

TRADE LAW UPDATE



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November 2023

HIGHLIGHTS FROM NOVEMBER

[Legal Insights for Manufacturing: International Trade & Supply Chain](#)

Husch Blackwell's Technology, Manufacturing & Transportation group has published its second-annual [Legal Insights for Manufacturing report](#), covering the top challenges facing U.S.-based manufacturers and including a section on international trade and supply chain concerns. In particular, our team takes a closer look at the elevated importance of know-your-customer/business (KCY/B) practices and how they are impacting the manufacturing supply chain.

U.S. DEPARTMENT OF COMMERCE DECISIONS

Investigations

- Certain Paper Shopping Bags From India: On November 6, 2023, Commerce issued its preliminary affirmative [determination](#) of countervailable subsidies, preliminary affirmative determination of critical circumstances in part, and alignment of final determination with the final antidumping duty determination.

- Certain Paper Shopping Bags From the People's Republic of China: On November 6, 2023, Commerce issued its preliminary affirmative [determination](#) of countervailable subsidies, preliminary affirmative

determination of critical circumstances, and alignment of final determination with final antidumping duty determination.

- Certain Hardwood Plywood Products From the People's Republic of China: On November 14, 2023, Commerce issued its notice of court decision not in harmony with the final [determination](#) of antidumping duty investigation; notice of amended determination pursuant to court decision; and notice of revocation of antidumping duty order, in part.
- Truck and Bus Tires From Thailand: On November 14, 2023, Commerce issued its [initiation](#) of less-than-fair-value investigation.
- Certain Paper Shopping Bags From the People's Republic of China: On November 17, 2023, Commerce issued its preliminary affirmative determination of countervailable subsidies, preliminary affirmative determination of critical circumstances, and alignment of final determination with final antidumping duty determination; correction
- Frozen Warmwater Shrimp From Ecuador, India, Indonesia, and the Socialist Republic of Vietnam: On November 21, 2023, Commerce issued its [initiation](#) of countervailing duty investigations.

- Non-Refillable Steel Cylinders From the People’s Republic of China: On November 21, 2023, Commerce issued its affirmative preliminary [determination](#) of circumvention of the antidumping and countervailing duty orders.
- Frozen Warmwater Shrimp From Ecuador and Indonesia: On November 21, 2023, Commerce issued its [initiation](#) of less-than-fair-value investigations.
- Boltless Steel Shelving Units Prepackaged for Sale From India: On November 29, 2023, Commerce issued its preliminary negative [determination](#) of sales at less than fair value and postponement of final determination
- Boltless Steel Shelving Units Prepackaged for Sale From Malaysia: On November 29, 2023, Commerce issued its preliminary affirmative [determination](#) of sales at less than fair value, postponement of final determination, and extension of provisional measures.
- Boltless Steel Shelving Units Prepackaged for Sale From Taiwan: On November 29, 2023, Commerce issued its preliminary affirmative [determination](#) of sales at less than fair value, postponement of final determination, and extension of provisional measures.
- Boltless Steel Shelving Units Prepackaged for Sale From Thailand: On November 29, 2023, Commerce issued its preliminary affirmative [determination](#) of sales at less than fair value, postponement of final determination, and Extension of Provisional Measures.
- Boltless Steel Shelving Units Prepackaged for Sale From the Socialist Republic of Vietnam: On November 29, 2023, Commerce issued its preliminary affirmative [determination](#) of sales at less than fair value, postponement of final determination, and extension of provisional measures.

