expert opinion, plaintiff’s motion to amend the scheduling order, and defendant’s motion for summary judgment and the associated response and reply).

Defendant opposes plaintiff’s motion for voluntary dismissal, noting in particular its expenditure of resources and its pending summary judgment motion, which is ready for disposition by the court.

The court will grant plaintiff’s motion to dismiss, deny all other pending motions as moot, and enter judgment dismissing this action.

**I. BACKGROUND**

Plaintiff made three entries of showerheads, on January 7, 9, and 16, 2014, at the port of Los Angeles, California (Entry Nos. 231–1288327–1, 231–1288330–5, 231–1289161–3, respectively). Summons 1 (June 12, 2015), ECF No. 1. Customs liquidated the entries between November 21 and 28, 2014, inclusive, classifying the imported showerheads in subheading 3924.90.5650, Harmonized Tar-

iff Schedule of the United States (“HTSUS”) (“Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics: Other: Other, Other”), subject to duty at 3.4% *ad val.*<sup>1</sup> *Id.* at 2. Plaintiff contested the liquidations in an administrative protest filed May 20, 2015 (Protest No. 2704–15–100595). *Id.* at 1. Customs denied the protest on June 3, 2015, and plaintiff commenced this action on June 12, 2015. *Id.* Plaintiff filed the complaint on August 28, 2015, Compl. (Aug. 28, 2015), ECF No. 7, and defendant filed its answer on January 22, 2016, Answer (Jan. 22, 2016), ECF No. 15.

Before the court, plaintiff claimed classification in subheading 8424.89.0000, HTSUS (“Mechanical appliances (whether or not hand operated) for projecting, dispersing or spraying liquids or powders . . . ; parts thereof: Other appliances: Other”), subject to duty at 1.8% *ad val.* Compl. ¶ 23. In the alternative, plaintiff claimed classification in a “parts” subheading of heading 8424, subheading 8424.90.9080, HTSUS (“Mechanical appliances (whether or not hand operated) for projecting, dispersing or spraying liquids or powders . . . ; parts thereof: Parts: Other, Other”), free of duty. *Id.* ¶ 29.

Plaintiff filed a motion to exclude the opinion of the government’s witness, Dr. Lamyaa El-Gabry, on February 25, 2019. Pl.’s Mot. to Exclude Expert Op. (Feb. 25, 2019), ECF No. 35. Defendant responded to this motion on March 1, 2019. Def.’s Mem. of Law in Opp’n to Pl.’s Mot. to Exclude Expert Op. (Mar. 1, 2019), ECF No. 36. Plaintiff filed a motion for leave to file a reply in support of the motion to exclude the opinion on March 8, 2019. Pl.’s Mot. for Leave to File Reply in Sup. of Mot. to Exclude Expert Op. (Mar. 8, 2019), ECF No. 37.

Plaintiff filed its motion for voluntary dismissal on April 29, 2019. Pl.’s Mot. for Voluntary Dismissal (Apr. 29, 2019), ECF No. 42 (“Pl.’s Mot.”). Defendant moved for summary judgment the following day, claiming that the merchandise was correctly classified by Customs upon liquidation. Def.’s Mot. for Summ. J. and Def.’s Br. and Exs. in Supp. of its Mot. for Summ. J. (Apr. 30, 2019), ECF Nos. 43 (public), 44 (conf.) (“Def.’s Mot.”). Defendant filed a response in opposition to plaintiff’s motion for voluntary dismissal on May 9, 2019. Def.’s Mem. of Law in Opp’n to Pl.’s Mot. for Voluntary Dismissal (May 9, 2019), ECF No. 47 (“Def.’s Mem.”). Plaintiff replied to defendant’s opposition on May 17, 2019. Pl.’s Reply in Supp. for Mot. of Voluntary Dismissal (May 17, 2019), ECF No. 48. Plaintiff responded to defendant’s motion for summary judgment on June 4, 2019, opposing defendant’s motion on the grounds that (1) defendant has not shown entitlement to

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<sup>1</sup> All citations to the Harmonized Tariff Schedule of the United States are to the 2014 edition.

summary judgment as there are disputed material facts in the case; and (2) granting plaintiff's motion for voluntary dismissal would provide defendant the relief it seeks and avoid unnecessary litigation. Pl.'s Resp. to Def.'s Mot. for Summ. J. (June 4, 2019), ECF No. 49 ("Pl.'s Resp."). Defendant replied in support of its summary judgment motion on July 17, 2019. Reply Mem. of Law in Supp. of the Gov't's Mot. for Summ. J. (July 17, 2019), ECF No. 53.

## II. DISCUSSION

### A. Subject Matter Jurisdiction

The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012), according to which the U.S. Court of International Trade ("USCIT") has exclusive jurisdiction over an action brought under section 515 of the Tariff Act of 1930, *as amended* ("Tariff Act"), 19 U.S.C. § 1515 (2012), to contest a denial of a protest by Customs.

### B. Voluntary Dismissal Pursuant to Rule 41(a)(2)

Dismissal of actions is governed by Rule 41 of the Rules of the U.S. Court of International Trade. Where, as here, the motion for voluntary dismissal was not filed before the opposing party served its answer to the complaint and there is no stipulation of dismissal signed by all parties, dismissal requires a court order, and the court may order dismissal "on terms that the court considers proper." USCIT R. 41(a)(2). Unless otherwise stated, such dismissal is without prejudice. *Id.*

### C. Plaintiff's Motion to Dismiss

Noting that goods from China classified in subheading 8424.89.90 are subject to 25% additional duties pursuant to presidential action taken under Section 301 of the Trade Act of 1974, effective August 23, 2018, Moen gives as its reason for seeking dismissal of this case that "[t]he Section 301 duties imposed by the Government have significantly changed the importing landscape for showerheads manufactured in China." Pl.'s Mot. 1. Plaintiff adds that goods from China classified under subheading 8424.90.90, HTSUS, (its alternative classification claim) are subject to Section 301 additional duties of 10%, effective September 24, 2018. *Id.*

### D. Defendant's Opposition to Plaintiff's Motion to Dismiss

Defendant gives three reasons for opposing plaintiff's motion to dismiss. It argues that "[t]his case is ready for the Court to resolve on the merits, as indicated by the motion for summary judgment that we filed the day after plaintiff moved to dismiss the case." Def.'s Mem. 3.

It argues, next, that “plaintiff does not seek to abandon its classification claim” and “will likely litigate the correct classification of its showerheads if and when goods classifiable under its claimed tariff provision are no longer subject to the 301 duties.” *Id.* Additionally, defendant points out that “significant time and resources have been expended litigating the correct classification of plaintiff’s showerheads.” *Id.*

A motion for voluntary dismissal under Rule 41(a)(2) is within the sound discretion of the court and should be granted unless clear legal prejudice to an opposing party can be shown. 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2364 (3d ed. 2019). Voluntary dismissal is favored generally because ruling otherwise would require a plaintiff to pursue a complaint in which it is no longer interested. *See id.* Courts typically consider the following factors when determining whether sufficient legal prejudice exists to deny a Rule 41(a)(2) motion: (1) defendant’s effort and expense in preparation for trial; (2) any excessive delay or lack of diligence on the part of the plaintiff in prosecuting the action; (3) insufficient explanation of the need for dismissal; and (4) whether defendant has filed a motion for summary judgment. *Id.*

The court does not have a basis to conclude that plaintiff caused excessive delay, or demonstrated a lack of diligence, in prosecuting this action. Nor does the court conclude that plaintiff failed to provide a sufficient explanation for its request for dismissal, plaintiff having disclosed the reason it is not interested in contesting the liquidation of the entries at issue. Pl.’s Resp. 2. The first and fourth factors, i.e., defendant’s efforts in litigating and the motion for summary judgment, merit further discussion.

Regarding the time and resources it has expended, defendant states that “the government has spent over three years” litigating the classification issue in this case, that “[f]act and expert discovery has included multiple rounds of document exchange, including documents requested by plaintiff that could only be obtained from the National Archives and Records Administration,” and that “[d]iscovery has also included Rule 30(b)(6) depositions” and “the exchange of export reports.” Def.’s Mem. 1–2. Defendant adds that “[t]he Government also has had to respond to three procedural motions that plaintiff filed after the 301 duties became effective” and “was not advised that plaintiff was going to seek dismissal of this case until shortly before the dispositive motion deadline, after the Government had nearly completed its motion for summary judgment.” *Id.* at 2.

While the government has expended time and effort in litigation, the court cannot presume that all of this time and effort necessarily



will come to naught. Noting that plaintiff has multiple protests that have been administratively suspended, defendant expects that if this case is dismissed according to Rule 41(a)(2), Moen will file a new action that “would likely be identical to this case.” *Id.* At least some of the effort the government devoted to discovery and the summary judgment motion may be useful if and when a new action is brought on other entries of the merchandise at issue. See *Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc.*, 479 F.3d 1330, 1337–38 (Fed. Cir. 2007). Also, upon dismissal of the instant action, the liquidation of the entries that are the subject of this action, which occurred at the classification the government advocates, will stand. For these reasons, defendant will not suffer clear legal prejudice should Moen, having obtained dismissal, decide to litigate the classification issue later (with respect to entries other than those at issue here), or not at all. Defendant cites *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) for the proposition that “the Court’s responsibility is to reach the correct result” and USCIT Rule 1 for the principle that the court should do so as efficiently as possible. Def.’s Mem. 3. But *Jarvis Clark* did not address the issue posed by defendant’s motion to dismiss. Nor does the “just, speedy, and inexpensive” requirement of Rule 1 require the court to deny the motion to dismiss where, as here, plaintiff does not wish to proceed with its classification claim and defendant cannot establish that it will be legally prejudiced by dismissal.

### III. CONCLUSION

For the reasons stated above, the court will grant plaintiff’s motion for voluntary dismissal without prejudice and will deny all other pending motions as moot.

Judgment will enter accordingly.

Dated: July 26, 2019  
New York, NY

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

## Slip Op. 19–96

## COMMITTEE OVERSEEING ACTION FOR LUMBER INTERNATIONAL TRADE INVESTIGATIONS OR NEGOTIATIONS, Plaintiff, v. UNITED STATES, Defendant, and FONTAINE INC., et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge  
Court No. 19–00122

[Vacating the temporary restraining order entered on July 15, 2019 and denying Plaintiff's motion for a preliminary injunction.]

Dated: July 26, 2019

*Sophia J.C. Lin*, Picard Kentz & Rowe LLP, of Washington, DC, argued for Plaintiff Committee Overseeing Action for Lumber International Trade Investigations or Negotiations. With her on the brief were *Lisa W. Wang*, *Andrew W. Kentz*, *David A. Yocis*, *Nathanial M. Rickard*, *Heather N. Doherty*, and *Zachary J. Walker*.

*Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Stephen C. Tosini*, Senior Trial Counsel. Of counsel on the brief were *Jessica DiPietro* and *Nikki Kalbing*.

*Elliot J. Feldman*, Baker & Hostetler, LP, of Washington, DC, argued for Defendant-Intervenor Fontaine, Inc. With him on the brief were *Michael S. Snarr*, *John J. Burke*, *Mark B. Lehnardt*, *Lindita V. Ciko Torza*, and *Jake R. Frischknecht*.

*Lynn G. Kamarck*, Hughes Hubbard & Reed LLP, of Washington, DC, argued for Defendant-Intervenor the Government of Canada. With her on the brief were *Joanne E. Osendarp*, *Dean A. Pinkert*, *Alan G. Kashdan*, *Daniel M. Witkowski*, and *Stephen R. Halpin, III*.

*Jonathan M. Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington, DC, argued for Defendant-Intervenor Scierie Alexandre Lemay & Fils Inc. With him on the brief were *Yohai Baisburd*, *Myles S. Getlan*, and *James E. Ransdell*.

**OPINION AND ORDER****Barnett, Judge:**

Plaintiff, Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (“the Coalition” or “Plaintiff”) challenges the final results of the countervailing duty expedited review of certain softwood lumber products from Canada. Compl. ¶¶ 1–2, ECF No. 2;<sup>1</sup> *Certain Softwood Lumber Products From Canada*, 84 Fed. Reg. 32,121 (Dep’t Commerce July 5, 2019) (final results of

<sup>1</sup> Plaintiff invokes the court’s jurisdiction pursuant to 28 U.S.C. § 1581(i)(4) or, alternatively, 28 U.S.C. § 2581(c). Compl. ¶¶ 3, 6. Pursuant to 28 U.S.C. § 1581(i)(4), “the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.” 28 U.S.C. § 1581(i)(4). Pursuant to 28 U.S.C. § 1581(c), “[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A or 517 of the Tariff Act of 1930,” 19 U.S.C. §§ 1516a, 1517. 28 U.S.C. § 1581(c).

countervailing duty expedited review) (“*Final Results of Expedited Review*”), and accompanying Issues and Decision Mem. (“I&D Mem.”), C-122–858 (June 28, 2019), available at <https://enforcement.trade.gov/frn/summary/canada/2019–14338–1.pdf> (last accessed July 26, 2019).

