C-122-858
Remand
Court No. 19-00122
POR: 1/1/2015 – 12/31/2015
Public Document
E&C OFIII: KJ

Committee Overseeing Action for Lumber International Trade Investigations or Negotiations, et al. v. United States, et al.,
Court No. 19-00122, Slip Op. 20-167
(CIT November 19, 2020)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

A. Summary

The Department of Commerce (Commerce) has prepared these final results of redetermination in accordance with the opinion and remand order of the U.S. Court of International Trade (CIT or Court), issued on November 19, 2020, in *Committee Overseeing Action for Lumber International Trade Investigations or Negotiations, et al. v. United States, et al.*, Court No. 19-00122, Slip Op. 20-167 (CIT 2020) (*Remand Order*). These final results of redetermination concern Commerce's final results in the countervailing duty (CVD) expedited review of certain softwood lumber products from Canada, in which Commerce stated that section 103(a) of the Uruguay Round of Agreements Act (URAA) provides the statutory authority for promulgation of its CVD expedited review regulations at 19 CFR 351.214(k).[1]

On January 6, 2021, Commerce issued the Draft Results of Redetermination (Draft Remand).[2] In the Draft Remand, pursuant to the CIT's remand instruction for the *Final Results*

[1] *See Certain Softwood Lumber Products from Canada: Final Results of Countervailing Duty Expedited Review*, 84 FR 32121 (July 5, 2019) (*Final Results of Expedited Review*), and accompanying Issues and Decision Memorandum (IDM) at Comment 1 (citing section 103(a) of the URAA, Pub. L. No. 103-465, 108 Stat. 4809 (1994)).
[2] *See* Draft Results of Redetermination Pursuant to Court Remand, *Committee Overseeing Action for Lumber International Trade Investigations or Negotiations, et al. v. United States, et al.*, Court No. 19-00122, Slip Op. 20-167 (CIT 2020).

of Expedited Review, Commerce reconsidered the statutory basis upon which it promulgated its CVD expedited review regulations at 19 CFR 351.214(k) to determine individual subsidy rates for companies not individually examined in an investigation.[3]

In accordance with the *Remand Order*, the Draft Remand presumed that Commerce did not have the statutory authority to promulgate the CVD expedited review regulations, 19 CFR 351.214(k), pursuant to sections 103(a) and 103(b) of the URAA, and that Congress did not acquiesce to Commerce's conduct of CVD expedited reviews and promulgation of 19 CFR 351.214(k) when Congress failed to prohibit explicitly CVD expedited reviews in recent amendments to the Tariff Act of 1930, as amended (the Act). Furthermore, Commerce considered the alternative legal authorities argued by the U.S. government,[4] and jointly by the Canadian Governmental Parties,[5] and determined that those alternative authorities did not provide Commerce with express statutory authority to promulgate the CVD expedited review regulations at 19 CFR 351.214(k).

On January 21, 2021, the Canadian Parties[6] and the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (Plaintiff or COALITION) submitted comments concerning the Draft Remand.[7]

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[3] *See Remand Order* at 34-35.
[4] *See* ECF No. 111 at 6-14.
[5] *See* ECF No. 120 at 4-27. The Canadian Governmental Parties are the Government of Canada (GoC) and Government of Quebec (GoQ).
[6] The Canadian Parties are the GoC, GoQ, the Government of New Brunswick, the Conseil de l'industrie forestière du Québec, Fontaine Inc., Les Produits Forestiers D&G Ltée (D&G), Marcel Lauzon Inc. (MLI), Scierie Alexandre Lemay & Fils Inc. (Lemay), Mobilier Rustique (Beauce) Inc., and North American Forest Products Ltd. (NAFP).
[7] *See* Canadian Parties' Letter, "Certain Softwood Lumber from Canada: Comments on Draft Results of Redetermination," dated January 21, 2021 (Canadian Parties' Draft Remand Comments); *see also* COALITION's Letter, "Certain Softwood Lumber Products from Canada: Comments on Draft Results for Redetermination Pursuant to Remand in the Countervailing Duty Expedited Review of Certain Softwood Lumber Products from Canada," dated January 21, 2021 (COALITION's Draft Remand Comments).

For the reasons discussed below and after consideration of the comments submitted, Commerce determines in these final results of redetermination that section 103(a) of the URAA, as well as the other legal authorities presented to the CIT, cannot be the basis for the promulgation of the CVD expedited review regulations under 19 CFR 351.214(k) and, thus, Commerce lacks the statutory authority to conduct CVD expedited reviews.

B. Background

1. The CVD Expedited Review Regulations

Article 19.3 of the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (SCM Agreement), provides, in relevant part:

> Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

In 1994, through the URAA, Congress approved the SCM Agreement and made several amendments to the antidumping and countervailing duty provisions of the Act.[8] The Statement of Administration Action (SAA)[9] accompanying the URAA, stated the following in the section entitled "Company-Specific Subsidy Rates and Expedited Reviews":

> Pursuant to existing section 706(a)(2), Commerce normally calculates a country-wide rate applicable to all exporters unless there is a significant differential in CVD rates between companies or if a state-owned company is involved. Article 19.3 of the Subsidies Agreement provides that any exporter whose exports are subject to a CVD order, but which was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review to establish an individual CVD rate for that exporter.
>
> Several changes must be made to the Act to implement the requirements of Article 19.3 of the Subsidies Agreement.[10]

[8] *See* URAA, Pub. L. No. 103-465, 108 Stat. 4809 (1994).
[9] *See* Section 102(d) of the URAA (The SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.").
[10] *See* SAA, H.R. Doc. 103-316, Vol. I at 870 (1994), reprinted at 1994 U.S.C.C.A.N. 4040, 4199, at 941.

As explained in the SAA, sections 264 and 265 of the URAA implemented some of the requirements of Article 19.3 of the SCM Agreement.[11] However, sections 264 and 265 did not implement the particular requirement in Article 19.3 of the SCM Agreement for expedited CVD reviews. In other words, despite the recognition by Congress of the need to apply expedited reviews for those "not actually investigated other than a refusal to cooperate" in the SAA, the Act did not set forth the procedures by which expedited reviews of non-investigated exporters or producers in CVD proceedings would be conducted.