Administrative Reviews

- Carbon and Alloy Steel Threaded Rod From India: On November 2, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2021–2022).
- Certain Aluminum Foil From the People’s Republic of China: On November 2, 2023, Commerce issued its final [results](#) of countervailing duty administrative review (2021).
- Common Alloy Aluminum Sheet From the Republic of Turkey: On November 2, 2023, Commerce issued its final [results](#) of countervailing duty administrative review (2020–2021).
- Low Melt Polyester Staple Fiber From the Republic of Korea: On November 3, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2021–2022).
- Common Alloy Aluminum Sheet From India: On November 6, 2023, Commerce issued its final [results](#) of countervailing duty administrative review (2020– 2021).
- Drawn Stainless Steel Sinks From the People’s Republic of China: On November 6, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2021–2022).
- Phosphate Fertilizers From the Russian Federation: On November 6, 2023, Commerce issued its final [results](#) of countervailing duty administrative review (2020–2021).
- Certain Aluminum Foil From People’s Republic of China: On November 7, 2023, Commerce issued its final [results](#) of antidumping duty administrative review and final determination of no shipments (2021–2022).
- Common Alloy Aluminum Sheet From India: On November 7, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2020– 2022).
- Common Alloy Aluminum Sheet From Spain: On November 7, 2023, commerce issued its final [results](#) of antidumping duty administrative review (2020– 2022).
- Phosphate Fertilizers From the Kingdom of Morocco: On November 7, 2023, Commerce issued its final [results](#) of countervailing duty administrative review (2020–2021).
- Wooden Cabinet and Vanities and Components Thereof From the People’s Republic of China: On November 7, 2023, Commerce issued its final [results](#) and final determination of no shipments of the antidumping duty administrative review (2021–2022).
- Wooden Cabinets and Vanities and Components Thereof From the People’s Republic of China: On November 7, 2023, Commerce issued its final [results](#) and partial rescission of countervailing duty administrative review (2021).
- Chlorinated Isocyanurates From Spain: On November 9, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2021–2022).

- Citric Acid and Certain Citrate Salts From the People’s Republic of China: On November 9, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2021–2022).
- Heavy Walled Rectangular Welded Steel Pipes and Tubes From Mexico: On November 9, 2023, Commerce issued its notice of court decision not in harmony with the results of antidumping administrative review; notice of amended final [results](#).
- Common Alloy Aluminum Sheet From Germany: On November 13, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2020–2022).
- Common Alloy Aluminum Sheet From Turkey: On November 13, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2020–2022).
- Glycine From India: On November 13, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2021–2022).
- Multilayered Wood Flooring From the People’s Republic of China: On November 15, 2023, Commerce issued its notice of court decision not in harmony with the results of antidumping administrative review; notice of amended final [results](#).
- Certain Cased Pencils From the People’s Republic of China: On November 16, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2021–2022).
- Prestressed Concrete Steel Wire Strand From Ukraine: On November 16, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2020–2022).
- Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From India: On November 22, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2021–2022).
- Forged Steel Fittings From Taiwan: On November 24, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2021–2022).
- Certain New Pneumatic Off-the-Road Tires From India: On November 27, 2023, Commerce issued its notice of correction to the final results, and amended final [results](#) of countervailing duty administrative review (2021).
- Carbon and Alloy Steel Wire Rod From the Republic of Korea: On November 28, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2021–2022).
- Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Korea: On November 28, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2021–2022).

Changed Circumstances Reviews

- Certain Corrosion-Resistant Steel Products From the Republic of Korea: On November 16, 2023, Commerce issued its final [results](#) of antidumping duty changed circumstances review.

Sunset Reviews

- Drawn Stainless Steel Sinks From the People’s Republic of China: On November 1, 2023, Commerce issued its final [results](#) of the expedited second sunset review of the antidumping duty order.
- Ripe Olives From Spain: On November 3, 2023, Commerce issued its final [results](#) of the expedited first sunset review of the countervailing duty order.
- Ripe Olives From Spain: On November 3, 2023, Commerce issued its final [results](#) of the expedited first sunset review of the antidumping duty order.
- Cast Iron Soil Pipe Fittings From the People’s Republic of China: On November 6, 2023, Commerce issued its final [results](#) of the expedited first sunset review of the countervailing duty order.
- Cast Iron Soil Pipe Fittings From the People’s Republic of China: On November 6, 2023, Commerce issued its final [results](#) of the expedited first sunset review of the antidumping duty order.