This matter is now before the court on Plaintiff’s motion for a temporary restraining order (“TRO”) and preliminary injunction. Pl.’s Mot. for Temporary Restraining Order and for Prelim. Inj. (“Pl.’s Mot.”), ECF No. 6. On July 15, 2019, prior to assignment to the undersigned, the court entered an order granting Plaintiff’s motion for a TRO. See Temporary Restraining Order (July 15, 2019), ECF No. 10. Pursuant to Rule 65 of the rules of the U.S. Court of International Trade (“USCIT”), the TRO will expire on July 29, 2019. See USCIT Rule 65(b)(2). Plaintiff now seeks to enjoin, “pending a final and conclusive court decision in this litigation, and any appeals therefrom,” “Defendant United States, together with its delegates, officers, agents, servants, and employees of the International Trade Administration of the U.S. Department of Commerce and U.S. Customs and Border Protection” from: (1) liquidating “any unliquidated entries of softwood lumber from Canada that” were subject to the *Final Results of Expedited Review*, entered on or after April 28, 2017, and were produced or exported by seven of the eight companies that received *de minimis* or reduced rates in the review; (2) revoking the relevant countervailing duty order on five companies that received *de minimis* rates in the review; and (3) collecting cash deposits at the rates established in the *Final Results of Expedited Review* on entries made on or after July 5, 2019 and which were produced or exported by the eight companies subject to the review. [Proposed] Order, ECF No. 6.

Defendant, United States (“the Government”), and several Defendant-Intervenors oppose Plaintiff’s motion. See Def.’s Mot. to Dismiss and Opp’n to Pl.’s Mot. for a Prelim. Inj. (“Def.’s MTD & Opp’n”), ECF No. 21; Opp’n of Def.-Int., Fontaine Inc., to Pl.’s Mot. for Temporary Restraining Order and for Prelim. Inj. (“Fontaine’s Opp’n”), ECF No. 26; Opp’n of Def.-Int. Gov’t of Canada to Pl.’s Mot. for Temporary Restraining Order and for Prelim. Inj. (“Gov’t of Canada’s Opp’n”), ECF No. 67; Resp. of Def.-Int. Scierie Alexandre Lemay & Fils Inc. Opp’n to Pl.’s Mot. for Temporary Restraining Order and for Prelim. Inj. and in Supp. of Def.’s Mot. to Dismiss (“Lemay’s Opp’n”), ECF No. 68.<sup>2</sup> Fontaine, Inc. (“Fontaine”) has also moved to

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<sup>2</sup> Defendant has moved to dismiss Plaintiff’s complaint for lack of subject matter jurisdiction. See Def.’s MTD & Opp’n to Inj. at 6–8. Responses to this motion are due on August 21, 2019.

modify the TRO. *See* Mot. to Modify Temporary Restraining Order (“Fontaine’s Mot.”), ECF No. 22. On July 25, 2019, the court heard oral argument on Plaintiff’s motion. Docket Entry, ECF No. 69. For the reasons discussed herein, the court will vacate the TRO as having been improvidently granted and deny Plaintiff’s motion for a preliminary injunction.<sup>3</sup> Accordingly, the court will deny as moot Fontaine’s motion to modify the TRO.

## BACKGROUND

“A ‘final determination’ in an antidumping or countervailing duty investigation constitutes a final decision by the [U.S. Department of Commerce (“Commerce” or “the agency”)] as to whether dumping or countervailable subsidization is occurring.” 19 C.F.R. § 351.210(a). When the determination is affirmative, Commerce must determine an estimated individual countervailable subsidy rate or weighted average dumping margin, as the case may be, for each exporter and producer individually investigated as well as an “estimated all-others rate for all exporters and producers not individually investigated.” 19 U.S.C. §§ 1671d(c)(1)(B)(i)(I), 1673d(c)(1)(B)(i)(I)-(II). Commerce must then “order the posting of a cash deposit, bond, or other security . . . for each entry of the subject merchandise in an amount based on the estimated individual countervailable subsidy rate, the estimated all-others rate, or the estimated countrywide subsidy rate,” *id.* § 1671d(c)(1)(B)(ii), or, in antidumping proceedings, “in an amount based on the estimated weighted average dumping margin or the estimated all-others rate,” *id.* § 1673d(c)(1)(B)(ii). In the event of a negative determination, the investigation will be terminated, and any suspension of liquidation will be ended. 19 C.F.R. § 351.207(d)-(e).

Relevant here, an exporter that Commerce did not select for individual examination in a countervailing duty investigation may, within 30 days of the date of publication of the relevant order, request an expedited review of the cash deposit rate. 19 C.F.R. § 351.214(k). The period of review is the period of investigation used in the original investigation. *Id.* § 351.214(k)(3)(i). This enables the agency to use

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<sup>3</sup> The court will defer ruling on Defendant’s motion to dismiss for lack of subject matter jurisdiction until briefing is complete. *See U.S. Ass’n of Importers of Textiles and Apparel v. United States*, 413 F.3d 1344, 1348 (Fed. Cir. 2005) (reviewing the trade court’s entry of a preliminary injunction and concluding that the court did not abuse its discretion in delaying consideration of the defendant’s motion to dismiss for lack of subject matter jurisdiction until briefing was completed). While the appellate court held that the USCIT erred in failing to consider the jurisdictional issue as part of its consideration of the plaintiff’s likelihood of success on the merits, *see id.*, as discussed herein, the court does not reach that issue because the Coalition has failed to establish irreparable harm. The court is effectively returning the matter to the pre-TRO *status quo ante*.

data from that investigation in order to expedite the review. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,321 (Dep't Commerce May 19, 1997) (final rule) (“Preamble”). While the final results of an expedited review “will not be the basis for the assessment of countervailing duties,” Commerce “may exclude from the countervailing duty order in question any exporter for which the [agency] determines an individual net countervailable subsidy rate of zero or de minimis.” 19 C.F.R. § 351.214(k)(3)(iv).

Final duty liability typically is determined in an administrative review of an order pursuant to 19 U.S.C. § 1675(a)(1). *See* 19 C.F.R. § 351.213(a); *cf.* 19 C.F.R. § 351.11(b)(1) (explaining that, upon publication of an antidumping or countervailing duty order, Commerce will instruct CBP “to assess antidumping duties or countervailing duties (whichever is applicable) on the subject merchandise, in accordance with the Secretary’s instructions at the completion of” either an administrative review, new shipper review, or expedited antidumping review).<sup>4</sup> Interested parties may request an administrative review “during the anniversary month of the publication of an antidumping or countervailing duty order.” *Id.* § 351.213(b). If no review is requested (or when all requests for review are withdrawn), Commerce will, “without additional notice,” instruct CBP to assess antidumping duties or countervailing duties at the cash deposit rates. *Id.* § 351.212(c).

In November 2017, Commerce issued final affirmative determinations in its countervailing duty (“CVD”) and antidumping duty (“AD”) investigations of certain softwood lumber products from Canada. *See Certain Softwood Lumber Products From Canada*, 82 Fed. Reg. 51,814 (Dep’t Commerce Nov. 8, 2017) (final aff. countervailing duty determination and final negative determination of critical circumstances); *Certain Softwood Lumber Products From Canada*, 82 Fed. Reg. 51,806 (Dep’t Commerce No. 8, 2017) (final aff. determination of sales at less than fair value and aff. final determination of critical

<sup>4</sup> Commerce’s regulations recognize that,

[u]nlike the systems of some other countries, the United States uses a ‘retrospective’ assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported. Generally, the amount of duties to be assessed is determined in a review of the order covering a discrete period of time.

*KYD, Inc. v. United States*, 35 CIT 475, 480, 779 F. Supp. 2d 1361, 1368, 35 C.I.T. 475, 480 (2011) (quoting 19 C.F.R. § 351.212(a)). “[T]he absence of certainty regarding the dumping margins and final assessment of antidumping duties is a characteristic of the retrospective system of administrative reviews designed by Congress.” *SKF USA Inc. v. United States*, 31 CIT 951, 960, 491 F. Supp. 2d 1354, 1363 (2007) (quoting *Abitibi-Consol. Inc. v. United States*, 30 CIT 714, 724, 437 F. Supp. 2d 1352, 1361 (2006)).

circumstances).<sup>5</sup> On January 3, 2018, Commerce published the CVD and AD orders. See *Certain Softwood Lumber Products From Canada*, 83 Fed. Reg. 347 (Dep't Commerce Jan. 3, 2018) (am. final aff. countervailing duty determination and countervailing duty order) (“*CVD Order*”); *Certain Softwood Lumber Products From Canada*, 83 Fed. Reg. 350 (Dep't Commerce Jan. 3, 2018) (antidumping duty order and partial am. final determination) (“*AD Order*”).

On March 8, 2018, in response to requests filed by certain Canadian producers, Commerce initiated an expedited review of the *CVD Order*. See *Certain Softwood Lumber Products From Canada*, 83 Fed. Reg. 9,833 (Dep't Commerce March 8, 2018) (initiation of expedited review of the countervailing duty order) (“*Initiation Notice*”); 19 C.F.R. § 351.214(k). The companies subject to the expedited review (and their affiliates) were not selected for individual examination during the investigation and had been assigned the “all-others” rate of 14.19 percent. *CVD Order*, 83 Fed. Reg. at 348. The “period of review” for the expedited review ran from January 1, 2015, through December 31, 2015. *Initiation Notice*, 83 Fed. Reg. at 9,833.

On July 5, 2019, Commerce issued the *Final Results of Expedited Review* in which the agency calculated reduced or *de minimis* rates for the eight companies as follows: (1) Les Produits Forestiers D&G Ltée and its cross-owned affiliates (“D&G”): 0.21 percent; (2) Marcel Lauzon Inc. and its cross-owned affiliates (“MLI”): 0.42 percent; (3) North American Forest Products Ltd. and its cross-owned affiliates (“NAFP”): 0.17 percent; (4) Roland Boulanger & Cie Ltée and its cross-owned affiliates (“Roland”): 0.31 percent; (5) Scierie Alexandre Lemay & Fils Inc. and its cross-owned affiliates (“Lemay”): 0.05 percent; (6) Fontaine and its cross-owned affiliates: 1.26 percent; (7) Mobilier Rustique (Beauce) Inc. and its cross-owned affiliates (“Rustique”): 1.99 percent; and (8) Produits Matra Inc. and Sechoirs de Beauce Inc. and their cross-owned affiliate (“Matra”): 5.80 percent. *Final Results of Expedited Review*, 84 Fed. Reg. at 32,122.

The rates calculated for D&G, MLI, NAFP, Roland, and Lemay are considered *de minimis*, therefore, Commerce stated it would instruct U.S. Customs and Border Protection (“CBP”) “to discontinue the suspension of liquidation and the collection of cash deposits of estimated countervailing duties on all shipments of softwood lumber produced and exported by” those companies that were entered on or

<sup>5</sup> Commerce issued preliminary affirmative determinations in its CVD and AD investigations on April 28, 2017 and June 30, 2017, respectively. *Certain Softwood Lumber Products From Canada*, 82 Fed. Reg. 19,657 (Dep't Commerce Apr. 28, 2017) (prelim. aff. countervailing duty determination, and alignment of final determination with final antidumping duty determination); *Certain Softwood Lumber Products From Canada*, 82 Fed. Reg. 29,833 (Dep't Commerce June 30, 2017) (prelim. aff. determination of sales at less than fair value).



after July 5, 2019; “liquidate, without regard to countervailing duties, all suspended entries of shipments of softwood lumber produced and exported by” those companies; and “refund all cash deposits of estimated countervailing duties collected on all such shipments.” *Id.* As to the companies receiving a lower—but not *de minimis*—rate (Fontaine, Rustique, and Matra), Commerce stated it would instruct CBP “to collect cash deposits of estimated countervailing duties” at the rates calculated for the *Final Results of Expedited Review*. *Id.*

## DISCUSSION

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain a preliminary injunction, a party must demonstrate “(1) likelihood of success on the merits, (2) irreparable harm absent immediate relief, (3) the balance of interests weighing in favor of relief, and (4) that the injunction serves the public interest.” *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (citing *Winter*, 555 U.S. at 20). “Although preliminary injunctions against liquidation have become almost automatic in antidumping and countervailing duty cases, they are an extraordinary remedy never awarded as of right.” *Sumecht NA, Inc. v. United States*, 923 F.3d 1340, 1345 (Fed. Cir. 2019) (internal quotation marks and citation omitted).

“In evaluating [irreparable] harm, the court must consider ‘the magnitude of the injury, the immediacy of the injury, and the inadequacy of future corrective relief.’” *Shree Rama Enter. v. United States*, 21 CIT 1165, 1167, 983 F. Supp. 192, 194 (1997) (quoting *Queen’s Flowers de Colombia v. United States*, 20 CIT 1122, 1125, 947 F. Supp. 503, 506 (1996)). Of these three factors, “immediacy [of the injury] and the inadequacy of future corrective relief” may be weighed more heavily than magnitude of harm. *Nat’l Juice Prods. Ass’n v. United States*, 10 CIT 48, 53, 628 F. Supp. 978, 984 (1986) (citations omitted).<sup>6</sup> Critically, irreparable harm may not be speculative, see *Am. Inst. for Imported Steel, Inc. v. United States*, 8 CIT 314, 318, 600 F. Supp. 204, 209 (1984), or determined by surmise, *Elkem Metals Co. v. United States*, 25 CIT 186, 192, 135 F.Supp.2d 1324, 1331 (2001) (citation omitted). “It is not enough to establish ‘a mere possibility of injury, even where prospective injury is great. A presently existing, actual threat must be shown.’” *Shree Rama*, 21 CIT at 1167, 983 F.

<sup>6</sup> *National Juice Products* has since been superseded by statute, but the change does not relate to the proposition for which it is being cited herein. See *CannaKorp, Inc. v. United States*, 41 CIT \_\_\_, \_\_\_, 234 F. Supp. 3d 1345, 1352 (2017).