In February 1996, Commerce published its *Proposed Rule* laying out the procedures for conducting CVD expedited reviews under the regulations for new shipper reviews at proposed section 351.214(k) of Commerce's regulations.[12] The *Proposed Rule Preamble* explained:

> To implement Article 19.3 of the SCM Agreement, paragraph (k) expands the new shipper review procedure to cover exporters that were not individually examined in a countervailing duty investigation where the Secretary limited the investigation under section 777A(e)(2)(A) of the Act.[13]

Commerce published its *Final Rule* in May 1997 and restated in the *Preamble* that "paragraph (k) implements Article 19.3 of the SCM Agreement…Article 19.3 requires expedited reviews for exporters that were not 'actually investigated' in a CVD investigation."[14] Commerce's final CVD expedited review regulations were issued under 19 CFR 351.214(k).

2. Softwood Lumber CVD Expedited Review

On January 3, 2018, Commerce published the CVD order on softwood lumber from Canada.[15] On March 8, 2018, in response to requests filed by certain Canadian producers and

[11] *Id.* at 941-942.
[12] *See Antidumping Duties; Countervailing Duties; Proposed Rule*, 61 FR 7308, 7317-7319 (Feb. 27, 1996) (*Proposed Rule* and *Proposed Rule Preamble*).
[13] *See Proposed Rule Preamble*, 61 FR at 7318.
[14] *See Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27322 (May 19, 1997) (*Final Rule* and *Preamble*).
[15] *See Certain Softwood Lumber Products from Canada: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 83 FR 347 (January 3, 2018) (*CVD Order*).

exporters, Commerce initiated an expedited review of the *CVD Order* pursuant to 19 CFR 351.214(k).[16] The companies subject to the expedited review were not selected as mandatory or voluntary respondents in the CVD investigation and were subject to the all-others rate of 14.19 percent.[17] The period of review for the expedited review was the same as for the CVD investigation, *i.e.*, January 1, 2015, through December 31, 2015.[18]

On July 5, 2019, Commerce published the *Final Results of Expedited Review*, in which Commerce explained that it promulgated 19 CFR 351.214(k) pursuant to section 103(a) of the URAA.[19] Specifically, Commerce explained that Article 19.3 of the SCM Agreement expressly provides for expedited reviews of non-investigated exporters or producers in CVD proceedings and that the SAA states that "Article 19.3 of the Subsidies Agreement provides that any exporter whose exports are subject to a CVD order, but which was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review to establish an individual CVD rate for that exporter."[20] Commerce further noted that although the SAA provides that "{s}everal changes must be made to the Act to implement the requirements of Article 19.3 of the Subsidies Agreement," the URAA did not implement a specific provision for the conduct of CVD expedited reviews in the Tariff Act.[21] However, Commerce concluded that under section 103(a) of the URAA, Congress delegated to Commerce the authority to promulgate regulations to ensure that remaining obligations under the URAA that were not set forth in a particular provision of the Act were set forth in Commerce' regulations.[22] Section 103(a) of the

[16] *See Certain Softwood Lumber Products from Canada: Initiation of Expedited Review of the Countervailing Duty Order*, 83 FR 9833 (March 8, 2018) (*Initiation Notice*).
[17] *See CVD Order*, 83 FR at 348.
[18] *See Initiation Notice*, 83 FR at 9833.
[19] *See Final Results of Expedited Review* IDM at 19.
[20] *Id.* at 18 (citing SAA at 941).
[21] *Id.* at 18-19 (citing SAA at 941).
[22] *Id.* at 19.

URAA provides that "appropriate officers of the United States Government may issue such regulations, as may be necessary to ensure that any provision of this Act, or amendment made by this Act,… is appropriately implemented…."[23] Commerce reasoned that it was an "appropriate officer{} of the United States Government" with the authority to promulgate the CVD expedited review regulations at 19 CFR 351.214(k) to ensure that all provisions of U.S. law are consistent with U.S. obligations under the URAA.[24]

After determining that it had statutory authority to conduct the expedited review, Commerce found that among the eight companies subject to the CVD expedited review: (1) five of the companies each had a *de minimis* subsidy rate and were, therefore, excluded from the *CVD Order*;[25] and (2) three of the companies were entitled to individual countervailing duty cash deposit rates ranging from 1.26 percent to 5.80 percent.[26]

3. The Court's *Remand Order*

The COALITION challenged Commerce's *Final Results of Expedited Review*, arguing, *inter alia*, that Commerce exceeded the congressional grant of rulemaking authority set forth in section 103(a) of the URAA when the agency promulgated the regulation governing CVD expedited reviews, 19 CFR 351.214(k), pursuant to that statutory provision.[27]

In its *Remand Order*, the CIT held that Commerce exceeded its authority in promulgating the CVD expedited review regulations pursuant to section 103(a) of the URAA.[28] The CIT reasoned that section 103(a) of the URAA only authorizes Commerce to issue regulations for

[23] *Id.* at 19 (citing section 103(a) of the URAA).
[24] *Id.* at 19.
[25] The five companies are: D&G, Lemay, MLI, NAFP (located in New Brunswick), and Roland Boulanger & Cie Ltée (Roland). *See Final Results of Expedited Review*, 84 FR at 32122.
[26] The three companies are: Fontaine Inc., Mobilier Rustique (Beauce) Inc., and Produits Matra Inc. and Sechoirs de Beauce Inc. *See Final Results of Expedited Review*, 84 FR at 32122.
[27] *See Remand Order* at 4.
[28] *Id.* at 17.

enacted provisions of the URAA, and not for perceived international obligations Congress did not implement in the URAA.[29] Because the URAA does not contain a provision explicitly authorizing CVD expedited reviews, the CIT held that section 103(a) cannot be the basis of Commerce's authority for promulgating its CVD expedited review regulations.[30] The CIT stated that its conclusion is further reinforced by the fact that the Uruguay Round Agreements are not self-executing, but must be enacted into U.S. law through implementing legislation.[31]

The CIT also disagreed with the U.S. government's and Canadian Governmental Parties' argument that the SAA accompanying the URAA evidences Congressional intent that Commerce conduct CVD expedited reviews.[32] The SAA acknowledges that Article 19.3 of the SCM Agreement entitles a non-investigated exporter to an expedited review to establish an individual CVD rate for that exporter.[33] However, the CIT explained that, although the SAA discusses amendments that were needed to several sections of the Act to implement Article 19.3 of the SCM Agreement, the SAA does not propose any actions for the implementation of CVD expedited reviews.[34] The CIT, therefore, held that the SAA does not indicate legislative intent that Commerce conduct CVD expedited reviews.[35]

Because the SAA does not discuss the implementation of CVD expedited reviews, the CIT also held that Commerce's regulations at 19 CFR 351.214(k) are not, as argued by both the U.S. government and the Canadian Governmental Parties,[36] authorized by section 103(b) of the

[29] *Id.* at 17-18.
[30] *Id.* at 20-21.
[31] *Id.* at 22.
[32] *Id.* at 25-26 (citing ECF No. 111 at 7-8; ECF No. 120 at 10-11).
[33] *Id.* at 25-26 (citing SAA at 941).
[34] *Id.* at 6.
[35] *Id.* at 27.
[36] *See* ECF No. 111 at 9-10; ECF No. 120 at 12. Commerce did not cite section 103(b) of the URAA in the *Final Results of Expedited Review*, but the U.S. government invoked the provision in its briefing to the Court. *See* ECF No. 111 at 4, 9-10.