Scope Ruling

- None

Circumvention

- Certain Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: On November 9, 2023, Commerce issued its final affirmative [determination](#) of circumvention of the antidumping duty order.
- Certain Welded Carbon Steel Standard Pipes and Tubes From India: On November 9, 2023, Commerce issued its final affirmative [determination](#) of circumvention of the antidumping duty order.
- Circular Welded Carbon Quality Steel Pipe From the People’s Republic of China: On November 9, 2023, Commerce issued its final affirmative [determination](#) of circumvention of the antidumping duty and countervailing duty orders.
- Light-Walled Rectangular Pipe and Tube From the People’s Republic of China: On November 9, 2023, Commerce issued its final affirmative [determination](#) of circumvention of the antidumping duty and countervailing duty orders.
- Light-Walled Rectangular Pipe and Tube From the Republic of Korea: On November 9, 2023, Commerce issued its final affirmative [determination](#) of circumvention of the antidumping duty order.
- Light-Walled Welded Rectangular Carbon Steel Tubing From Taiwan: On November 9, 2023, Commerce issued its final affirmative [determination](#) of circumvention of the antidumping duty order.
- Fresh Garlic From the People’s Republic of China: On November 14, 2023, Commerce issued its preliminary affirmative [determination](#) of circumvention.
- Antidumping and Countervailing Duty Orders on Certain Aluminum Foil From the People’s Republic of China: On November 27, 2023, Commerce issued its final affirmative [determinations](#) of circumvention with respect to the Republic of Korea and the Kingdom of Thailand.

U.S. INTERNATIONAL TRADE COMMISSION

Section 701/731 Proceedings

Investigations

- Aluminum Extrusions From China, Colombia, Dominican Republic, Ecuador, India, Indonesia, Italy, Malaysia, Mexico, South Korea, Taiwan, Thailand, Turkey, United Arab Emirates, and Vietnam: On November 27, 2023, the ITC issued its preliminary affirmative [finding](#) that there was the likelihood of material injury to the U.S. domestic industry and continued the investigations.

U.S. CUSTOMS & BORDER PROTECTION

[EAPA Case 7814: Texas United Chemical Company, LLC](#)

On November 8, 2023, the CBP issued a Notice of Initiation of Investigation and Interim Measures related to Texas United Chemical Company, LLC (“Texas United”), which is affiliated with and/or operates as TBC-Brinadd, LLC (“TBC-Brinadd”), collectively referred to as “Importer” or Texas United.” The CBP is investigating whether the Importer evaded antidumping duty (“AD”) order A-570-985 on xanthan gum from the People’s Republic of China (“China”). CBP found that reasonable suspicion exists that the Importer entered covered merchandise for consumption into the customs territory of the United States through evasion by transshipping Chinese-origin xanthan gum (“xanthan gum” or “the covered merchandise”) through Turkey by the shipper, Neu Kimya Anonim Sirketi (“Neu Kimya”). As a result, CBP is issuing a formal notice of initiation of investigation and interim measures (“Notice”).

COURT OF INTERNATIONAL TRADE

Summary of Decisions

[Slip Op. 23-157 Valeo North America v. United States](#)

The Court sustained Commerce’s redetermination that plaintiff Valeo North America, Inc.’s (Valeo) T-series aluminum sheet was subject to antidumping and countervailing duties on common alloy aluminum sheet (CAAS) from China. The Court had remanded Commerce’s determination that Valeo’s T-series aluminum sheet is an in-scope aluminum product with a “3XXX-series” core, because the scope language was ambiguous as to whether it includes alloys that are unregistered with the Aluminum

Association, such as Valeo's product. The Court also remanded for Commerce to address evidence that Valeo's product undergoes heat-treatment in light of evidence that 3XXX-series alloys are not heat treatable.