Supp. at 194–95 (quoting *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (1983)). Failure as to this factor is grounds for denying injunctive relief. *See, e.g., Sumecht*, 923 F.3d at 1348.

### A. Parties' Contentions

Plaintiff presents three arguments as to why it will be irreparably harmed without an injunction. First, Plaintiff argues that its claims will be rendered moot and judicial review will be “a meaningless exercise” if the unliquidated entries of subject merchandise produced or exported by the five companies assigned a *de minimis* rate are liquidated before the conclusion of this case. Pl.’s Mot. at 12–13. Plaintiff acknowledges that liquidation of entries made on or after June 30, 2017 remains suspended by operation of the *AD Order* and pending administrative reviews thereof. *Id.* at 13. Nevertheless, Plaintiff argues, it will be harmed by liquidation of entries that entered between April 28, 2017 and June 30, 2017 and those that entered after June 30, 2017 due to “developments regarding the *AD Order* before the [c]ourt reaches a conclusion in this case.” *Id.* at 13–14. Second, Plaintiff argues that it will be harmed by the liquidation of Rustique’s and Fontaine’s entries at the rates established in the *Final Results of Expedited Review* because Rustique and Fontaine have withdrawn their requests to be included in the first administrative review of the *CVD Order* and no additional requests have been maintained. *Id.* at 16–18. Third, Plaintiff argues that revocation of the *CVD Order* as to the five companies with *de minimis* rates and reduced cash deposit rates for the three other companies increases the possibility of circumvention of the *CVD Order*, which will “further injure Plaintiff and the domestic industry.” *Id.* at 19.

Defendant and Defendant-Intervenors argue that Plaintiff’s motion must fail for lack of proof of irreparable harm; Plaintiff will not be harmed by liquidation, revocation, or changes to cash deposit rates; and its assertions regarding circumvention of the *CVD Order* are speculative. *See* Def.’s MTD and Opp’n to Inj. at 9–11; Fontaine’s Opp’n at 46; Gov’t of Canada’s Opp’n at 1–2, 3–4; Lemay’s Opp’n at 6–8. Fontaine further argues that any harm Plaintiff incurs respecting liquidation of Fontaine’s and Rustique’s entries “is of [its] own making” because the Coalition withdrew its request for an administrative review of those companies. Fontaine’s Opp’n at 5; *see also id.*, Attach. 2 (the Coalition’s withdrawal of its request for an administrative review).

## **B. Plaintiff Has Not Met its Burden of Proving Irreparable Harm**

Plaintiff's assertions of harm arising from liquidation, revocation, or changes in the cash deposit rates are unsupported and unpersuasive.

First, Plaintiff has not shown that it will incur irreparable harm in connection with liquidation of entries without regard to countervailing duties for D&G, MLI, NAFP, Roland, and Lemay. Plaintiff attempts to analogize the effect of liquidation on the Coalition to the effect of liquidation during the pendency of a challenge to an administrative review. See Pl.'s Mot. at 12 (citing, *inter alia*, *Zenith*, 710 F.2d at 810). Challenges to administrative reviews differ from challenges to investigations, however, because they address dumping margins calculated on entries of subject merchandise for a specific period of review. See *Zenith*, 710 F.2d at 808. For that reason, the *Zenith* court concluded that liquidation constituted irreparable harm because the plaintiff, a domestic producer, would lose the "only remedy available to [it] for an incorrect review determination." *Id.* at 810 (noting that liquidation would prevent the trial court from assessing duties *on the covered entries* "in accordance with a correct margin").

"The emphasis throughout *Zenith* is on the liquidation of entries for a specific review period and the potential loss of plaintiff's remedy, i.e., the right to have the administrative determination reviewed, with respect to that specific period." *FMC Corp. v. United States*, 3 F.3d 424, 431 (Fed. Cir. 1993). In contrast, the cash deposit rates established in an investigation are prospective because they affect future entries, "not just those made within a specific time period." *NSK Corp. v. United States*, 31 CIT 1962, 1965 (2007) (citation omitted). Accordingly, liquidation of entries—without more—generally does not constitute irreparable harm in a challenge brought by a domestic producer to an investigation determination. See *Trent Tube Div., Crucible Materials Corp. v. United States*, 14 CIT 587, 588, 744 F. Supp. 1177, 1179 (1990) (citing cases finding that liquidation is insufficient to find irreparable harm in challenges by domestic producers to negative injury or dumping determinations, and finding same in the context of a request for an injunction by a domestic producer challenging an affirmative determination); *Altix, Inc. v. United States*, 26 CIT 735, 737, 211 F. Supp. 2d 1378, 1380 (2002) (discussing *Trent Tube* and denying motion for preliminary injunction filed by domestic producers challenging an affirmative injury determination).

The purpose of an expedited review “is to provide a noninvestigated exporter with its own cash deposit rate prior to the arrival of the first anniversary month of the order, at which point the exporter may request an administrative review,” *Preamble*, 62 Fed. Reg. at 27,321, therefore, the results of an expedited review are akin to a final investigation determination. If Plaintiff prevails in this case, the five companies excluded from the order by the expedited review would be reinstated in the *CVD Order* with the concomitant collection of cash deposits and suspension of liquidation. Thus, liquidation of entries during the interim period would not moot Plaintiff’s claims and, absent evidence demonstrating specific, irreparable harm from liquidation of those entries, Plaintiff is not entitled to an injunction barring liquidation of such entries.<sup>7</sup>

Plaintiff also has not demonstrated harm arising from the liquidation of Rustique’s and Fontaine’s entries. Assuming, *arguendo*, that Rustique’s and Fontaine’s entries will liquidate at the reduced rate established in the *Final Results of Expedited Review*,<sup>8</sup> Plaintiff has not demonstrated irreparable harm. As noted by Fontaine, any harm that arises is self-inflicted as a result of Plaintiff’s withdrawal of its requests for administrative reviews of those companies, maintenance of which would have continued the suspension of liquidation pending Commerce’s final assessment of duties in the administrative review. See Fontaine’s Opp’n at 5. Thus, Plaintiff is left asserting that liquidation at one estimated deposit rate rather than another estimated deposit rate constitutes irreparable harm, without any evidence of actual harm and without regard to Plaintiff’s actual withdrawal of its request to have the actual subsidy rate for these entries determined by review.

Plaintiff’s attempt to analogize this case to the circumstances underlying the court’s grant of a preliminary injunction in *Fuyao Glass Industry Group Co., Ltd. v. United States*, 27 CIT 1321, 1323 (2003),

<sup>7</sup> Plaintiff cites to the court’s opinion in *Husteel Co., Ltd. v. United States*, 38 CIT \_\_, \_\_. 34 F. Supp. 3d 1355, 1360 (2014), as an example of the court enjoining liquidation in the context of a challenge to an investigation determination. Pl.’s Mot. at 15 (citing *Husteel*, 34 F. Supp. 3d at 1358–64). *Husteel* is distinguishable in that movants were the foreign producers and exporters of subject merchandise, not domestic producers of the foreign like product, and maintained that they should have received a *de minimis* rate in the investigation, been excluded from the order, and not required to go through administrative reviews. See Compl. ¶¶ 13, 21, *Husteel Co., Ltd., et al. v. United States, et al.*, No. 14-cv-00215 (Ct. Int’l Trade Aug. 2, 2016). Such circumstances distinguish *Husteel* from the present case.

<sup>8</sup> Plaintiff avers that Commerce’s automatic assessment provision requires liquidation at the all-others rate established in the investigation, but that it is unclear whether Commerce will interpret the regulation to require liquidation at the rates established in the *Final Results of Expedited Review*. Pl.’s Mot. at 17; see also 19 C.F.R. § 351.212(c).

is unpersuasive. Pl.'s Mot. at 17–18. In *Fuyao*, the court found irreparable harm on the basis of liquidation when an exporter withdrew its own request for an administrative review subsequent to the initial determination. 27 CIT at 1321; cf. *OKI Elec. Industry Co., Ltd. v. United States*, 11 CIT 624, 631, 669 F. Supp. 480, 485 (1987) (finding irreparable harm to plaintiff/importer of subject merchandise and enjoining liquidation of entries at the challenged rate from the investigation when the plaintiff had withdrawn its request for an administrative review). *Fuyao* and *OKI* are distinguishable because the movants—importers/exporters of subject merchandise—had a direct financial stake in the rate at which entries would be liquidated. In contrast, here, the Coalition consists of domestic producers who have not provided any evidence of any harm from, or stake in, the liquidation of the entries at an allegedly erroneous rate. Moreover, judicial relief will continue to be available to Plaintiff if it prevails because future entries would be subject to the all-others rate established in the *CVD Order* pending a subsequent review.<sup>9</sup> Accordingly, Plaintiff has not demonstrated that it would incur irreparable harm from the liquidation of Rustique's and Fontaine's entries.

Lastly, Plaintiff has not shown that it will be irreparably harmed by revocation of the order and the implementation of reduced cash deposit rates due to the potential for circumvention of the *CVD Order*. Put simply, Plaintiff's speculative circumvention concerns do not present the type of "immediate and viable threat of irreparable harm" necessary for an injunction to issue. *Otter Prods., LLC v. United States*, 38 CIT \_\_, \_\_, 37 F. Supp. 3d 1306, 1315 (2014) (internal quotation marks and citation omitted). Plaintiff has not provided evidence demonstrating that circumvention is likely, or that Coalition members would be irreparably harmed by circumvention. Plaintiff also contends that because Commerce has found Matra to be uncreditworthy, there is an increased risk that CBP will not be able to collect duties owed if Plaintiff prevails. Pl.'s Mot. at 20. Besides being speculative, Plaintiff does not explain why Matra's inability to pay duties harms the Coalition specifically, given that it is not the recipient of the duties.

In sum, Plaintiff has failed to offer persuasive arguments or any evidence demonstrating that it would be irreparably harmed in the absence of the temporary restraining order or preliminary injunction.

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<sup>9</sup> Because the court finds the absence of irreparable harm even if Rustique's and Fontaine's entries liquidate at the rates established in the *Final Results of Expedited Review*, the court need not decide whether any potential harm would have been mitigated by the continued suspension of liquidation in place in connection with the first administrative review of the *AD Order* (albeit excepting the two months between the CVD and AD preliminary determinations, see *supra*, note 5).

For this reason, the court will vacate the temporary restraining order, finding that it was improvidently granted, and deny Plaintiff's request for injunctive relief. *See Sumecht*, 923 F.3d at 1348 (affirming court's denial of injunctive relief when the movant failed to demonstrate irreparable harm).

### CONCLUSION & ORDER

For the reasons discussed herein, the court **VACATES** the Temporary Restraining Order entered on July 15, 2019 (ECF No. 10) and **DENIES** Plaintiff's motion for a preliminary injunction (ECF No. 6). Fontaine's motion to modify the temporary restraining order (ECF No. 22) is **DENIED AS MOOT**.

Dated: July 26, 2019

New York, New York

*/s/ Mark A. Barnett*  
MARK A. BARNETT, JUDGE



Slip Op. 19-97

ARCELORMITTAL USA LLC, Plaintiff, and AK STEEL CORPORATION, NUCOR CORPORATION, and UNITED STATES STEEL CORPORATION, Plaintiff-Intervenors, NOVOLIPETSK STEEL PUBLIC JOINT STOCK COMPANY, Consolidated Plaintiff, v. UNITED STATES, Defendant, and PAO SEVERSTAL and SEVERSTAL EXPORT GMBH, Defendant-Intervenors.

Before: Gary S. Katzmam, Judge  
Consol. Court No. 16-00168

[Commerce's Final Results of Redetermination Pursuant to Court Remand is sustained in its entirety.]

Dated: July 29, 2019

*John M. Herrmann, II* and *Brooke Ringel*, Kelly Drye & Warren, LLP, of Washington, DC, argued for plaintiff. With them on the joint brief were *Paul C. Rosenthal*, *Kathleen W. Cannon*, and *R. Alan Luberda*; *Alan H. Price*, *Timothy C. Brightbill*, and *Christopher B. Weld*, Wiley Rein LLP, of Washington, DC, for plaintiff-intervenor, Nucor Corporation; *Thomas M. Beline*, and *Sarah E. Shulman*, Cassidy Levy Kent, LLP, of Washington, DC, for plaintiff-intervenor, *United States Steel Corporation*; and *Daniel L. Schneiderman*, and *Stephen A. Jones*, King & Spalding LLP, of Washington, DC, for plaintiff-intervenor, *AK Steel Corporation*.

*Matthew P. McCullough* and *Tung A. Nguyen*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, argued for consolidated plaintiff. With them on the brief was *Marat S. Umerov*.

*Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel was *Brendan Saslow*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC. With him on the brief was *Lydia C. Pardini*, attorney.



*Daniel J. Cannistra*, Crowell & Moring LLP, of Washington, DC, argued for defendant-intervenors.