URAA, which provides for the issuance of "{a}ny interim regulation necessary or appropriate to carry out any action proposed in the {SAA}"[37]

Finally, the CIT held that Congress had not, in failing to explicitly prohibit CVD expedited reviews in recent amendments to the Act, acquiesced to Commerce's interpretation of section 103(a) of the URAA as authorizing Commerce to implement regulations for conducting CVD expedited reviews, as argued by the Canadian Governmental Parties in their brief and advanced by the U.S. government at oral argument.[38]

In addition to sections 103(a) and 103(b) of the URAA, the U.S. government and the Canadian Governmental Parties offered several additional grounds for Commerce's administration of CVD expedited reviews and promulgation of its regulations at 19 CFR 351.214(k). Specifically, the U.S. government also argued that CVD expedited reviews are not expressly prohibited by law, and Commerce's inherent authority to reconsider previously closed proceedings authorized it to conduct CVD expedited reviews, in compliance with the U.S. government's international obligations, and reconsider its determinations in CVD investigations.[39] The U.S. government also explained that under section 101(a) of the URAA, Congress approved the trade agreements resulting from the Uruguay Rounds, including the SCM Agreement, and demonstrated an intent that Commerce conduct expedited reviews.[40] The Canadian Governmental Parties also cited sections 101(a) and 101(b) of the URAA.[41] Section 101(a) of the URAA generally provides that "Congress approves…the trade agreements

[37] *See Remand Order* at 23-24.
[38] *Id.* at 28-32 (citing ECF No. 120 at 18, footnote 11; ECF Nos. 166, 168 (Oral Argument), at 26:50-28.45).
[39] *See* ECF No. 111 at 4, 12-13 (citing *GTNX, Inc. v. INTTRA, Inc.*, 789 F.3d 1309, 1313 (Fed. Cir. 2015) (*GNTX*) (quoting *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360 (Fed. Cir. 2008) (*TKS*) ("{A}dministrative agencies possess inherent authority to reconsider their decisions, subject to certain limitations, regardless of whether they possess explicit statutory authority to do so.")).
[40] *See* ECF No. 111 at 7, 11 (citing sections 101(a) and 101(d)(12) of the URAA).
[41] *See* ECF No. 120 at 7-10.

described in {section 101(d)} resulting from the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Trade and Tariffs."[42] The SCM Agreement is one of the agreements described in section 101(d) of the URAA.[43] Section 101(b) of the URAA further provides that the President, "to ensure the effective operation of, and adequate benefits for the United States under {the Uruguay Round Agreements}…may accept the Uruguay Round Agreements."[44] The Canadian Governmental Parties argued that section 103(a) of the URAA allows Commerce to issue its expedited review regulations to implement sections 101(a) and (b) of the URAA, which approve the Uruguay Round Agreements, including the SCM Agreement.[45]

The Canadian Governmental Parties also cited sections 705(c), 751(a), 751(b), and 77A(e) of the Act as bases of authority for Commerce to conduct CVD expedited reviews.[46] Rather than issuing judgment on these alternative authorities, the CIT remanded the *Final Results of Expedited Review* for Commerce to either reconsider the statutory basis for its CVD expedited review regulations, or to take action in conformity with the CIT's opinion.[47] The CIT held that 19 CFR 351.214(k) would remain in effect pending resolution of this case.[48]

C. Analysis

We have considered the CIT's analysis in its *Remand Order* in reassessing our reliance on section 103(a) of the URAA as the statutory basis for promulgating the CVD expedited review regulations at 19 CFR 351.214(k). We observe that section 103(a) of the URAA authorizes U.S. government officers to issue the necessary regulations to ensure implementation

[42] *See* section 101(a)(1) of the URAA.
[43] *See* section 101(d)(12) of the URAA.
[44] *See* section 101(b) of the URAA.
[45] *See* ECF No. 120 at 7-10.
[46] *Id.* at 14-26.
[47] *See Remand Order* at 3-4, 33-35.
[48] *Id.* at 34.

of "any provision of this Act, or amendment made by this Act…" Consistent with the CIT's analysis and opinion, we are issuing these final results of redetermination which presume that this provision of the URAA does not provide Commerce with the authority to promulgate its CVD expedited review regulations at 19 CFR 351.214(k).

Furthermore, the SAA does not specifically discuss implementation of CVD expedited reviews. Thus, these final results of redetermination similarly presume, consistent with the CIT's holding and analysis, that neither the SAA itself, nor section 103(b) of the URAA, serve as the basis for promulgating the CVD expedited review regulations at 19 CFR 351.214(k).[49]

Finally, in accordance with the CIT's analysis, we are presuming on remand that Congress's failure to prohibit CVD expedited reviews in recent amendments to the Act does not equate to an explicit grant of Congressional authority to conduct CVD expedited reviews and promulgate the CVD expedited review regulations at 19 CFR 351.214(k), pursuant to section 103(a) of the URAA.

We have furthermore reviewed the alternative legal bases proposed by the U.S. government and Canadian Governmental Parties as potential statutory authorities for Commerce's promulgation of its CVD expedited review regulations at 19 CFR 351.214(k). First, the U.S. government cited case law and lack of explicit legal prohibition to CVD expedited reviews to argue that an agency's inherent authority to reconsider previous decisions authorizes Commerce to reconsider final determinations through CVD expedited reviews.[50] Upon consideration of this argument, we have concluded that Commerce's inherent authority to reconsider prior decisions, and lack of an explicit prohibition on CVD expedited reviews, do not

[49] *See* SAA at 941.
[50] *See* ECF No. 111 at 12-14 (citing *GNTX*, 789 F.3d at 1313; and *TKS*, 529 F.3d at 1360).

equate to specific statutory authorization under the URAA to conduct CVD expedited reviews and promulgate CVD expedited review regulations.