In its remand redetermination, Commerce relied on a publication by the Aluminum Association, as well as on non-public information from the original investigation, to analyze the contested scope language, and the Court determined that Commerce provided a reasoned explanation for its conclusion that registration with the Aluminum Association is not necessary for in-scope inclusion. As to the question of heat treatment, Commerce determined on remand that Valeo's product did not undergo heat treatment, but rather, underwent a combination of annealing and cold-working that did not preclude classification as a 3XXX series-alloy. The Court ruled that Valeo did not present a cogent challenge to that aspect of Commerce's determination.

Finally, in response to Valeo's argument that Commerce must revoke the suspension of liquidation instructions regarding Valeo's imports of aluminum sheet, the Court found that Commerce appropriately adhered to its regulations by not revoking the instructions.

[Slip Op. 23-158 Saha Thai Steel Pipe v. United States](#)

In a case involving the 2019-2020 administrative review of the antidumping duty order on circular welded carbon steel pipes from Thailand, the Court granted in part and denied in part petitioner Saha Thai Steel Pipe Public Company Ltd.'s (Saha Thai) motion for judgment on the agency record. At issue was (1) whether Commerce legally applied adverse facts available (AFA) in finding that Saha Thai was affiliated with seven companies and (2) whether Saha Thai timely opposed Commerce's inclusion of pipe that was potentially not subject to the AD order and thus incorrectly used in calculating Saha Thai's AD margin.

As to the first issue, Saha Thai reported during the administrative review that it had no potential affiliates, e.g., persons involved in the development, production, resale, etc. of subject pipe. Subsequently, one of the defendant-intervenors submitted publicly available information identifying seven unreported affiliates of Saha Thai, one of which shared a human resource manager with Saha Thai. In ruling on this issue, the Court segregated its analysis between the six companies appearing to be affiliated via stock ownership/family board membership, and the seventh company with whom Saha Thai shared a human resource manager. For the first six companies, the Court sustained Commerce's reliance on AFA, as these companies were affiliated through majority stock ownership/board membership and this evidence met the legal affiliation standard. However, for the seventh company, the Court ruled that the "the sharing of a single human resource manager is insufficient for a reasonable mind to conclude that [this company] and Saha Thai are affiliated." The Court remanded the matter of the seventh company to Commerce to perform a proper affiliation analysis.

The second matter in dispute concerned an intervening decision in which the Court ruled that dual-certified pipe was not subject to the scope of the antidumping order at issue. The matter is currently on appeal before the Court of Appeals for the Federal Circuit (CAFC). As a result, in the current litigation, Saha Thai amended its original complaint, claiming that Commerce should correct its margin calculation as a result of the intervening decision. While Commerce initially argued that administrative exhaustion prohibits Saha Thai's arguments, at oral argument the Government took the position that the scope of the antidumping orders could be a question of pure law and requested that the Court structure any remand to allow it to align the agency's position with that of the CAFC. The Court interpreted this as a request for voluntary remand, which it granted.

[Slip Op. 23-159 BGH v. United States](#)

In the countervailing duty investigation of forged steel fluid end blocks from Germany, the Court remanded, for a third time, Commerce's determination that a government energy subsidy program is countervailable. In the underlying investigation, Commerce determined that the "Konzessionsabgabenverordnung," or the "KAV" program, was countervailable because it was limited to a subset of customers whose energy usage exceeded a certain wattage per month and year. The Court noted that while a subsidy limited to a "sufficiently small" number of industries does not in and of itself render it countervailable, if the program is available widespread, that is, available on an "objective" basis, that program constitutes a countervailable subsidy. The Court therefore remanded to Commerce for further explanation or reconsideration with respect to its determination that the KAV program is a countervailable subsidy.

[Slip Op. 23-160 AG Der Dillinger v. United States](#)

In a case involving Commerce's antidumping investigation of certain carbon and alloy steel cut-to-length plate from Germany, the Court granted consolidated plaintiffs' (collectively, Salzgitter) motion for entry of a partial judgment regarding Commerce's determination regarding challenges raised by Salzgitter. In that determination, Commerce applied partial AFA to certain sales for which Salzgitter could not identify and report the manufacturer. In response to Salzgitter's motion, the Government confirmed that granting the motion would not threaten piecemeal resolution of the matters remaining in the case, which involve other interested parties and are not relevant to Salzgitter. As a result, the Court granted the motion for entry of a partial judgment, allowing Salzgitter the opportunity to immediately appeal if it chooses.