## OPINION

### Katzmann, Judge:

In the prequel to the instant matter, there was occasion to take note of the multiple parties and agencies, shifting alignments and intersecting claims and issues that often mark the cases that unfold in the United States Court of International Trade. *ArcelorMittal USA LLC v. United States*, 42 CIT \_\_, 337 F. Supp. 3d 1285 (2018). The court here returns to the complex litigation surrounding the United States Department of Commerce’s (“Commerce”) final affirmative determination of its *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products From the Russian Federation*, 81 Fed. Reg. 49,935 (Dep’t Commerce July 29, 2016) (“*Final Determination*”), P.R. 531 and the accompanying July 20, 2016 Issues and Decision Memorandum, C–821–823 (“*IDM*”), P.R. 522. In this consolidated action, plaintiffs from two different cases — ArcelorMittal USA LLC (“ArcelorMittal”) and Novolipetsk Steel Public Joint Stock Company (“NLMK”) — challenge different elements of the *Final Determination* and *IDM*. Before the court now is Commerce’s Final Results of Redetermination Pursuant to Court Remand (“*Remand Redetermination*”) (Dep’t Commerce Dec. 18, 2018), ECF No. 115, which the court ordered in *ArcelorMittal*, 337 F. Supp. 3d 1285.

In its previous decision, *id.* at 1309, the court remanded the *Final Determination* to Commerce (1) to explain or reconsider how the adverse facts available (“AFA”) rate that Commerce applied to a respondent in the investigation, Severstal Export GmbH (“Severstal”), was sufficiently adverse; and (2) to provide the specific factual basis for its AFA finding that the Government of Russia’s (“GOR”) provision of natural gas to NLMK was a specific and thus countervailable subsidy. On remand, Commerce (1) applied the same AFA rate to Severstal; and (2) indicated that it based its specificity finding on the 2013 annual report of a GOR authority, Public Joint Stock Company Gazprom (“Gazprom”). See *Remand Redetermination* at 17, 20. Defendant the United States (“the Government”) requests that the court sustain Commerce’s *Remand Redetermination* in its entirety. Def.’s Resp. to Comments on Remand Redetermination (“Def.’s Br.”), Feb. 15, 2019, ECF No. 125. NLMK argues that Commerce abused its discretion by rejecting NLMK’s untimely comments on the draft remand and that the *Remand Redetermination* does not adequately justify Commerce’s specificity finding. Consol. Pl. NLMK’s

Comments on Commerce’s Redetermination on Remand (“NLMK’s Br.”), Jan. 17, 2019, ECF No. 118. ArcelorMittal urges the court to sustain Commerce’s *Remand Redetermination* with respect to the specificity issue but contends that Commerce again failed to explain why its selected AFA rate for Severstal was sufficiently adverse. Pl. & Pl.-Inter.’s Comments on the U.S. Department of Commerce’s Dec. 18, 2018 Final Redetermination Pursuant to Remand (“ArcelorMittal’s Br.”), Jan. 17, 2019, ECF No. 117; Pl. & Pl.-Inter.’s Resp. to Comments by NLMK on the U.S. Department of Commerce’s Redetermination Pursuant to Remand (“ArcelorMittal’s Resp.”), Feb. 15, 2019, ECF No. 124. The court sustains Commerce’s *Remand Redetermination* in its entirety.

### BACKGROUND

The relevant legal and factual background of the prior proceedings has been set forth in greater detail in *ArcelorMittal*, 337 F. Supp. 3d at 1290–98. Information pertinent to the instant case is set forth below.

In the *Final Determination*, Commerce determined a *de minimis ad valorem* countervailable subsidy rate for Severstal and a 6.5 percent rate for NLMK. See *Final Determination*, 81 Fed. Reg. at 49,936. In calculating these rates, Commerce examined tax incentives for mining expenses and the provision of natural gas by Gazprom for less than adequate remuneration (“LTAR”) and requested relevant information from the companies and the GOR, which it did not provide. *ArcelorMittal*, 337 F. Supp. 3d at 1294–96. At verification, Commerce discovered that Severstal had used an income tax deduction for mining expenses that it had not reported and applied AFA to find that Severstal had received a countervailable subsidy for that program. *Id.* at 1296–97. Commerce applied its “[countervailable subsidy duty] CVD AFA hierarchy” for investigations and, under the first tier of that hierarchy, selected as Severstal’s AFA rate the highest rate calculated for a cooperating respondent in the same investigation for the identical program. *Id.* at 1297. Specifically, Commerce applied the .03 percent subsidy rate that had been calculated for NLMK for the mining expense program. *Id.*; see also 19 C.F.R. § 351.511(a)(2)(ii).

Regarding the provision of natural gas for LTAR via Gazprom, Commerce applied AFA because the Russian government did not provide Commerce with documentation and underlying data that Commerce requested to verify natural gas sales detailed in Gazprom’s 2014 annual report. *ArcelorMittal*, 337 F. Supp. 3d at 1296. As part of its application of AFA, Commerce found that Gazprom’s provision of

natural gas to NLMK was *de facto* specific under 19 U.S.C. § 1677(5A)(D)(iii)(II),<sup>1</sup> thus meeting the criteria for a countervailable subsidy. *Id.*

In its remand order, the court sustained Commerce’s application of AFA to Severstal’s use of the mining expense program; however, the court found that Commerce had not adequately explained why the .03 rate was sufficiently adverse. *Id.* at 1300–01. Specifically, the court found that the two reasons that Commerce gave for why the .03 rate was sufficiently adverse — that (1) the rate was above zero and (2) the rate was higher than the incorrectly calculated preliminary determination rate — were insufficient. Noting that “Commerce [] has wide latitude in its selection of an appropriate AFA rate” and that “Commerce is not obligated to deviate from its hierarchy or produce a program-specific rate that necessarily results in an affirmative overall rate,” the court instructed Commerce on remand to “provide adequate explanation as to why the program-specific rate it selected was sufficiently adverse to satisfy the underlying statutory purposes.” *Id.* at 1301.

The court also sustained Commerce’s application of AFA to the provision of natural gas for LTAR but held that Commerce “did not provide any specific factual basis for its [*de facto* specificity] conclusion” and remanded the *Final Determination* to Commerce to “identify the record facts it relied upon in making its *de facto* specificity determination.” *Id.* at 1309.

On November 15, 2018, Commerce released its draft remand redetermination to the parties and gave them until November 26, 2018 to submit comments on it. *Remand Redetermination* at 7. ArcelorMittal submitted timely comments, *id.*, but NLMK did not. Instead, on December 3, 2018, NLMK submitted an untimely request for an extension of time to submit comments on the draft remand redetermination. NLMK explained that it did not learn of the issuance of the draft redetermination until December 3 because its counsel had been abroad when Commerce released the draft redetermination and that the “notification to that effect was lost in the email traffic during that

<sup>1</sup> 19 U.S.C. § 1677(5A)(D)(iii) provides that:

Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exist:

- (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
- (II) An enterprise or industry is a predominant user of the subsidy.
- (III) An enterprise or industry receives a disproportionately large amount of the subsidy.
- (IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

period.” See Rejection of Extension Request and Comments to Draft Results of Redetermination (Dec. 10, 2018), Remand P.R. 5 (“Rejection Letter”). Commerce found that extraordinary circumstances did not exist that would require it to consider NLMK’s untimely request for an extension and rejected NLMK’s submissions from the remand record. *Id.*

In its *Remand Redetermination*, Commerce again determined that NLMK’s .03 subsidy rate should be applied to Severstal as AFA. Commerce noted that, when applying AFA, it “is not required [by statute] to guess at what the result would have been if there had been cooperation” and that “[t]he fact that the CVD program rate in question is, by itself, not sufficiently high to result in an overall subsidy rate for the Severstal Companies that is above *de minimis* is not determinative of whether the program rate itself is sufficiently adverse.” *Remand Redetermination* at 8–9. Commerce described how its hierarchy typically deters non-cooperation, *id.* at 9–17, and explained that “[t]here is no information on the record to indicate that NLMK’s program-specific rate is not sufficiently adverse to the Severstal Companies with regard to that program,” *id.* at 10. Commerce further stated that the .03 rate is “the highest subsidy rate available for the program at issue” and that “[a]djusting this rate, or selecting another rate in place of it, would be a highly speculative endeavor and could contravene the statute.” *Id.* Specifically, Commerce asserted that using the .03 rate would be consistent with Commerce’s statutory responsibilities to deter noncooperation and to use, to the extent practicable, a corroborated AFA rate that reflects the subsidization behavior of the Russian government. *Id.* at 15.

Regarding the application of AFA to Gazprom’s natural gas provision, Commerce stated that, “[o]n the basis of the record, the evidence to support Commerce’s AFA *de facto* specificity finding . . . is Gazprom’s 2013 annual report.” *Id.* at 20. The 2013 annual report supported the allegation of specificity in the petition for the investigation, and Commerce “note[d] that no interested party brought litigation against Commerce arguing that it should not have initiated [the investigation] on the allegation of the provision of natural gas for LTAR because of inadequate support for specificity.” *Id.* Commerce explained that the 2013 annual report provided evidence that:

- (1) the metallurgy industry “heavily used” natural gas and accounted for four percent of Gazprom’s total sales in 2013; (2) the metallurgy sector is one of the top six sectors that accounted for Gazprom’s 2013 domestic natural gas sales; and (3) the metal-

lurgy sector is the only industrial manufacturing sector whose consumption of Gazprom's natural gas is separately listed in the annual report.

*Id.* According to Commerce, these facts supported its finding that the metallurgy sector was a predominant user and thus that the provision of natural gas for LTAR was specific.

On January 17, 2019, ArcelorMittal and NLMK filed their comments on the *Remand Redetermination*. ArcelorMittal's Br.; NLMK's Br. On January 25, 2019, the case was stayed due to the lapse in appropriations. *See* Order, Jan. 25, 2019, ECF No. 121. On February 15, 2019, after appropriations had been restored, ArcelorMittal and the Government filed responses. ArcelorMittal's Resp.; Def.'s Br. A few days later, NLMK moved to supplement the record with its rejected submissions, and the Government opposed this motion. Mot. to Suppl. the Record, Feb. 19, 2019, ECF No. 126; Resp. to Mot. to Suppl. the Record, Feb. 20, 2019, ECF No. 127. Oral argument was held on July 2, 2019. ECF No. 133. The Government filed supplemental authority on July 3, 2019, and NLMK and ArcelorMittal filed supplemental authority on July 10, 2019. Def.'s Suppl. Auth., ECF No. 134; NLMK's Suppl. Auth., ECF No. 135; ArcelorMittal's Suppl. Auth., ECF No. 136.

### JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (a)(2)(B)(ii). Under 19 U.S.C. § 1516a(b)(1)(B)(i), “[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” *See also Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (*quoting* 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.’” *Xinjiaimei Furniture (Zhangzhou) Co. v. United States*, 38 CIT \_\_, \_\_, 968 F. Supp. 2d 1255, 1259 (2014) (*quoting Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

### DISCUSSION

ArcelorMittal contends that Commerce’s *Remand Redetermination* did not comply with the court’s remand order because Commerce’s explanation for its selection of the .03 AFA rate remained inadequate. NLMK, for its part, argues that Commerce impermissibly rejected its untimely comments on the draft remand redetermination and that

Commerce failed to sufficiently justify its *de facto* specificity AFA decision. The court is not persuaded by ArcelorMittal's or NLMK's contentions and sustains Commerce's *Remand Redetermination* in its entirety.

### **I. Commerce Adequately Explained Why the .03 Rate Was Sufficiently Adverse.**

ArcelorMittal contends that Commerce inadequately explained why the .03 AFA rate was appropriately adverse because it provided only the general reasoning behind the CVD AFA hierarchy and did not consider the circumstances of this particular proceeding. See ArcelorMittal's Br. at 7 ("In the draft of its [*Remand Redetermination*], Commerce did not provide any . . . explanation that is responsive to the Court's *Remand Order* other than rote insistence that an AFA rate comporting with the agency's AFA hierarchy must be inherently adverse.") (internal citations omitted). While ArcelorMittal is correct that Commerce does rely on and describe the rationale behind its CVD AFA hierarchy, Commerce also addressed why use of hierarchy is appropriate in the instant case: "[t]here is no information on the record to indicate that NLMK's program-specific rate is not sufficiently adverse to the Severstal Companies with regard to that program." *Remand Redetermination* at 10. Cf. *BMW of North America LLC v. United States*, — F.3d —, 2019 WL 2482060, at \*8 (Fed. Cir. 2019) (remanding for further proceedings because "Commerce did not address how procedural irregularities surrounding the administrative review process affected its view of BMW's level of culpability"). Moreover, Commerce explained that selecting the .03 rate, which was "the highest subsidy rate available for the program at issue," *Remand Redetermination* at 10, would best balance the statutory purposes of deterring non-cooperation and using a corroborated rate that reflects the subsidization behavior of the Russian government, *id.* at 9. See also *BMW*, 2019 WL 2482060, at \*7 (noting that "Commerce has wide discretion when it comes to selecting an AFA rate" but that "[t]he appropriate rate will depend upon the facts of a particular case and cannot be punitive, aberrational, or uncorroborated"); *SolarWorld Americas, Inc. v. United States*, 41 CIT \_\_, \_\_, 229 F. Supp. 3d 1362, 1366 (2017) ("An AFA rate selected by Commerce must reasonably balance the objectives of inducing compliance and determining an accurate rate.") (citing *F.ili De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 2032 (Fed. Cir. 2000)).