With respect to section 101 of the URAA, we observe that although Congress approved the Uruguay Round agreements, including the SCM Agreement, under section 101 of the URAA, section 101 does not make specific reference to, or provide explicit provision for, the implementation of CVD expedited reviews. Therefore, we do not find that the general reference under section 101 of the URAA to Congress's approval of the SCM Agreement equates to express authority to promulgate the CVD expedited review regulations under 19 CFR 351.214(k) through section 103(a) of the URAA.

Furthermore, we find that sections 705(c), 751(a), 751(b), and 777A(e) of the Act do not specifically address CVD expedited reviews or provide Commerce with explicit authority to conduct CVD expedited reviews and promulgate its CVD expedited review regulations at 19 CFR 351.214(k). Section 705(c) of the Act discusses the effects of final CVD determinations in investigations, but does not address CVD expedited reviews. Similarly, as we stated in the *Final Results of Expedited Review*, section 751(b) of the Act addresses changed circumstance reviews and not expedited reviews.[51] Section 777A(e) of the Act also does not specifically address expedited reviews, but rather states that Commerce shall determine individual subsidy rates for each known exporter or producer in investigations or administrative reviews, and also provides direction for selecting a reasonable number of exporters or producers if the number of known exporters and producers is so large as to make it not practicable to calculate individual subsidy rates for each company.

[51] *See Final Results of Expedited Review* IDM at 29-30.

We also find that section 751(a) of the Act does not pertain to Commerce's conduct of CVD expedited reviews. As Commerce explained in the *Final Results of Expedited Review:*

> {CVD expedited reviews and administrative reviews} are separate proceedings that are governed by different regulations, promulgated according to distinct authorities, and provide different remedies…Commerce conducts expedited CVD reviews according to the procedures set out in 19 CFR 351.214(k), in accordance with section 103(a) of the URAA, not section 751(a) of the Act…Section 751(a) of the Act governs administrative and new shipper reviews of orders, while 19 CFR 351.213 lays out specific procedures for administrative reviews of orders under section 751(a)(1) of the Act. Because this is an expedited CVD review, section 751(a)(1) of the Act and 19 CFR 351.213 are inapplicable to this proceeding.[52]

For the same reasons, we continue to find in these final results of redetermination that section 751(a) of the Act does not provide Commerce with the express authority to conduct CVD expedited reviews and promulgate its CVD expedited review regulations at 19 CFR 351.214(k).

Therefore, in accordance with the CIT's analysis and *Remand Order*, we are issuing these final results of redetermination which presumes that Commerce lacks the statutory authority to promulgate CVD expedited review regulations, currently at 19 CFR 351.214(k), and to conduct CVD expedited reviews.

D. Summary and Analysis of Interested Party Comments on the Draft Remand

Comment 1: Whether Commerce Has Implicit Authority to Conduct CVD Expedited Reviews

The COALITION asserts that Commerce correctly concluded in the Draft Remand that it lacks *express* statutory authority to promulgate 19 CFR 351.214(k) and to conduct CVD expedited reviews under the alternative bases of authority cited by the United States and Canadian Parties.[53] In addition, the COALITION argues that Commerce also lacks *implicit*

[52] *Id*. at 26.
[53] *See* COALITION's Draft Remand Comments at 3.

authority to conduct CVD expedited reviews under those alternative bases of authority.[54] Specifically, the COALITION states that Commerce correctly concluded that sections 705(c), 751(a), 751(b), and 777A(e) of the Act do not provide Commerce the statutory authority to conduct CVD expedited reviews, because these provisions "do not specifically address CVD expedited reviews or provide Commerce with explicit authority to conduct CVD expedited reviews and promulgate its CVD expedited review regulations{.}"[55] The COALITION argues that these provisions also do not provide Commerce any implicit or "gap-filling" authority, because "the notion of gap-filling refers to explicit or implicit legislative delegations of authority to an agency for the purpose of clarifying ambiguous—yet extant—statutory provisions."[56] Sections 705(c), 751(a), 751(b), and 777A(e) of the Act do not, according to the COALITION, contain ambiguous language that confers on Commerce implicit authority to conduct CVD expedited reviews.[57]

The COALITON also states that Commerce correctly concluded that "the general reference under section 101 of the URAA to Congress's approval of the SCM Agreement {does not} equate{} to express authority to promulgate CVD expedited review regulations under 19 CFR 351.214(k) through section 103(a) of the URAA."[58] The COALITION asserts that those provisions also do not afford Commerce implicit or gap-filling authority to promulgate 19 CFR 351.214(k) or to conduct CVD expedited reviews because the statutory language in sections 101 and 103(a) of the URAA is clear and unambiguous.[59]

[54] *Id*. at 3-5.
[55] *Id*. at 5 (citing Draft Remand at 11-12).
[56] *Id*. (citing *Remand Order* at 21).
[57] *Id*. at 5.
[58] *Id*. (citing Draft Remand at 10-11).
[59] *Id*. at 5.

The COALITION also supports Commerce's conclusion in the Draft Remand that "Commerce's inherent authority to reconsider prior decisions, and lack of an explicit authorization on CVD expedited reviews, do not equate to specific statutory authority under the URAA to conduct CVD expedited reviews and promulgate CVD expedited review regulations."[60] However, the COALITION emphasizes that Commerce's authority to reconsider prior decisions under the Act does not grant Commerce statutory authority to conduct CVD expedited reviews.[61] Specifically, the COALITION notes that in the underlying litigation, the U.S. government argued that CVD expedited reviews are reconsiderations of Commerce's decisions in CVD investigations, a proceeding authorized under the Act.[62] The COALITION asserts that such argument is untenable because CVD expedited reviews are not legally permissible reconsiderations of decisions in CVD investigations.[63] As it argued in the underlying litigation,[64] the COALITION opines that the respondent selection methodology inherent to CVD expedited reviews violates section 777A(e) of the Act, which governs the respondent selection methodology in CVD investigations.[65] Accordingly, the COALITON argues that Commerce's conduct of CVD expedited reviews cannot be considered a lawful exercise of the agency's inherent authority to reconsider its decisions in CVD investigations.[66]

The Canadian Parties also acknowledge that there are no statutory provisions that *explicitly* reference CVD expedited reviews.[67] However, the Canadian Parties assert that Commerce applied the incorrect standard in dismissing the alternative bases of authority for