[Slip Op. 23-161 Risen Energy et al. v. United States](#)

The Court again remanded to Commerce the sixth administrative review of the countervailing duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules, from China. Just last month, the Court remanded to Commerce to (1) attempt to verify information provided by plaintiff Risen Energy Co., Ltd. (Risen) showing that it did not benefit from the Export Buyer's Credit Program (EBCP), a program that provides credit at preferential interest rates to qualifying purchasers of goods from the Government of China; (2) explain or recalculate its land benchmark benefit involving certain land leases; and (3) explain why the data Commerce used to calculate the ocean freight benefit was supported by substantial evidence.

With respect to the first issue, the EBCP, Commerce requested on remand that Risen's unaffiliated customers participate in verification, one of which declined. Because this customer accounted for a significant portion of Risen's sales, Commerce concluded that verification was not possible because the customer's refusal to participate "would leave an insurmountable gap in the record." Commerce therefore again relied on AFA in finding that Risen had benefited from the EBCP. The Court found, however, that Commerce's request for unaffiliated customers to participate in verification is "onerous" and "unreasonable," given the amount of time that has passed since the period of review and the expense involved. Further, Commerce presented no evidence that customers' non-use statements were inaccurate. Remanding this issue again, the Court ordered Commerce to not include a subsidy amount for EBCP.

With respect to the landmark benchmark matter, Commerce explained in its redetermination why it relied on its original data source as a benchmark, and it also used another Malaysian data source. The Court remanded the matter back to Commerce, as it exceeded its remand mandate by combining two data sources, rather than simply explaining its reliance on the original source. On the ocean freight matter, Commerce recalculated using only a secondary source of data. No party contested the ocean freight determination and the Court affirmed.

[Slip Op. 23-162 Sweet Harvest Foods v. United States](#)

The Court upheld the International Trade Commission's (ITC) final affirmative critical circumstances determination in the antidumping investigation of raw honey imports from Vietnam. Plaintiffs, U.S. honey importers, challenged the ITC's determination, arguing that the ITC focused on the wrong period and failed to consider the most recent data. Plaintiffs also argued that even if the ITC analyzed the correct period, it still reached an unreasonable determination that was not supported by substantial evidence.

Regarding the period of review, the Court ruled that the ITC correctly reviewed imports occurring during the period after the filing of the antidumping petition and before suspension of liquidation occurred. As for the substantial evidence arguments, plaintiffs contended that the ITC ignored two key pieces of evidence: (1) information demonstrating that the U.S. industry was experiencing severe shortages and its inability to supply customers at the end of the period of investigation; and (2) information demonstrating that U.S. honey producers would not be losing any sales opportunities as a result of Vietnamese imports. The Court found, however, that the ITC persuasively explained why evidence of "severe shortages" of honey would not be likely to undermine the antidumping order, namely, that the evidence did not pertain to domestically produced honey. Regarding lost sales opportunities, the ITC responded that, notwithstanding where the honey was in the supply chain, substantial increases in imports would result in downward prices and thus continued underselling. The Court concluded that the ITC's affirmative critical circumstances determination was reasonable.

[Slip Op. 23-163 Lumber Int'l Trade v. United States](#)

The Court granted Canadian exporters' motion to reinstate the exclusion to the countervailing duty (CVD) order on softwood lumber from Canada. In the CVD investigation, Commerce calculated de minimis subsidy rates for the respondents. In reviewing the original administrative determination, the Court reinstated the CVD order with respect to the excluded exporters, and the exporters were then required to start posting CVD cash deposits on their entries. The CAFC, however, reversed the Court's ruling. In deciding the present motion, the Court reinstated the exclusion back to the date of the Court's original order, and it ordered Commerce to instruct CBP to liquidate the Canadian exporters' entries without the assessment of CVD duties.