This approach is consistent with statute and with Commerce's practice in other cases. 19 U.S.C. § 1677e(d)(1)(A) (providing that Commerce may "use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involv-



ing the same country”); *see, e.g., SolarWorld*, 229 F. Supp. 3d at 1367 (noting that Commerce seeks an AFA rate that balances the “dual goals” of insuring (1) that non-cooperating respondents do not receive a better rate under AFA than they would have by cooperating and (2) that the chosen rate “best approximates how the non-cooperating respondent likely used the subsidy program”); Issues and Decision Memorandum accompanying the *Final Determination in the Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People’s Republic of China* (Dep’t Commerce Nov. 5, 2018), 83 Fed. Reg. 57,429, at 10–11 (noting that “after an evaluation of the situation that resulted in the application of an adverse inference, Commerce may decide that given the unique and unusual facts on the record, the use of the highest rate within that step is not appropriate” but that “[t]here are no facts on this record that suggest that a rate other than the highest rate envisioned under the appropriate step of the hierarchy applied in accordance with section 776(d)(1) of the [Tariff] Act [of 1930] should be applied as adverse facts available”) (internal quotations omitted).<sup>2</sup>

ArcelorMittal nonetheless contends that the situation here is “unique” enough to require Commerce to depart from strictly adhering to its hierarchy. According to ArcelorMittal, because “this case was the first countervailing duty investigation involving subject merchandise from Russia, steps two through four of Commerce’s CVD AFA hierarchy . . . were not available to the agency,” and thus “it was apparent at the time of the *Preliminary Determination* that Commerce could not move beyond an analysis under step one of the hierarchy” — the .03 rate — “without departing from the hierarchy altogether.” ArcelorMittal’s Br. at 13. ArcelorMittal claims that (1) this circumstance allowed Severstal to game the system to receive a more favorable rate than it deserved; and (2) Severstal’s failure to correct its claim of non-use after the publication of the *Preliminary Determination* shows that it chose not to cooperate in order to receive a better rate. *Id.* at 12.

This contention is not persuasive. First, as ArcelorMittal acknowledges, there were few rates available to Commerce from which to choose in this case; indeed, at oral argument, ArcelorMittal was unable to identify any other rate that Commerce could have or should have used. Under these circumstances, it was entirely reasonable for Commerce to use the only available rate which was also explicitly

<sup>2</sup> The amendments to the Tariff Act of 1930, enacted in the Trade Preferences Extension Act of 2015, are applicable to all determinations made on or after August 6, 2015, and therefore are applicable to this proceeding. *See Hyundai Steel Co. v. United States*, 41 CIT \_\_\_, \_\_\_, 279 F. Supp. 3d 1349, 1354 n.1 (2017). Commerce explicitly states that the amendments apply. *IDM* at 13.

permitted by statute. *See* 19 U.S.C. § 1677e(d)(1)(A) (providing that Commerce may “use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country”). Additionally, ArcelorMittal does not and cannot point to any record evidence that supports its theory that Severstal intentionally omitted its mining program use from its initial questionnaire responses or that a different preliminary rate would have compelled Severstal to correct information that it may not have even known was wrong. It was not unreasonable for Commerce to refuse to choose a different, potentially uncorroborated rate based on mere speculation. Thus, the circumstances of this case are not so unique as to require Commerce to deviate from its hierarchy. *Cf. BMW*, 2019 WL 2482060, at \*7 (remanding for further proceedings because “Commerce did not consider or address BMW’s argument regarding” the effects of procedural abnormalities on BMW’s ability to cooperate, including the rescission and subsequent reinstatement of the review after the Federal Circuit reversed a ruling of this court over two years after the rescission).

## **II. Commerce Did Not Abuse Its Discretion by Rejecting NLMK’s Untimely Comments.**

NLMK claims that Commerce abused its discretion by rejecting NLMK’s untimely request for an extension of time to submit its comments. NLMK now requests that the court receive NLMK’s comments into the record and consider the arguments contained therein. NLMK’s Br. at 2–5; Mot. to Suppl. the Record. Specifically, NLMK contends that, because no regulation or statute governs time limits and extensions with respect to remand proceedings, nothing prevented Commerce from accepting NLMK’s comments and NLMK presented good cause for Commerce to extend the deadline and accept the comments.

The court is not persuaded. While NLMK is correct that no statutory provision or regulation, by its terms, governs time limits and extensions with respect to remand proceedings, NLMK’s argument belies the fact that “Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits.” *Yantai Timken Co. v. United States*, 31 CIT 1741, 1754–55, 521 F. Supp. 2d 1356, 1370–71 (2007), *aff’d*, 300 F. App’x 934 (Fed. Cir. 2008) (quoting *Reiner Brach GmbH & Co. v. United States*, 26 CIT 549, 559, 206 F. Supp. 2d 1323, 1334 (2002)); *Fine Furniture (Shanghai) Ltd. v. United States*, 36 CIT 1206, 1218, 865 F. Supp. 2d 1254, 1266 (2012), *aff’d*, 748 F.3d 1365 (Fed. Cir. 2014), and *aff’d*, 748 F.3d 1365 (Fed. Cir. 2014) (recognizing that “setting and enforcing its own deadlines is within Commerce’s

discretion”) (citing *Reiner Brach*, 206 F. Supp. 2d at 1334; *Yantai Timken*, 521 F. Supp. 2d at 1371). This court has recognized that Commerce’s broad discretion to set and enforce deadlines applies to remand proceedings. See *Timken Co. v. United States*, 40 CIT \_\_, \_\_, 179 F. Supp. 1168, 1176 (2016) (“Commerce’s discretion in setting time limits to comment on draft results of redetermination is broad.”). Moreover, “[s]trict enforcement of time limits and other requirements is neither arbitrary nor an abuse of discretion when Commerce provides a reasoned explanation of its decision.” *Maverick Tube Corp. v. United States*, 39 CIT \_\_, \_\_, 107 F. Supp. 3d 1318, 1331 (2015) (citing *Dongtai Peak Honey Indus. Co. v. United States*, 38 CIT \_\_, \_\_, 971 F. Supp. 3d 1234, 1242 (2014)).

The parties dispute the significance of 19 C.F.R. § 351.302 to this case.<sup>3</sup> See NLMK’s Br. at 3; Def.’s Br. at 17. That provision regulates the extension of time limits in antidumping and countervailing proceedings but does not expressly govern remand proceedings. See *Timken Co. v. United States*, 40 CIT \_\_, \_\_, 179 F. Supp. 3d 1168, 1176 (2016) (recognizing that “Commerce’s discretion in setting time limits to comment on draft results of redetermination is broad, as there is no

<sup>3</sup> 19 C.F.R. § 351.302 provides:

- (a) Introduction. This section sets forth the procedures for requesting an extension of a time limit. In addition, this section explains that certain untimely filed or unsolicited material will be rejected together with an explanation of the reasons for the rejection of such material.
- (b) Extension of time limits. Unless expressly precluded by statute, the Secretary may, for good cause, extend any time limit established by this part.
- (c) Requests for extension of specific time limit. Before the applicable time limit established under this part expires, a party may request an extension pursuant to paragraph (b) of this section. An untimely filed extension request will not be considered unless the party demonstrates that an extraordinary circumstance exists. The request must be in writing, in a separate, stand-alone submission, filed consistent with § 351.303, and state the reasons for the request. An extension granted to a party must be approved in writing.
  - (1) An extension request will be considered untimely if it is received after the applicable time limit expires or as otherwise specified by the Secretary.
  - (2) An extraordinary circumstance is an unexpected event that:
    - (i) Could not have been prevented if reasonable measures had been taken, and
    - (ii) Precludes a party or its representative from timely filing an extension request through all reasonable means.
- (d) Rejection of untimely filed or unsolicited material.
  - (1) Unless the Secretary extends a time limit under paragraph (b) of this section, the Secretary will not consider or retain in the official record of the proceeding:
    - (i) Untimely filed factual information, written argument, or other material that the Secretary rejects, except as provided under § 351.104(a)(2); or
    - (ii) Unsolicited questionnaire responses, except as provided under § 351.204(d)(2).
  - (2) The Secretary will reject such information, argument, or other material, or unsolicited questionnaire response with, to the extent practicable, written notice stating the reasons for rejection.

statute or regulation governing its conduct in this situation”). Nonetheless, it appears that Commerce chooses to adhere to the directives of 19 C.F.R. § 351.302 in remand proceedings, *see, e.g., Jinxiang Yuanxin Imp. & Exp. Co. v. United States*, 39 CIT \_\_, \_\_, 71 F. Supp. 3d 1338, 1356 (2015) (holding that “the Department did not abuse its discretion in rejecting the market and price data that Yuanxin filed nine days after the submission deadline” for Commerce’s remand redetermination and citing 19 C.F.R. § 351.302); *Diamond Sawblades Mfrs. Coalition v. United States*, No. 06–00248, 2014 WL 5463307, at \*3–\*4 (Oct. 29, 2014) (noting that the Government and defendant-intervenor stated that a proper extension of time request for remand comments should have been made under 19 C.F.R. § 351.302), which NLMK acknowledged in its untimely request for an extension of time.

In any event, just because Commerce was not required to adhere to 19 C.F.R. § 351.302 does not mean that using this regulation as a guideline constituted an abuse of discretion; if anything, Commerce’s adaptation of the framework of 19 C.F.R. § 351.302 helped ensure that the result in this case would be consistent with the outcomes in similar situations involving untimely requests for extensions of time in antidumping and countervailing duty proceedings. *See Neo Solar Power Corp. v. United States*, 40 CIT \_\_, \_\_, 190 F. Supp. 3d 1255, 1262 (2016).

Here, Commerce set deadlines consistent with the procedures established for similar circumstances and explained its rationale for rejecting NLMK’s untimely submission. Commerce set a clear deadline for comments on the draft remand redetermination. NLMK failed to meet that deadline and did not even seek an extension of time to submit comments before the deadline had expired. As Commerce explained when rejecting NLMK’s untimely submission, the only reason that NLMK gave to explain the untimeliness of its submissions was that the notice of the draft remand redetermination has been “lost in e-mail traffic” while NLMK’s counsel was traveling. NLMK’s Br. at 2–3; Rejection Letter. Moreover, NLMK was aware of the impending deadline for Commerce to submit the *Remand Redetermination* to this court and thus should have anticipated the release of the *Remand Redetermination*. *See* Rejection Letter; *see also Jinxiang Yuanxin Imp. & Exp. Co. v. United States*, 39 CIT \_\_, \_\_, 71 F. Supp. 3d 1338, 1356 (2015) (holding that “the Department did not abuse its discretion in rejecting the market and price data that Yuanxin filed nine days after the submission deadline” because the court’s remand order put Yuanxin on notice that it would have an

opportunity to submit new information and Yuanxin provided no reason why it could not have timely filed its data or requested an extension of time).

“Commerce . . . routinely *rejects* untimely-filed submissions” where, as here, a respondent fails to demonstrate good cause. *Dongtai Peak Honey Industry Co., Ltd. v. United States*, 777 F.3d 1343, 1351–52 (Fed. Cir. 2015) (emphasis original). In *Dongtai Peak Honey*, for example, the Federal Circuit determined that Commerce permissibly found that a company lacked good cause for a late filing, which it explained was due to difficulties communicating between American counsel and the Chinese client, computer problems, and a Chinese holiday. *Id.* at 1350.

Nonetheless, NLMK contends that Commerce here abused its discretion to set and enforce deadlines and cites two cases, *Artisan Mfg. Corp. v. United States*, 38 CIT \_\_, 978 F. Supp. 2d 1334 (2014) and *Grobest & I-Mei Industrial et al v. United States*, 38 CIT \_\_, 815 F. Supp. 2d 1342 (2014), in support. In those cases, this court found that Commerce abused its discretion by rejecting untimely requests for an extension of time because the interest in accuracy and fairness outweighed the interest in finality and the burden placed on Commerce; therefore, according to NLMK, Commerce likewise abused its discretion in this case.

The court notes that both *Artisan* and *Grobest* were issued prior to the Federal Circuit’s precedential decision in *Dongtai Peak Honey*, discussed above. In any event, the facts of those cases materially differ from the circumstances here. In *Artisan*, Artisan submitted a questionnaire response the morning following the due date at or near the beginning of business hours, 978 F. Supp. 2d at 1345, and the result of Commerce’s rejection of the questionnaire response was to impose an adverse rate on the company that was likely twice what it would have paid otherwise, *id.* at 1347. Considering the “inconsequential” effects of the delay, *id.* at 1345, and the “particularly severe” effect on Artisan, *id.* at 1347, the *Artisan* court found that, “*in the particular circumstances of this investigation,*” Commerce had abused its discretion, *id.* at 1344–45 (emphasis original). Similarly, in *Grobest*, the court noted that the late-filed document was consistent with information given to Commerce in several past administrative reviews of the same company, that the “the margin assigned to [plaintiff] was likely inaccurate and disproportionate,” and that the document was filed “more than seven months before Commerce released the preliminary results and one year before Commerce released the final results. Thus, there is no concern with finality in this case.” 815

F. Supp. 2d at 1367 (citing *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353–54 (Fed. Cir. 2006)).

In contrast, here, as previously discussed, “NLMK has not demonstrated an unexpected event that could not have been prevented and that precluded them from timely filing an extension request through all reasonable means”; that is, that NLMK’s counsel’s “inattentiveness” to its “email traffic” was insufficient reason to extend the deadline. Rejection Letter. Additionally, as NLMK itself noted in its extension request, Commerce had only about two weeks after the deadline for comments on the remand results before it was required to file the *Remand Redetermination* with this court, and “NLMK’s counsel should have been expecting Commerce to issue the Draft Remand Results for comment in advance of that deadline.” *Id.* Finally, nothing in the record of this case suggests that Commerce’s rejection of the untimely request resulted in a disproportionately punitive margin.