[60] *Id.* at 3 (citing Draft Remand at 10).
[61] *Id.* at 3-4.
[62] *Id*. at 4 (citing ECF No. 111).
[63] *Id.*
[64] *Id*. (citing ECF No. 127).
[65] *Id*.
[66] *Id.*
[67] *See* Canadian Parties' Draft Remand Comments at 3.

conducting CVD expedited reviews because they do not "explicitly or "specifically" refer to CVD expedited reviews.[68] The Canadian Parties state that there is nothing in the Court's decision that suggests or mandates that a statutory provision must refer explicitly to expedited reviews in order for that provision to support conducting such reviews.[69] They opine that, if statutory authority for expedited reviews required an "explicit" statutory reference to expedited reviews, then the Court could have simply determined that the expedited review regulation has no statutory support, and there would have been no point in the Court issuing a remand to address any of the other cited statutory provisions.[70] Instead, the Canadian Parties argue, the Court focused on whether Congress had conferred power upon Commerce to conduct expedited reviews, and not simply whether the alternative bases for conducting expedited reviews explicitly contained language referring to those reviews.[71] According to the Canadian Parties, Congressional conferral of power to conduct CVD expedited reviews does not have to be in a separate provision specifically dedicated to expedited reviews.[72]

The Canadian Parties thus assert that the question Commerce should be addressing is whether, through any of the cited provisions, Congress conferred inherent power upon Commerce to conduct expedited reviews.[73] They assert, in conducting that inquiry, courts have made clear that this means something other than whether the authorization is explicit and cite to *TKS*, where the U.S. Court of Appeals for the Federal Circuit (CAFC) found that Commerce had the authority to reopen and reconsider administrative reviews notwithstanding that "the parties do not dispute, that {section 751(b)(1) of the Act} does not expressly provide for a changed

[68] *Id.* (citing Draft Remand at 11-12).
[69] *Id.* at 3.
[70] *Id.*
[71] *Id.* at 4 (citing *Remand Order* at 20 (quoting *Agro Dutch Indus. v. United States*, 508 F.3d 1024, 1033 (Fed. Cir. 2007) ("an agency literally has no power to act. . . unless and until Congress confers power upon it.")).
[72] *Id.* at 4.
[73] *Id.*

circumstances review of the type conducted here."[74] In an earlier decision in this proceeding, the Court declined to consider the argument that agencies have this inherent authority to reconsider their decisions, because the Court concluded it was an impermissible *post hoc* rationalization for agency action that Commerce had not advanced itself.[75] The Canadian Parties assert that Commerce's remand redetermination should consider this inherent authority for conducting CVD expedited reviews.[76]

The Canadian Parties further argue that, given Commerce's clear understanding and recognition that Article 19.3 of the SCM Agreement requires CVD expedited reviews, Commerce must, as a matter of U.S. law, explore all statutory authorities that might enable it to conduct expedited reviews in compliance with the United States' WTO obligations.[77] They note that the CAFC has recognized that U.S. statutes "must be interpreted to be consistent with {international}obligations, absent contrary indications in the statutory language or its legislative history."[78] Here, the Canadian Parties assert there is no "contrary" indication in the URAA, the Act, or their legislative histories that would affirmatively preclude compliance with Article 19.3 of the SCM Agreement.[79]

The Canadian Parties further claim that Commerce has not provided sufficient explanation as to why none of the bases of authority (apart from section 103(a) of the URAA) cited by the Canadian Parties and the United States support the conduct of an expedited review proceeding.[80] The Canadian Parties urge Commerce, when preparing this final remand

[74] *Id*. (citing *TKS*, 529 F.3d at 1360).
[75] *Id*. at 4, footnote 4 (citing *Committee Overseeing Action for Lumber International Trade Investigations or Negotiations v. United States*, 413 F. Supp. 3d 1334, 1346 (CIT 2019)).
[76] *Id*.
[77] *Id*.
[78] *Id*. at 5-6 (citing *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1348 (Fed. Cir. 2004) (alteration in original) (quoting *Luigi Bormioli Corp. v. United States*, 304 F.3d 1362, 1368 (Fed. Cir. 2002))).
[79] *Id*.
[80] *Id*.

redetermination, to engage the arguments they made during the expedited review and to the Court regarding why they believe that the alternative bases of authority they cited provide the required support for expedited reviews.[81] The Canadian Parties claim that if Commerce declines to explore any of these alternatives bases, it would be in violation of the SCM Agreement.[82]

Of the alternative bases of authority, the Canadian Parties take specific issue with Commerce's analysis of sections 751(a)(1) of the Act and section 103(b) of the URAA. The Canadian Parties assert that it was only in the *Final Results of Expedited Review* in this proceeding that Commerce stated, for the first time, and without any explanation for its change of position, that section 751(a)(1) does not authorize expedited reviews.[83] They contend that the Draft Remand provides no further clarification of Commerce's reasoning, or why it reversed its prior positions both at the administrative level and before the Court, and makes no attempt to engage with the Canadian Parties' prior arguments that section 751(a)(1) does provide authority for Commerce to conduct expedited reviews.[84] The Canadian Parties argue that Commerce's failure to explain its change of position violates the principle that when an agency changes its prior practice, it must provide an adequate explanation for its change.[85]

With respect to section 103(b) of the URAA, the Canadian Parties state that Commerce has dismissed its own argument that section 103(b) of the URAA is a source of authority for 19 CFR 351.214(k).[86] Although Commerce cited section 103(b) of the URAA in its brief to the Court, the Canadian Parties claim that Commerce rejected its section 103(b) argument in the

[81] *Id.*
[82] *Id.* at 6.
[83] *Id.* at 7.
[84] *Id.* at 7-8.
[85] *Id*. at 8 (citing *SKF USA Inc. v United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011). *See also Nippon Steel Corp. v. U.S. Int's Trade Comm'n*, 494 F.3d 1371, 1378 n.5 (Fed Cir. 2007); and *Associacion de Exportadores e Industriales de Aceeitunas de Mesa v. U.S.*, 429 F. Supp. 3d 1325, 1338-1339 (CIT 2020)).
[86] *Id*. at 8 (citing ECF No. 111 at 9-10).