[Slip Op. 23-164 Goodluck India v. United States](#)

The Court upheld Commerce's liquidation instructions regarding plaintiff Goodluck India Limited's (Goodluck) cash deposit amount. In the antidumping (AD) investigation on cold-drawn mechanical tubing of carbon and alloy steel (CDMT), Commerce relied on adverse facts available (AFA) in calculating Goodluck's margin, which it challenged in Court (Goodluck I). Upon remand to consider information it had rejected during its investigation, Commerce recalculated Goodluck's AD margin to zero percent. As required by law, Commerce then published notice in the Federal Register that it had revoked from the AD order CDMT produced and exported by Goodluck. Prior to the Timken Notice, Commerce initiated the first administrative review, in which it discontinued the review as to Goodluck upon concluding that it had no reviewable entries. In the second administrative review, Goodluck again requested a review, but Commerce again concluded that Goodluck did not have reviewable entries. In the third administrative review, Goodluck did not request a review of itself, nor did any other party.

Shortly after the initiation of AR3, the CAFC reversed Goodluck I, ruling that Commerce's initial rejection of Goodluck's information and reliance on AFA was lawful. Commerce subsequently reinstated the AD order as to Goodluck in AR1, AR2, and provided parties with a 14-day window to withdraw their request/s for AR3. However, as no party requested a review of Goodluck, Commerce instructed CBP to liquidate Goodluck's entries at the originally calculated 33.7 percent rate, effective September 10, 2021. In response, Goodluck filed this case, arguing that the Timken Notice was unlawful because it deprived Goodluck of its right to have its entries reviewed in AR3. Goodluck also argued that even if Commerce lawfully issued its AR3 liquidation instructions, the rate should have been zero. The Court disagreed on all counts.

First, Commerce's liquidation of Goodluck's AR3 was in line with Commerce's rules and was therefore lawful. "Automatic liquidation," as it is known, occurs when no timely requests for a review for a particular exporter is made. Goodluck could have requested review in AR3, as it met the requisite "exporter or producer" status, notwithstanding the Timken Notices' exclusion of CDMT "produced and exported" by Goodluck, but it did not avail itself of this opportunity. Second, with respect to Goodluck's due process argument, the Court ruled that Commerce satisfied its regulatory and statutory obligations of notice, and the fact that Goodluck requested to be reviewed in AR2 demonstrates that it had notice of its rights regarding AR3. Third, Commerce's AR3 liquidation at 33.7 percent was lawful, because the Timken Notice made clear that liquidation at the zero percent rate was subject to "the pendency of the appeals process." Finally, the Court ruled that, while Commerce did not provide an explanation for the effective date of September 10, 2021, the error was harmless, as that date falls within the ongoing fourth administrative review, which will result in Goodluck either receiving an interest refund or credit.

[Slip Op. 23-165 Wilmar Trading v. United States](#)

The Court's opinion remains confidential as of the date of this newsletter and a summary will be provided in the December Trade Law Update.

[Slip Op. 23-166 Kumar Industries v. United States](#)

The Court upheld Commerce's decision to assess antidumping duties on Goodluck India's entries of cold-drawn mechanical tubing made during the period covered by the third administrative review of the antidumping duty (AD) order. In upholding Commerce's decision, the Court found that while Goodluck's entries prior to the review period were excluded, the exporter itself was not excluded from the order. The Court also found that there was no error by Commerce in ordering liquidation at the original antidumping duty rate of 33.7 percent, and not at the provisional rate of zero percent. Goodluck mistakenly believed that due to ongoing litigation, it was not subject to the order and chose not to request review. This belief stemmed from Commerce issuing a Timken Notice that specifically stated that the "merchandise produced and exported by Goodluck" was excluded from the AD order, not that Goodluck as an entity was excluded. The Court disagreed with Goodluck's reading of the order and agreed that Commerce's finding was not contrary to its regulations.