“The United States Supreme Court has clarified that, ‘[a]bsent constitutional constraints or extremely compelling circumstances [,] the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’” *Dongtai Peak Honey*, 777 F.3d at 1351 (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978)). “Accordingly, absent such constraints or circumstances, courts will defer to the judgment of an agency regarding the development of the agency record.” *PSC VSMPO–Avisma Corp. v. United States*, 688 F.3d 751, 760 (Fed. Cir. 2012).

For the reasons discussed above, no such “extremely compelling circumstances” exist in this case. Thus, in light of the “[i]mportant principles of timeliness and finality [that] undergird all aspects of litigation,” *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012), and the facts of this case, it was not an abuse of discretion for Commerce to reject NLMK’s untimely extension request and submissions.

### **III. NLMK Failed to Exhaust Its Administrative Remedies.**

“A reviewing court usurps [the agency’s] function when it sets aside an agency determination upon a ground not theretofore presented and deprives the agency of an opportunity to consider the matter, make its ruling, and state the reasons for its action.” *Unemployment Compensation Comm’n v. Argon*, 329 U.S. 143, 155 (1946). A party who fails to exhaust their administrative remedies in this manner therefore may not raise an issue for the first time before the trial



court. See *Boomerang Tube LLC v. United States*, 856 F.3d 908, 910 (Fed. Cir. 2017) (“[A]bsent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies.”); *Corus Staal BV v. United States*, 856 F.3d 1370, 1379 (Fed. Cir. 2017) (noting that the Federal Circuit takes “a strict view of the requirement that parties exhaust their administrative remedies before . . . Commerce in trade cases”) (internal quotations omitted); *AIMCOR v. United States*, 141 F.3d 1098, 1111–12 (Fed. Cir. 1998).

This exhaustion requirement applies to remand proceedings. See *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383–84 (Fed. Cir. 2008) (holding that party failed to exhaust administrative remedies by not raising issue in comments on draft remand results); *AIMCOR*, 141 F.3d at 1111–12 (same); *Taian Ziyang Food Co. v. United States*, 37 CIT \_\_, \_\_, 918 F. Supp. 2d 1345, 1361 (2013) (“The prescribed avenue for challenging remand results requires that a party first file comments on the draft results at the administrative level, setting forth the party’s objections.”) (citing *Mittal Steel*, 548 F.3d at 1383–84; *AIMCOR*, 141 F.3d at F 1111–12).

Here, because Commerce rightly rejected NLMK’s untimely comments and removed them from the record, NLMK’s objections to the draft remand redetermination were never properly before Commerce. NLMK thus failed to exhaust its administrative remedies<sup>4</sup> in challenging the draft remand redetermination.

In any event, Commerce’s *Remand Redetermination* complied with the court’s instruction to “identify record facts on which it bases its *de facto* specificity finding,” which could come from a variety of sources, including the petition or “any other information placed on the record.” *ArcelorMittal*, 337 F. Supp. 3d at 1307 (citing 19 U.S.C. § 1677e(b)(2)). Pursuant to this directive, Commerce identified the 2013 Gazprom annual report contained in the petition. As described *supra*, contrary to NLMK’s assertions, Commerce also adequately explained its selection of the 2013 annual report. Commerce indicated that the following evidence in the 2013 annual report supports the adverse inference that the metallurgy sector is “a predominant user” of the natural gas

<sup>4</sup> Nor is there an exception — such as futility or a pure question of law — that excuses NLMK’s failure to exhaust its administrative remedies in this case. See *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007); *Corus Staal*, 856 F.3d at 1379. For instance, there is no reason to believe that Commerce would not have appropriately considered NLMK’s comments, had they been timely submitted. Additionally, the question of whether the metallurgy sector is a predominant user of the natural gas subsidy is a highly factual determination that requires Commerce to identify and evaluate relevant record evidence. See *ArcelorMittal*, 337 F. Supp. 3d at 1307 (noting that the AFA statute requires Commerce to support the *de facto* specificity finding with record evidence).

subsidy and thus met the *de facto* specificity criteria of 19 U.S.C. § 1677(5A)(D)(iii)(II):

(1) the metallurgy industry “heavily used” natural gas and accounted for four percent of Gazprom’s total sales in 2013; (2) the metallurgy sector is one of the top six sectors that accounted for Gazprom’s 2013 domestic natural gas sales; and (3) the metallurgy sector is the only industrial manufacturing sector whose consumption of Gazprom’s natural gas is separately listed in the annual report.

*Remand Redetermination* at 20.

### CONCLUSION

Commerce’s *Remand Redetermination* is sustained in its entirety. NLMK’s motion to supplement the record is denied.

**SO ORDERED.**

Dated: July 29, 2019

New York, New York

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

Slip Op. 19–98

COLUMBIA FOREST PRODUCTS, et al., Plaintiffs, v. UNITED STATES, Defendant, and SHELTER FOREST INTERNATIONAL ACQUISITION, INC., et al., Defendant-Intervenors.

Before: Jane A. Restani, Judge  
Court No. 18–00098

[Commerce’s determination not to initiate an anticircumvention inquiry is sustained]

Dated: July 30, 2019

*Timothy C. Brightbill*, Wiley Rein LLP, of Washington, DC, for Plaintiffs Columbia Forest Products, Commonwealth Plywood Inc., States Industries, Inc., and Timber Products Company. With him on the brief were *Tessa V. Capeloto*, *Stephanie M. Bell*, and *Elizabeth S. Lee*.

*Joshua E. Kurland*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel was *Caroline D. Bisk*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

*Daniel L. Porter*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for Defendant-Intervenor Shelter Forest International Acquisition, Inc. With him on the brief was *Gina M. Colarusso*.

*Gregory S. Menegaz*, deKieffer & Horgan, PLLC, of Washington, DC, for Defendant-Intervenors Linyi Chengen Import and Export Co., Ltd., Linyi City Shenrui Interna-

tional Trade Co., Ltd., Linyi Jiahe Wood Industry Co., Ltd., Linyi Sanfortune Wood Co., Ltd., Shandong Dongfang Bayley Wood Co., Ltd., Shanghai Futuwood Trading Co., Ltd., Suqian Hopeway International Trade Co., Ltd., Suzhou Oriental Dragon Import and Export Co., Ltd., Xuzhou Jiangyang Wood Industries Co., Ltd., Xuzhou Longyuan Wood Industry Co., Ltd., Xuzhou Shengping Imp and Exp Co., Ltd., and Far East American, Inc. With him on the brief were *J. Kevin Horgan* and *Alexandra H. Salzman*.

*Kirsten Smith*, Sandler Travis & Rosenberg, PA, of Washington, DC, for Defendant-Intervenor IKEA Supply AG. With her on the brief were *Arthur Purcell*, of New York, NY, and *Sarah E. Yuskaitis*, of Washington, DC.

*Jeffrey S. Grimson*, Mowry & Grimson, PLLC, of Washington, DC, for Defendant-Intervenors Concannon Corporation, Fabuwood Cabinetry Corporation, Laminate Technologies, Inc., Masterbrand Cabinets, Inc., Northwest Hardwoods, Inc., Taraca Pacific, Inc., Patriot Timber Products, Inc., and USPLY LLC. With him on the brief were *Jill A Cramer* and *Bryan P. Cenko*.

## OPINION

### Restani, Judge:

This case involves an attempt by plaintiffs Columbia Forest Products, Commonwealth Plywood Inc., States Industries, Inc., and Timber Products Company (collectively “Columbia Forest”) to expand unfair trade orders covering plywood with at least one hardwood veneer to cover plywood with no hardwood veneer, i.e., softwood veneered plywood. It fails.

The matter is before the court on a motion for judgment upon the agency record by Columbia Forest. Columbia Forest seeks a remand to the United States Department of Commerce (“Commerce”) with instructions to perform a minor alterations anticircumvention analysis on softwood veneered plywood or provide legally sufficient reasons for why such an analysis is unnecessary. *See* Pls. Columbia Forest’s Mem. in Supp. of their R. 56.2 Mot. for J. on the Agency Record, ECF No. 60–1 (Nov. 21, 2018) (“Columbia Forest Br.”). Defendant United States (“the government”) and Defendant-Intervenors argue that Commerce’s determination not to initiate such an inquiry is supported by substantial evidence and otherwise lawful. *See* Def.’s Mem. in Opp. to Pls.’ R. 56.2 Mot. for J. upon the Agency Record, ECF No. 66 (Mar. 21, 2019) (“Gov. Br.”); Def.-Ints.’ Resp. to Mot. for J. on the Agency Record, ECF No. 67 (Mar. 21, 2019) (“Chengen Br.”); Def. Int. Shelter Forest Acquisition, Inc.’s Mem. in Opp’n to Pls.’ R. 56.2 Mot. for J. on the Agency Record, ECF No. 68 (Mar. 21, 2019) (“Shelter Br.”); Def.-Ints. Concannon Corp., Fabuwood Cabinetry Corporation, Laminate Technologies, Inc., Liberty Woods International, Inc., Masterbrand Cabinets, Inc., Northwest Hardwoods, Inc., Taraca Pacific, Inc., Patriot Timber Products Inc. and USPLY LLC Resp. in Opp’n Pls.’ Mot. For J. Upon the Agency Record, ECF No. 69 (Mar. 21, 2019) (“Concannon Br.”); Resp. Br. of Def.-Int. IKEA Supply AG, ECF No. 70 (Mar. 21, 2019) (“Ikea Br.”). For the following reasons, the court

grants the government's motion for summary judgment and denies Columbia Forest's motion for summary judgment.

### BACKGROUND

On November 18, 2016, the Coalition for Fair Trade in Hardwood Plywood ("Petitioners"), of which Columbia Forest Products, Commonwealth Plywood Inc., States Industries, Inc., and Timber Products Company are members, filed antidumping duty ("AD") and countervailing duty ("CVD") petitions covering certain hardwood and decorative plywood products ("hardwood plywood") from the People's Republic of China ("PRC"). See *Certain Hardwood Plywood Products from the PRC: Petition for the Imposition of Antidumping and Countervailing Duties*, A-570-051 & C-570-052 (Nov. 18, 2016) ("Petition"). The Petition defined "hardwood and decorative plywood" as "a flat panel composed of an assembly of two or more layers or plies of wood veneers in combination with a core[,] . . . [that] must have at least either the face or back veneer composed of one or more species of hardwood or bamboo." *Id.* at 4. The Petition also claimed that "[h]ardwood and decorative plywood may include products that meet the American National Standard for Hardwood and Decorative Plywood . . ." *Id.*

On December 8, 2016, Commerce initiated AD and CVD investigations and solicited interested party input regarding the scope of the investigations. See *Certain Hardwood Plywood Products from the PRC: Initiation of Less-Than-Fair-Value Investigation*, 81 Fed. Reg. 91,125 (Dep't Commerce Dec. 16, 2016); *Certain Hardwood Plywood Products from the PRC: Initiation of Countervailing Duty Investigation*, 81 Fed. Reg. 91,131 (Dep't Commerce Dec. 16, 2016). After receiving scope comments, Commerce issued a preliminary scope decision memorandum on certain hardwood plywood products from the PRC. See *Certain Hardwood Plywood Products from the PRC: Scope Comments Decision Memorandum for the Preliminary Determinations* (Dep't Commerce Apr. 17, 2017) ("Preliminary Scope Memorandum").

Based on the Petition and the analysis set forth in its Preliminary Scope Memorandum, Commerce described the scope of the investigations, in relevant part, as follows:

The merchandise subject to this investigation is hardwood and decorative plywood, and certain veneered panels as described below. For purposes of this proceeding, hardwood and decorative plywood is defined as a generally flat, multilayered plywood or other veneered panel, consisting of two or more layers or plies of wood veneers and a core, with the face and/or back veneer made

of non-coniferous wood (hardwood) or bamboo. The veneers, along with the core may be glued or otherwise bonded together. Hardwood and decorative plywood may include products that meet the American National Standard for Hardwood and Decorative Plywood, ANSI/HPVA HP-1–2016 (including any revisions to that standard).

For purposes of this investigation a “veneer” is a slice of wood regardless of thickness which is cut, sliced or sawed from a log, bolt, or flitch. The face and back veneers are the outermost veneer of wood on either side of the core irrespective of additional surface coatings or covers as described below.

The core of hardwood and decorative plywood consists of the layer or layers of one or more material(s) that are situated between the face and back veneers. The core may be composed of a range of materials, including but not limited to hardwood, softwood, particleboard, or medium-density fiberboard (MDF).

All hardwood plywood is included within the scope of this investigation regardless of whether or not the face and/or back veneers are surface coated or covered and whether or not such surface coating(s) or covers obscures the grain, textures, or markings of the wood. . .

All hardwood and decorative plywood is included within the scope of this investigation, without regard to dimension . . . However, the most common panel sizes of hardwood and decorative plywood are 1219 x 1829 mm (48 x 72 inches), 1219 x 2438 mm (48 x 96 inches), and 1219 x 3048 mm (48 x 120 inches).

. . .