Draft Remand by stating: "Furthermore, the SAA does not specifically discuss implementation of CVD expedited reviews. Thus, these draft results of redetermination similarly presume, consistent with the CIT's holding and analysis, that neither the SAA itself, nor section 103(b) of the URAA, serve as the basis for promulgating the CVD expedited review regulations at 19 CFR 351.214(k)."[87]

Finally, the Canadian Parties assert that Commerce's characterization of the SAA being "consistent with the CIT's holding and analysis" is incorrect, because the SAA does address expedited reviews.[88] They argue that, in fact, there is nothing in the Court's opinion that precludes reliance on section 103(b) of the URAA as a basis for supporting expedited reviews.[89] They state that the Court limited its holding to section 103(a); if the Court had intended its analysis of section 103(a) to apply as well to section 103(b), it would not have included section 103(b) in the list of alternative bases to be considered on remand.[90] Given the Court's express holding listing section 103(b) on that list, and that the U.S. government previously proffered section 103(b) in support of expedited reviews, the Canadian Parties contend that it is not clear why Commerce is now changing its position, and Commerce should address the merits of this argument.[91]

Therefore, the Canadian Parties argue that Commerce should revise its Draft Remand to provide a more detailed analysis of the alternative bases of authority and provide interested parties the opportunity to comment on that revised draft.[92]

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[87] *Id*. at 8 (citing Draft Remand at 9-10).
[88] *Id*. at 8 (The SAA states at 941: "Article 19.3 of the Subsidies Agreement provides that any exporter whose exports are subject to a CVD order, but was not actually investigated for reasons other than a refusal to cooperate, *shall be entitled to an expedited review to establish an individual CVD rate for that exporter*." (emphasis added)).
[89] *Id.* at 8.
[90] *Id.* at 8-9.
[91] *Id.* at 9.
[92] *Id.* at 6, 12.

Commerce's Position:

All parties appear to agree that there is no *explicit* statutory authority for Commerce's promulgation of its expedited review regulations at 19 CFR 351.214(k) and conduct of CVD expedited reviews. Accordingly, our analysis of the lack of explicit authority to issue those regulations addressed in the Draft Remand and set forth above remains unchanged.

Both the Canadian Parties and COALITION focus their comments almost exclusively on the question of whether Commerce has *implicit* statutory authority to issue regulations that allow Commerce to conduct CVD expedited reviews. Therefore, in these final results of redetermination, in response to both sets of comments, we are addressing whether Commerce has "implicit" statutory authority to promulgate expedited review regulations and conduct CVD expedited reviews under any of the provisions which they have argued, and to which the Court has pointed in its *Remand Order*.

Sections 705(c), 751(a), 751(b), and 777A(e) of the Act

With respect to arguments pertaining to sections 705(c), 751(a), 751(b), and 777A(e) of the Act, we find that those provisions do not provide inherent authority to Commerce to conduct CVD expedited reviews. As explained in the Draft Remand, sections 705(c), 751(a),[93] 751(b),

[93] In asserting that Commerce has suddenly and without explanation rejected section 751(a) of the Act as its basis for conducting CVD expedited reviews, the Canadian Parties ignore Commerce's detailed explanation in the *Final Results of Expedited Review* outlining the reasons for its prior references to section 751(a) of the Act and why Commerce does not believe that provision provides statutory authority to conduct CVD expedited reviews. Specifically, Commerce explained in the *Final Results of Expedited Review*:

> With respect to Commerce's previous expedited CVD reviews, we do not disagree that in its analysis in *Lumber IV*, Commerce's very first expedited CVD review, Commerce cited to section 751(a) of the Act as granting "authority" for the "conduct of" "such" a "review." However, as Commerce explained in that same paragraph, the "concept of expedited reviews in countervailing duty proceedings {was} very recent," and Commerce admitted it was still learning how to conduct and apply such a review. We now find that Commerce's citation to section 751(a) of the Act as granting "authority" in the *Lumber IV Initiation Notice* was legally erroneous, as was its citation in the *Preliminary* and *Final Results* of that review to section 751(a)(1) of the Act as one of the authorities to which the "expedited reviews and notice(s)" were "issued and published." In fact,

and 777A(e) of the Act do not address CVD expedited reviews, but rather pertain to final determinations of investigations, final results of administrative reviews, final results of changed circumstance reviews, and procedures for calculating individual subsidy rates in investigations and administrative reviews, respectively.[94] These provisions involve proceedings that are

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> Commerce should have explained in those notices and determinations that it was issuing and publishing its determinations in accordance with section 103(a) of the URAA, 19 CFR 351.221(a) and (b), and 19 CFR 351.214(k), as we have explained above. Notably, in *Lumber IV*, Commerce did, at least, clearly state that 19 CFR 351.214(k) is the regulatory provision which provides for expedited reviews for non-investigated exporters.
>
> In the recent expedited CVD reviews for *Supercalendered Paper from Canada*, *CTL Plate from China*, and *CORE from Korea*, Commerce also made clear that it initiated and conducted those reviews pursuant to the authority granted by 19 CFR 351.214(k). However, we recognize that, in some of those expedited CVD reviews, Commerce also made reference to section 751(a) of the Act, which may have caused confusion regarding the authority pursuant to which Commerce conducts expedited CVD reviews. For example, in the preliminary results of the CVD expedited reviews of *Supercalendered Paper from Canada* and *CTL Plate from China*, Commerce stated that the determination was "issued and published pursuant to {section} 751(a)(1) . . . of the Act and 19 CFR 351.214(h) and (k)," whereas in the final results of those reviews Commerce simply stated that "{t}his determination is issued and published in accordance with 19 CFR 351.214(k)." To be clear, although we correctly cited to 19 CFR 351.214(h) and (k) as authorities to which Commerce conducted and issued its preliminary results of expedited review in *Supercalendered Paper from Canada* and *CTL Plate from China*, we acknowledge that we also incorrectly mirrored language appearing in the *Preliminary Results* of *Lumber IV* in those reviews referencing section 751(a) of the Act.
>
> The references to section 751(a) of the Act in multiple cases may, we believe, be a result of confusion over the somewhat unique legal sources which provide the authority to conduct an expedited CVD review and provide jurisdiction for judicial review. First, as explained, 19 CFR 351.214(k) derives its authority from section 103(a) of the URAA, and not the Act. Further, the placement of paragraph (k) under 19 CFR 351.214, a regulation that references section 751 of the Act in its title ("New shipper reviews under section 751(a)(2)(B) of the Act") also complicates the issue overall, because as the Government explained in its Motion to Dismiss in *Irving Paper Limited*, final determinations under that regulation "may be contested under 28 U.S.C. § 1516a(a)(2)(A)," and, thus, provide courts "jurisdiction under 28 U.S.C. § 1581(c)." Finally, Commerce initially cited to section 751(a) of the Act several times in its first expedited CVD review, *Lumber IV*, and administratively, Commerce officials frequently rely on similar previous proceedings for guidance and citations to legal authorities in drafting initiation, preliminary determination, and final determination notices. Taken together, we find these factors may have contributed to the incorrect citation to section 751(a) of the Act in the expedited reviews cited above. We have no intention of making the same mistake in this proceeding.