[Slip Op. 23-167 Kaptan Demir v. United States](#)

The Court sustained Commerce’s remand redetermination that steel scrap was not an input “primarily dedicated” to the production of rebar. The case stems from 2018 administrative review of the countervailing duty order on rebar from Turkey, in which Commerce determined that subsidies received by Nur Gemicilik ve Ticaret A.S. (Nur) should be attributed to its affiliate Kaptan Demir Celic Endustrisi ve Tiaret A.S. (Kaptan), which was the respondent in the underlying administrative review. In a preceding opinion, the Court remanded with instructions to Commerce to fully explain how it had determined that steel scrap was a key input.

On remand, Commerce reconsidered and determined that (1) Nur’s production of steel scrap was not primarily dedicated to Kaptan’s production of rebar, (2) that steel scrap can be used in a variety of products, and that (3) Nur’s primary business activity is shipbuilding and therefore not “primarily dedicated” to Kaptan’s production of rebar. Sustaining Commerce’s remand, the Court ruled that Commerce’s analysis was lawful and that, accordingly, defendant-intervenors’ (domestic producers of rebar) arguments were meritless.

[Slip Op. 23-168 Risen Energy Co. v. United States](#)

The Court ruled that plaintiff, Risen Energy, may not amend its complaint to add an additional claim challenging Commerce’s decision to countervail China’s Article 26(2) tax program in its challenge to the CVD order on solar cells from China, due to the fact that the issue was not raised at the administrative level, and Risen had therefore failed to exhaust its administrative remedies. Risen sought to add the claim because in a separate decision, the tax program was found to be countervailable. The Court determined that the countervailability of the tax program was not a pure question of law that could result in waiver of the exhaustion doctrine, as it would require factual information on the record. The Court further stated that its decision in the parallel case does not mean that it would have reached the same result in the instant case, as that decision found that Commerce had failed to properly defend its specificity analysis.

[Slip Op. 23-169 Ninestar Corp. v. United States](#)

In the first opinion addressing the Uyghur Forced Labor Prevent Act (UFLPA) Entity List, the Court found that it likely has subject matter jurisdiction to review a challenge to the UFLPA Entity List. The plaintiff, Ninestar, brought a motion for a preliminary injunction against its placement on the list. The Court determined that jurisdiction will likely exist under the Court’s “residual” jurisdiction provision, which covers any civil action regarding “embargoes or other quantitative restrictions.” Further, the Court stated that the “prohibition on importing goods produced with nonvoluntary labor is a longstanding principle of U.S. trade and customs law that falls within Court’s expertise.” The Court relied on a 1988 Supreme Court decision, *K Mart Corp. v. Cartier*, which held that an “embargo” under the Court’s residual jurisdiction provision is a “governmentally imposed quantitative restriction -- of zero -- on the importation of merchandise.” In addition, because the Court residual jurisdiction provision covers challenges brought pursuant to Section 307 of the Trade Act of 1930 related to forced labor, for consistency’s sake, challenges to the UFLPA should also reside under the same jurisdictional provision. While the Court’s ruling was narrowly focused on the issue of jurisdiction, the remaining issues can now proceed.

COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[Appeal No. 2022-1392 Solar Energy Industries v. United States](#)

The CAFC found that the President has discretion to modify Section 201 duties under Section 2254(b)(1)(B) of the Trade Act of 1930, which allows for trade-restricting modifications in addition to trade-liberalizing ones. The core issue on appeal was whether the revocation of an exclusion from Section 201 duties for solar cells qualifies as a modification of the existing safeguard measures. The Court of International Trade had ruled that the revocation did not qualify as a modification, but the CAFC disagreed. In so ruling, the CAFC examined the statutory language and noted that there is silence as to whether “modify” includes a trade-restrictive change but that “the statute simply does not contain the narrowing limitation the [Court of International Trade] read into it.” The CAFC also found that the President did not violate any procedures in revoking the tariff exclusion, and that the statute does not require the President to reweigh the costs and benefits prior to modifying a trade action.