The scope of the investigation excludes the following items: (1) Structural plywood . . . manufactured to meet [certain U.S. Products Standards] and which has both a face and a back veneer of coniferous wood; (2) products which have a face and back veneer of cork; (3) multilayered wood flooring, as described in the antidumping duty and countervailing duty orders on Multilayered Wood Flooring from the [PRC] . . . (4) multilayered wood flooring with a face veneer of bamboo or composed entirely of bamboo; (5) plywood which has a shape or design other than a flat panel, with the exception of any minor processing described above; (6) products made entirely from bamboo and

adhesives . . . ; and (7) Phenolic Film Faced Plyform (PFF), also known as Phenolic Surface Film Plywood (PSF)[.]<sup>1</sup>

*See Certain Hardwood Plywood Products from the PRC: Preliminary Affirmative CVD Determination, Preliminary Affirmative Critical Circumstances Determination, in Part, and Alignment of Final Determination with Final Antidumping Duty Determination*, 82 Fed. Reg. 19,022, 19,024–25 (Dep’t Commerce Apr. 25, 2017) (“CVD Preliminary Determination”); *Certain Hardwood Plywood Products from the PRC: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part*, 82 Fed. Reg. 28,629, 28,638–39 (Dep’t Commerce June 23, 2017) (“AD Preliminary Determination”). After publication of the CVD Preliminary Determination, however, Commerce clarified that plywood with both a face and back veneer of coniferous wood (softwood) was not included within the scope of the investigations. *See Certain Hardwood Plywood Products from the PRC: Additional Scope Comments Preliminary Decision Memorandum and Extension of Deadlines for Scope Case Briefs and Scope Rebuttal Briefs at 7* (Dep’t Commerce June 16, 2017). Accordingly, Commerce modified the scope language to remove reference to HTSUS subheadings 4412.39.1000 and 4412.39.3000, which cover exclusively plywood with both veneers of softwood. *See id.*; *see also AD Preliminary Determination*, 82 Fed. Reg. at 28,639.

On June 20, 2017, shortly before Commerce published its AD Preliminary Determination, Petitioners requested that Commerce clarify the scope of the investigations to cover decorative plywood with both face and back veneers of softwood. *Certain Hardwood Plywood Products from the PRC: Request for Scope Clarification* (June 21, 2017) (“Scope Clarification Request”). Petitioners argued that the language did not expressly exclude hardwood plywood with both veneers of softwood and that it was their intent to include such merchandise within the scope of the investigations based on their references to the decorative and hardwood plywood standards. *Scope Clarification Request* at 5, 8–9. In its response, Commerce again determined, based on the language of the scope, that plywood with both face and back veneers of softwood unambiguously fell outside the scope of the investigations. *See Certain Hardwood Plywood Products from the PRC: Scope Comments Post-Preliminary Decision Memorandum* at 10–12

<sup>1</sup> The scope language includes several additional explicit exclusions, for certain furniture goods, kitchen cabinets, table tops, countertops, and laminated veneer lumber door and window components, that are not applicable to the subject merchandise at issue here. *See, e.g., AD Preliminary Determination*, 82 Fed. Reg. at 28,638–39.



(Dep't Commerce Oct. 16, 2017) ("Post-Preliminary Scope Determination") (stating that the plain language "expressly excludes the product"); *Certain Hardwood Plywood Products from the PRC: Final Scope Comments Decision Memorandum* at 14–19 (Dep't Commerce Nov. 6, 2017) ("Final Scope Determination").<sup>2</sup> Commerce also concluded that the Petitioners' "references to decorative plywood and the Hardwood Plywood Standard, simply state that softwood may be included as a component in hardwood plywood, but do not support the [P]etitioners' contention that it was their intent to include hardwood plywood with *both* a face *and* back veneer of softwood within the scope." *Final Scope Determination* at 18; *Post-Preliminary Scope Determination* at 11. Moreover, Commerce rejected the Petitioners' argument that "hardwood plywood with both face and back veneers of softwood cannot be expressly excluded from the scope because the scope does not provide an express exclusion for such products." *Final Scope Determination* at 18. Finally, Commerce expressed concern, inter alia, that expanding the scope "could also potentially be at odds with [Commerce's] industry support determination,<sup>3</sup> which was based on [its] and [the International Trade Commission's ("ITC")] understanding that hardwood plywood must have at least either a face or back veneer composed of hardwood or bamboo." *Post-Preliminary Scope Determination* at 12.<sup>4</sup>

On January 4, 2018, after receiving notification from the ITC that a domestic industry is materially injured because imports of certain hardwood plywood products were subsidized by foreign governments and sold in the United States at less than fair value, Commerce issued its final AD and CVD orders. *See Certain Hardwood Plywood Products from the PRC: Amended Final Determination of Sales at Less Than Fair Value, and AD Order*, 83 Fed. Reg. 504 (Dep't Commerce Jan. 4, 2018) ("AD Order"); *Certain Hardwood Plywood Products from the PRC: CVD Order*, 83 Fed. Reg. 513 (Dep't Commerce

<sup>2</sup> Commerce removed the following HTSUS subheadings from the scope, which cover exclusively plywood with face and back veneers of softwood: 4412.39.4011; 4412.39.4012; 4412.39.4019; 4412.39.4031; 4412.39.4032; 4412.39.4039; 4412.39.4051; 4412.39.4052; 4412.39.4059; 4412.39.4061; 4412.39.4062; 4412.39.4069; 4412.39.5010; 4412.39.5030; 4412.39.5050. *Final Scope Determination* at 19.

<sup>3</sup> A petition for the imposition of unfair trade duties must be filed "on behalf of an industry." 19 U.S.C. §§ 1671a(b)(1). Commerce determines that a petition is filed on behalf of the industry if there is support for the petition from domestic producers or workers who account for at least 25 percent of the total production of the domestic like product and more than 50 percent of the production of that portion of the industry expressing support or opposition to the petition. 19 U.S.C. §§ 1671a(c)(4)(A) & 1673a(c)(4)(A).

<sup>4</sup> The Final Scope Determination has not been challenged by any interested party. *See Certain Hardwood Plywood Products from the PRC: Minor Alterations Anticircumvention Inquiry Request* at 13, P.D. 39 (Dep't Commerce Apr. 2, 2018); Pls. Columbia Forest Products, Commonwealth Plywood Inc., States Indus., Inc., & Timber Products Co.'s Reply Br. at 2 n.4, ECF No. 71 (Apr. 18, 2019) ("Reply Br.").

Jan. 4, 2018) (“CVD Order”) (collectively, “Orders”). Based on its Final Scope Determination, Commerce continued to define the subject merchandise “as a generally flat, multilayered plywood or other veneered panel, consisting of two or more layers or plies of wood veneers and a core, with the face and/or back veneer made of non-coniferous wood (hardwood) or bamboo.” *AD Order*, 83 Fed. Reg. at 512; *CVD Order*, 83 Fed. Reg. at 515. Commerce did not further modify the scope language.

Shortly thereafter, on February 15, 2018, Columbia Forest requested that Commerce initiate an anticircumvention inquiry, pursuant to 19 U.S.C. § 1677j(c) and 19 C.F.R. § 351.225(i), to determine whether imports of plywood with both face and back veneers of softwood involve a minor alteration to the subject merchandise such that it would be subject to the Orders. See *Certain Hardwood Plywood Products from the PRC: Request for Anti-Circumvention Inquiry* at 1–2, P.D. 1–4, C.R. 2–9 (Feb. 15, 2018) (“Anticircumvention Petition”). Columbia Forest provided evidence of alleged circumvention and argued that a circumvention determination would be appropriate under the factors traditionally used in minor alterations inquiries. *Id.* at 11–16, 20.<sup>5</sup>

On April 2, 2018, Commerce decided not to initiate a minor alterations anticircumvention inquiry. See *Certain Hardwood Plywood Products from the PRC: Minor Alterations Anticircumvention Inquiry Request*, P.D. 39 (Dep’t Commerce Apr. 2, 2018) (“Non-Initiation Memo”). Pursuant to 19 U.S.C. § 1677j(c)(2), Commerce concluded that “it is unnecessary to consider whether plywood products with both face and back veneers of softwood are within the scope of the Orders. . . because [Commerce] already determined during the investigation that such products are not included in the scope.” *Id.* at 12; see also *id.* at 13–15 (citing its Post-Preliminary Scope Determination, relying on *Wheatland Tube Co. v. United States*, 161 F.3d 1365 (Fed. Cir. 1998), and distinguishing *Nippon Steel Corp. v. United States*, 219 F.3d 1348 (Fed. Cir. 2000) and *Deacero S.A. De C.V. v. United States*, 817 F.3d 1332 (Fed. Cir. 2016)). Commerce also stated that the inclusion of “plywood with both face and back veneers of softwood, which was not considered in the ITC’s injury analysis, could potentially create a conflict with the ITC injury determination, and impermissibly expand the scope of the Orders.” *Id.* at 13–14. Colum-

<sup>5</sup> In its request, Columbia Forest explained that “[t]o improve the administrability of potential orders, U.S. Producers chose not to specify in the scope language that hardwood and decorative plywood may also have both a face and back veneer made of softwood. Nonetheless, in the Petition, U.S. Producers clarified that [t]he term ‘hardwood plywood,’ as used in this scope definition, incorporates products referred to as decorative plywood and emphasized that, notwithstanding the term ‘hardwood,’ subject merchandise can be produced with softwood.” *Anticircumvention Petition* at 6 (internal quotations omitted).

bia Forest then timely initiated this action. *See* Complaint, ECF No. 9 (May 2, 2018).<sup>6</sup>

### JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(a)(2)(B)(vi). This court “hold[s] unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B).

To prevent the circumvention of an antidumping or countervailable duty order, the Tariff Act of 1930 provides that the “class or kind of merchandise subject to [such orders] shall include articles altered in form or appearance in minor respects . . . whether or not included in the same tariff classification.” 19 U.S.C. § 1677j(c)(1); *see also* 19 C.F.R. § 351.225(i) (“[Commerce] may include within the scope of an antidumping . . . duty order articles altered in form or appearance in minor respects”). In determining what alterations are properly considered minor, Commerce examines “such criteria as the overall characteristics of the merchandise, the expectation of ultimate users, the use of the merchandise, the channels of marketing[,] and the cost of any modification relative to the total value of the imported product.” S. REP.NO. 100–71, at 100 (1987); *see also Nippon Steel*, 219 F.3d at 1354. The minor alterations provision states somewhat ambiguously that it does not apply if Commerce, determines that “it would be unnecessary to consider the altered merchandise within the scope of the investigation, order, or finding.” 19 U.S.C. § 1677j(c)(2).

Section 1677j(c) essentially permits the inclusion “within the scope of an antidumping duty order products that are so insignificantly changed from a covered product that they should be considered within the scope of the order even though the alterations remove them from the order’s literal scope.” *Wheatland Tube*, 161 F.3d at 1371; *see also Deacero*, 817 F.3d at 1338 (stating that minor alterations inquiries “determine whether articles not expressly within the literal scope of a duty order may nonetheless be found within its scope as a result of a minor alteration to the merchandise covered in the investigation”). The purpose of the provision is to prevent circumvention through imports of “products with minor alterations that contain

<sup>6</sup> Commerce subsequently initiated a separate anticircumvention inquiry pursuant to 19 U.S.C. § 1677j(d) concerning the same order at issue here but a regarding more limited product. *See Certain Hardwood Plywood Products from the PRC: Initiation of Anti-Circumvention Inquiry on the Antidumping Duty and Countervailing Duty Orders*, 83 Fed. Reg. 47,883 (Dep’t Commerce Sept. 21, 2018). Columbia Forest moved to stay this action pending Commerce’s final determination in that anticircumvention inquiry. *See* Pls.’ Mot. to Stay Proceedings 1–5, ECF No. 53 (Oct. 18, 2018). The court denied the motion. *See* Order Denying Stay, ECF No. 59 Nov. 13, 2018).

features or technologies not in use in the class or kind of merchandise imported into the United States at the time of the original investigation.” S. REP.NO 100–71, at 101 (1987).

In *Wheatland Tube*, the Court of Appeals for the Federal Circuit (“CAFC”) held that a minor alterations inquiry is inappropriate with respect to “products unequivocally excluded from the order in the first place.” 161 F.3d at 1371. In that case, domestic producers argued that the scope of several antidumping orders for certain steel pipes included line pipe and dual certified pipe. *See id.* at 1369. In reviewing that claim, Commerce decided to perform a scope inquiry rather than a minor alterations inquiry. *Id.* at 1368. The scope of the order stated that “[a]ll carbon steel pipes and tubes within the physical description outlined above are included within the scope of this investigation, except line pipe . . . [and] [s]tandard pipe that is dual or triple certified[.]” *Id.* at 1367. Commerce concluded that line and dual-certified pipe were clearly excluded from the scope of the orders, and, consequently, section 1677j(c)(1) did not apply because it was “unnecessary for Commerce to include the ‘altered’ merchandise to protect the antidumping duty order.” *See Wheatland Tube Co. v. United States*, 973 F. Supp. 149, 163 (CIT 1997). The CAFC agreed, commenting that interpreting the scope to both include and exclude line and dual-certified pipe would render the orders internally inconsistent. *Wheatland Tube*, 161 F.3d at 1371 (A minor alterations inquiry was “unnecessary because it can lead only to an absurd result” and would “frustrate the purpose of the antidumping laws because it would allow Commerce to assess antidumping duties on products intentionally omitted from the ITC’s injury investigation.”).