See Final Results of Expedited Review IDM at 28-29. In accordance with this explanation, in the *Final Results of Expedited Review* underlying this proceeding, Commerce cited section 103(a) of the URAA – and not section 751(a) of the Act – as its basis of authority for promulgating its CVD expedited review regulations at 19 CFR 351.214(k). *Id.* at 26. Commerce has not reversed its position during the course of this litigation that section 751(a) of the Act does not authorize Commerce to conduct CVD expedited reviews.

[94] *See* Draft Remand at 11.

distinct from CVD expedited reviews in that they have their own separate purposes, procedures, and timelines. Therefore, sections 705(c), 751(a), 751(b), and 777A(e) of the Act neither explicitly nor implicitly address CVD expedited reviews.

Inherent Authority of Agencies to Reconsider Prior Decisions

With respect to the United States government's argument in the underlying litigation that Commerce's "inherent authority to reconsider {its} decisions" and lack of statutory prohibition on CVD expedited reviews permits Commerce to conduct CVD expedited reviews and reconsider its investigation determinations as a gap-filling measure to comply with the United States' international obligations -- we have considered that argument on remand and determined it does not apply in this case. That argument was based entirely on language derived from two very different CAFC cases, neither which has any similarities to the facts of this case.[95] The first case, *TKS*, arose from a changed circumstance review and allegations of fraud, and the second, *GNTX*, related to a patent case.[96] The facts of this proceeding do not involve changed circumstance reviews, allegations of fraud, or patents. Further, the means by which the principles about reconsideration of decisions were addressed in those cases does not appear to apply to Commerce's authority to conduct expedited reviews. Therefore, we conclude that the CAFC's holdings in *GNTX* and *TKS* do not address or apply to Commerce's authority to conduct CVD expedited reviews and promulgate regulations for such reviews, even though there is no statutory prohibition on CVD expedited reviews and Commerce does retain, in certain factual scenarios, an inherent ability to reconsider past decisions.

[95] *See* ECF 11 at 12-13 (citing *TKS*, 529 F.3d at 1360; and *GNTX*, 789 F.3d at 1313).
[96] *See TKS*, 529 F.3d at 1360; *see also GNTX*, 789 F.3d at 1313.

Section 103(b) of the URAA

With respect to the Canadian Parties' arguments about section 103(b) of the URAA, which provides for the issuance of "{a}ny interim regulation necessary or appropriate to carry out any action proposed in the {SAA}," although the Act and SAA do not specifically discuss implementation of CVD expedited reviews, we believe Congress still expressed its intent in the SAA that Commerce retain the ability to issue regulations to conduct CVD expedited reviews.[97] Specifically, the SAA acknowledges that Article 19.3 of the SCM Agreement has an expectation of CVD expedited reviews by stating: "{A}ny exporter whose exports are subject to a CVD order, but which was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review to establish an individual CVD rate for that exporter."[98] Furthermore, the SAA provides that "{s}everal changes must be made to the Act to implement the requirements of Article 19.3 of the Subsidies Agreement."[99] Accordingly, it is Commerce's interpretation of section 103(b) of the URAA, taken in consideration with the SAA language cited herein, that Congress intended Commerce to issue its expedited review regulations under that provision of the Act. This authority admittedly may not be explicit, but we do believe that Congress intended for Commerce to have the inherent and implicit authority to conduct expedited reviews and to issue regulations providing for such reviews.

That being said, the Court in this case precluded us from finding implicit authority under section 103(b) when it held that the SAA does not indicate legislative intent for Commerce to conduct CVD expedited reviews because the SAA does not directly propose any actions for the implementation of CVD expedited reviews.[100] We disagree with this interpretation of the SAA,

[97] *See* SAA at 941.
[98] *Id.*
[99] *Id.*
[100] *See Remand Order* at 23-24.

but we are also bound by the Court's holding in this regard on remand. Therefore, these final results of remand redetermination continue to presume, consistent with the Court's holding and analysis, that section 103(b) of the URAA provides Commerce with no authority, explicit or implicit, to promulgate the CVD expedited review regulations at 19 CFR 351.214(k).

Section 101 of the URAA

With respect to section 101 of the URAA, section 101(a) of the URAA generally provides that "Congress approves…the trade agreements described in {section 101(d)} resulting from the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Trade and Tariffs."[101] The SCM Agreement is one of the agreements described in section 101(d) of the URAA.[102] Further, section 101(b) of the URAA provides that the President, "to ensure the effective operation of, and adequate benefits for the United States under {the Uruguay Round Agreements}…may accept the Uruguay Round Agreements."[103] Just as we believe that section 103(b) of the URAA, standing alone, provides Commerce with the inherent authority to conduct expedited reviews, we also continue to believe that section 101, in conjunction with 103(a) and 103(b), also provides Commerce with the inherent authority to conduct such a review and issue the regulations at issue in this case.

However, as explained above, the Court found in this case that no provision of the URAA provides for CVD expedited reviews. That finding applies not only to section 103(b), but equally prohibits us from finding such inherent authority exists under section 101 of the URAA on remand.

[101] *See* section 101(a)(1) of the URAA.
[102] *See* section 101(d)(12) of the URAA.
[103] *See* section 101(b) of the URAA.

Section 103(a) of the URAA

Finally, with respect to 103(a) of the URAA, Commerce has consistently interpreted the URAA to grant the agency with the authority, whether it be implicit or explicit, to conduct CVD expedited reviews, because the SAA indicates Congressional intent that Commerce conduct CVD expedited reviews, even if it does not specifically discuss the mechanics for implementing such reviews.[104] As explained in the *Final Results of Expedited Review*, Commerce conducted the underlying expedited review on the belief that section 103(a) of the URAA explicitly grants Commerce the authority to conduct such a review.[105] Specifically, section 103(a) of the URAA provides that "appropriate officers of the United States Government may issue such regulations, as may be necessary to ensure that any provision of this Act, or amendment made by this Act,… is appropriately implemented…". In issuing 19 CFR 351.214(k), Commerce – as an appropriate officer of the U.S. government – ensured that all provisions of U.S. law are consistent with U.S. obligations under the URAA.