In *Nippon Steel*, by contrast, the CAFC concluded that a minor alterations inquiry was appropriate with respect to certain steel products with a chemical composition of boron exceeding that of the subject merchandise. *See* 219 F.3d at 1350–56. The applicable order covered alloy steel containing, by weight, not more than 0.0008 percent boron. *See id.* at 1350. Commerce initiated an anticircumvention inquiry after a domestic company alleged that foreign companies were increasing the amount of boron to circumvent the order. *Id.* at 1354. This Court preliminarily enjoined Commerce, reasoning, pursuant to *Wheatland Tube*, that an “absurd result” would occur if a minor alterations inquiry caused the antidumping order to “both exclude alloy steel containing more than 0.0008% boron and include alloy steel containing more than 0.0008% boron.” *Id.* at 1356. But the CAFC reversed, distinguishing *Wheatland Tube* on the basis that it involved judicial review of a final agency action, a scope determination, and two different products both of which “were well known when

the order was issued.” *Id.* at 1356. *Nippon Steel*, however, involved an injunction barring the agency from conducting a proceeding, solely a minor alterations inquiry, and a product “produced by making allegedly insignificant alterations to an existing product.” *Id.*

Finally, in *Deacero*, Commerce determined that steel wire rod with a 4.75-millimeter diameter fell under an antidumping duty order covering steel wire rods with a cross-sectional range of 5.00 millimeters to 19.00 millimeters as a minor alteration of the subject merchandise. 817 F.3d at 1336–39. The court held that substantial evidence supported the determination that the importer circumvented the order by reducing the diameter of the rods, which resulted in the exclusion of the product from the literal scope of the order. *Id.* at 1337–39. The court distinguished *Wheatland Tube* on the basis that the order did not contain an “explicit exclusion” of small-diameter rods. *Id.* at 1338 (identifying “certain metallic compositions of steel wire rod” that were explicitly excluded). It rejected the notion that the cross-sectional range could “be read to expressly exclude for purposes of anti-circumvention inquiries all products outside that range” as that would “render meaningless Congress’s intent to address circumvention concerns.” *Id.* The court also emphasized that, at the time the petition was filed, the smallest diameter steel wire rod produced in the investigated countries was 5.5 millimeters. *Id.* at 1339.

The issue in dispute here is whether the Orders, defining the subject merchandise as having “the face and/or back veneer made of non-coniferous wood (hardwood) or bamboo,” unequivocally exclude plywood with *both* veneers made of softwood such that it would be unnecessary to conduct a minor alterations inquiry. Columbia Forest argues that Commerce refused to initiate a minor alterations inquiry on the faulty premise that Commerce had already determined that the merchandise fell outside the plain language of the Orders. Columbia Forest Br. at 8–12; Reply Br. at 3–5. Columbia Forest contends that Commerce failed to distinguish *Nippon Steel* and *Deacero* and unreasonably relied on *Wheatland Tube*. Columbia Forest Br. at 12–18; Reply Br. 5–10. The government and Defendant-Intervenors, for their part, argue that Commerce’s prior scope determination precludes a minor alterations inquiry, and that Commerce appropriately relied on *Wheatland Tube* and distinguished *Nippon Steel* and *Deacero*. Gov Br. at 7–19; Ikea Br. at 11–20; Chengen Br. at 6–12; Shelter Br. at 12–24; Concannon Br. at 9–28.

Commerce properly determined that the limitations on the circumstances contemplated by 19 U.S.C. § 1677j(c)(2) control the outcome of this case, correctly relying on the reasoning in *Wheatland Tube*. Here, the allegedly altered merchandise at issue was specifically considered

during the investigation, was well-known at the outset of the investigation, and is different from the subject merchandise. First, plywood with both veneers of softwood was explicitly considered by Commerce during the investigation and found to be excluded from the scope based on the plain language of the Orders as drafted by the Petitioners. In *Wheatland Tube*, Commerce made a scope determination that line and dual-certified pipe were clearly excluded from the order on certain steel pipes. 161 F.3d at 1371 (affirming Commerce's determination that a minor alteration inquiry under section 1677j(c) was unnecessary); *see also Wheatland Tube*, 973 F. Supp. at 163 ("As Commerce has made a final determination that the alleged 'altered merchandise' . . . is clearly excluded from the scope of the antidumping duty orders in effect . . . it is unnecessary [per section 1677j(c)(2)] for Commerce to include the altered merchandise to protect the antidumping duty order."). By contrast, in *Nippon Steel and Deacero*, Commerce at no point—either in an investigation or subsequent scope inquiry—considered the products at issue or determined that they are excluded from the scope. Here, however, Commerce understood, throughout the investigation, that both Petitioners' intent and the plain language of the scope preclude coverage of hardwood plywood with both a face and back veneer of softwood. *Post-Preliminary Scope Determination* at 10–11; *Final Scope Determination* at 18. These scope determinations at issue specifically sought to answer whether the merchandise is excluded from the scope of the investigation.

Columbia Forest's responses to the contrary are unavailing. Columbia Forest claims that Commerce's prior scope findings only confirms a basic assumption in minor alterations inquiries: that the inquiry applies to merchandise that fall outside the literal scope of an order. *Columbia Forest Br.* at 11–12; *Reply Br.* at 3. But Columbia Forest misrepresents Commerce's reasoning that previous scope determinations rendered a minor alterations inquiry unnecessary. The scope determinations were not limited to the finding that the plain language of the scope excludes plywood with both veneers of softwood. Rather, Commerce also determined that the Petitioners did not intend to include the product with the scope of the investigation and that a finding otherwise would be at odds with the scope of the ITC injury determination, a basic requirement for an unfair trade order. *See Post-Preliminary Scope Determination* at 10–12; *Final Scope Determination* at 17–19. Because the scope clarifications occurred during the investigation, Commerce was not interpreting the scope of the Orders, but was establishing it. Through its investigatory scope determinations, Commerce established that the limitation of merchan-



dise to plywood with at least one hardwood or bamboo veneer excludes the use of two softwood veneers.

Columbia Forest contends that the Orders contain no express exclusion for plywood with both veneers of softwood and that only articles listed as “explicitly excluded” need not undergo a minor alterations inquiry. Columbia Forest Br. at 10; Reply Br. at 4. An affirmative circumvention decision here, Columbia Forest claims, would not require a simultaneous inclusion and exclusion of subject merchandise, as in *Wheatland Tube*, but instead would cover merchandise in addition to the ones expressly excluded, as in *Deacero* and *Nippon Steel*. Columbia Br. at 17. This is not the case. The final AD and CVD Orders were published based on the understanding that plywood with both veneers of softwood was excluded from the scope of the Orders. Although the Orders do not contain language explicitly excluding the allegedly circumventing product, Commerce’s previous clarification that the plain language of the scope was clear and required hardwood plywood to have at least one hardwood or bamboo veneer performs the same function—it unequivocally excludes from the scope of the order plywood with both veneers of softwood.

Moreover, like the merchandise in *Wheatland Tube* but unlike that of *Nippon Steel* and *Deacero*, plywood with both veneers of softwood was “well-known at the time of the investigations.” See Non-Initiation Memo at 15; *Nippon Steel*, 219 F.3d at 1356 (distinguishing *Wheatland Tube* on this basis); *Deacero*, 817 F.3d at 1339. Interested parties and Commerce were aware that plywood was imported with both veneers of softwood under several HTSUS headings. Indeed, Petitioners’ 2013 petition for AD and CVD orders explicitly included plywood with both veneers of softwood. See *Hardwood and Decorative Plywood from the PRC: Final Determination of Sales at Less Than Fair Value*, 78 Fed. Reg. 58,273, 58,275 (Dep’t Commerce Sept. 23, 2013) (“A hardwood and decorative plywood panel must have face and back veneers which are composed of one or more species of hardwoods, softwoods, or bamboo.”). In *Nippon Steel* and *Deacero*, the altered merchandise was not included in the physical description of the subject merchandise precisely because, at the time of the investigation, merchandise with the altered physical specifications was not known to be dumped into the United States. See, e.g., *Deacero*, 817 F.3d at 1339 (finding substantial evidence in Commerce’s conclusion that the smallest diameter steel wire rod produced in the investigated countries at the time the petition was filed was 5.5 mm).

Finally, Commerce reasonably concluded that plywood with veneers of softwood was not an alteration of subject merchandise, but rather

the production of a different product. *See Non-Initiation Memo* at 15. The Senate Report specifies that section 1677j(c) sought to prevent circumvention by “products with minor alterations that contain features or technologies not in use in the class or kind of merchandise imported into the United States at the time of the original investigation.” S. REP.NO. 100–71, at 101. Plywood is composed of layers of wood plies adhered to a core. At some point in the production process, a choice is made as to which kind of wood will form the outermost layers (the veneers). Softwood plywood contains two softwood veneers and hardwood plywood, as defined by the Orders, contains at least one veneer of hardwood. If two layers of softwood plies are added to hardwood plywood, then arguably, hardwood plywood is turned into softwood plywood. This process, Columbia Forest argues, constitutes a minor alteration of the subject merchandise. *See Columbia Forest Br.* at 13–14; *Reply Br.* at 7–10. But those veneers of softwood are not features of hardwood plywood.<sup>7</sup> Rather, they are components of many kinds of plywood, including those with softwood, hardwood, or bamboo cores. Although Commerce did not explicitly consider Columbia Forest’s evidence of circumvention, its determination that the use of two softwood veneers results in the production of a different product is supported by substantial evidence.

Commerce was also justifiably concerned that including the merchandise within the scope of the order would have been at odds with the ITC injury determination. “A fundamental requirement of both U.S. and international law is that an antidumping duty order must be supported by an ITC determination of material injury covering the merchandise in question.” *Wheatland Tube*, 973 F. Supp. at 158 (citing 19 U.S.C. § 1673). The ITC here defined the “domestic like product” based on an understanding that “hardwood plywood includes plywood that may have a face veneer and/or other layers of veneer of any softwood species *so long as* either the face or back veneer is of a hardwood species.” *Hardwood Plywood from China*, Inv. Nos. 701-TA-565 & 731-TA-1341, USITC Pub. 4661 at 7 (Jan. 2017) (emphasis added); *see also* 19 U.S.C. § 1677(10) (defining a “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation”). Thus, there was no ITC injury determination of plywood that

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<sup>7</sup> The Senate and House Reports provide examples of the kinds of features that would be considered a minor alteration. *See* S. REP. NO. 100–71, at 101 (1987) (“a minor alteration resulted in portable typewriters with calculator or memory features being excluded from the scope of an existing antidumping order on portable typewriters.”); H.R. REP. NO. 100–40, at 135 (1987) (The minor alterations provision “might apply when steel sheet is temper rolled prior to importation . . . or when a fire resistance coating is applied to cookware prior to importation.”).

had neither a back nor front veneer of hardwood. *See Hardwood Plywood from China*, Inv. No. 701-TA-565 & 731-TA-1341, USITC Pub. 4747 at 10 (Dec. 2017). Commerce's concern about including the allegedly altered merchandise within the scope of the Orders is especially important in the minor alterations context, where Commerce is not required to notify the ITC before making a determination. As this court explained in *Wheatland Tube*, the statutory scheme indicates that Congress sought to avoid a conflict with the requirement of an ITC injury determination by permitting only scope clarifications that were not "wholesale changes to the scope of the orders." 973 F. Supp. at 163. Given the scope of the ITC investigation, Commerce reasonably refrained from making an affirmative minor alterations finding because of the risk of a conflict with the requirement of an ITC injury determination.

The court acknowledges that evidence demonstrates that, since the initiation of the investigation, import volumes of plywood with both veneers of softwood increased drastically compared with plywood with at least one veneer of hardwood. Although a substitution effect may be indicative of circumvention, it is not a sufficient cause for Commerce to initiate a minor alterations inquiry. This is especially true given that the scope of the subject merchandise is driven by physical characteristics rather than actual end use. If Columbia Forest or other domestic interested parties suffer material injury because imports of plywood with front and back veneers of softwood are subsidized by foreign governments or sold in the United States at less than fair value, then the appropriate remedy is the initiation of an AD or CVD investigation that covers plywood with front and back veneers of softwood. Although Commerce may use the anticircumvention provisions to interpret the scope beyond its literal terms, it cannot interpret it "in a way contrary to its terms." *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990). To do otherwise would risk broadening the scope of an order to include a class or kind of merchandise that has not been the subject of a corresponding ITC injury determination. *See Wheatland Tube*, 973 F. Supp. at 163 n.9 ("When a class of merchandise already exists and is well known to the parties, the minor alterations provision should not allow a petitioner to broaden the scope of an order in a way which petitioner avoided at the outset.").

To summarize, the purpose of the minor alterations provision is to include merchandise that would have been included within the scope of an order but for minor alterations removing the merchandise from

the order's *literal* scope. This reasonably includes an intent that the merchandise as altered would have been included in the scope of the investigation if Commerce and the ITC had had reason to consider it at the outset of the investigation. *See Wheatland Tube*, 973 F. Supp. at 164 (holding that "declining to perform an anticircumvention investigation" was appropriate where "the merchandise at issue was always known to the parties, was discussed in respect to several rulings on scope and clearly was not included within the scope of the order"). Given this purpose, in determining whether it is unnecessary to perform a minor alterations inquiry under section 1677j(c)(2), it is reasonable for Commerce to consider whether the allegedly circumventing product existed at the time of the investigation and whether, during the investigation, Commerce already determined that the product is excluded from the scope. Accordingly, Commerce's decision that an anti-circumvention inquiry was unnecessary pursuant to 19 U.S.C. § 1677j(c)(2) is supported by substantial evidence and in accordance with law.

### CONCLUSION

For the foregoing reasons, Columbia Forest's motion for judgment on the agency record is **DENIED**. The court sustains Commerce's determination not to initiate a minor alterations anticircumvention inquiry regarding softwood veneered plywood.

Dated: July 30, 2019

New York, New York

*/s/ Jane A. Restani*

JANE A. RESTANI, JUDGE