However, as we have explained above, the Court held that section 103(a) cannot be the basis of authority for CVD expedited reviews, because, according to the Court, section 103(a) only permits Commerce to promulgate regulations for enacted provisions of the URAA, and the URAA does not contain a provision explicitly authorizing CVD expedited reviews.[106] Therefore, consistent with the Court's *Remand Order*, these final results of remand redetermination presume that section 103(a) of the URAA does not provide Commerce with explicit or implicit authority to conduct CVD expedited reviews.

[104] *See* SAA at 941.
[105] *See Final Results of Expedited Review* IDM at 18-20; ECF No. 111.
[106] *See Remand Order* at 17-18, 20-22.

Because we have complied with the Court's *Remand Order* and provided sufficient analysis of the alternative bases of authority, and have responded to interested party comments in these final results of redetermination, we find it unnecessary to issue a revised Draft Remand as suggested by the Canadian Parties.

Comment 2: How Commerce Should Treat The Expedited Review Companies If The Expedited Review Is Annulled By The Court

The COALITION argues that Commerce should undertake specific actions if it affirms its draft remand in the final results of redetermination.[107] First, the COALITON states that Commerce should issue a *Federal Register* notice to remove 19 CFR 351.214(k) from the agency's regulations, pursuant to section 553(b)(3)(B) of the Administrative Procedure Act, which provides that when an agency for good cause finds that notice and public procedures "are impracticable, unnecessary, or contrary to public interest," the agency may issue a rule without providing notice and an opportunity for public comment.[108] According to the COALITION, good cause exists to dispense with public comments in this case because, by removing 19 CFR 351.214(k) from its regulations, Commerce is simply conforming the text of its regulations to the Court's decision.[109]

The COALITION also states that Commerce should annul the findings of the *Final Results of Expedited Review* by voiding all liquidation and cash deposit instructions that were issued pursuant to the *Final Results of Expedited Review*.[110] The COALITION asserts that Commerce should direct U.S. Customs and Border Protection to: (1) suspend liquidation on all unliquidated entries of softwood lumber from Canada that were produced and/or exported by the

[107] *See* COALITION's Draft Remand Comments at 6-9.
[108] *Id*. at 6 (citing 5 U.S.C. § 553(b)(3)(B)).
[109] *Id.*
[110] *Id.* at 7.

eight expedited review companies; (2) include subject merchandise produced and/or exported by D&G, MLI, NAFP, Roland, and Lemay (the five expedited review companies excluded from the order) in the *CVD Order*; and (3) collect cash deposits for shipments of subject merchandise made by the expedited review companies at the countervailing duty rate that would have been applicable to each company had the *Final Results of Expedited Review* not be issued.[111]

In contrast, the Canadian Parties state that, given the significant reliance interests of the expedited review companies that are at stake, the Supreme Court's recent decision in *Homeland Security* mandates that Commerce consider the interests of all parties and the available alternatives in how it fashions its response to the Court's remand.[112] The Canadian parties argue that the expedited review companies have incurred considerable expense in participating in the expedited review and this litigation, and face potentially significant CVD exposure if the *Final Results of Expedited Review* are nullified.[113] They assert that should Commerce make no attempt to explore alternative bases for upholding the expedited review procedures so as to account for the serious reliance interests of the expedited review companies, Commerce would be acting to rescind those procedures without undertaking the analysis mandated by the Court in *Homeland Security*.[114]

The Canadian Parties explain that this reliance interest arose because, for the past 25 years, Commerce has maintained that the SCM Agreement requires CVD expedited reviews and that Commerce possesses the legal authority to conduct such reviews.[115] In the underlying investigation, Commerce stated that there was no need for company-specific exclusions in the

[111] *Id.* at 7-8.
[112] *See* Canadian Parties' Draft Remand Comments at 9 (citing *Dep't of Homeland Sec. v. Regents of the Univ. of California*, (*Homeland Security*) 140 S. Ct. 1891, 1913, 207 L. Ed. 2d 353 (2020) and *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)).
[113] *Id.* at 10.
[114] *Id.*
[115] *Id.*

investigation because companies not individually examined would have the opportunity to request an expedited review.[116] The Canadian Parties state that the expedited review companies acted in reliance on these statements and undertook the burden of going through the expedited review process.[117] The Canadian Parties argue that Commerce must now act to ensure that these companies retain the results of the expedited review (*e.g.*, exclusion from the *Order* or "reduced cash deposit/assessment rates").[118]

Relatedly, the Canadian Parties note that Commerce relied on section 751(a) of the Act in a prior proceeding before this Court regarding expedited reviews.[119] Specifically, the Canadian Parties state that months before initiating the expedited review in this proceeding, in *Irving Paper Limited v. United States*, the United States government moved to dismiss a pending 28 U.S.C. § 1581(i) challenge to Commerce's CVD expedited review of *Supercalendered Paper from Canada* on the grounds that expedited reviews are conducted pursuant to section 751(a) of the Act, which meant that the appeal was under 28 U.S.C. § 1581(c) and not § 1581(i).[120]

The Canadian Parties also state that, because the Draft Remand does not acknowledge or discuss the expedited review companies' reliance interests, the Canadian Parties are not addressing how those interests should be taken into account.[121] However, they reserve their right to address these issues in subsequent briefings and add that, depending on the outcome of the

[116] *Id.* at 10-11.
[117] *Id.* at 11.
[118] *Id.* at 11-12.
[119] *Id.* at 7, 12.
[120] *Id*. at 7 (citing *Irving Paper Ltd. v. United States*, *Defendant's {U.S. Government's} Opposition to Plaintiff's Motion to Consolidate and Motion to Dismiss*, Court No. 17-00128 (CIT September 21, 2017) (*Irving Paper*), ECF No. 39 at 10 & 12 (noting that Commerce's expedited review of supercalendered paper from Canada is a determination described in 28 U.S.C. § 1581(c) & 19 U.S.C. § 1516a(a)(2)(B)(iii) because it "is a final determination under section 1675 of title 19.")). This case was ultimately settled before any ruling on the jurisdictional issue.
[121] *Id.* at 10.

legal issues in this proceeding, that discussion could include addressing the appropriate remedies if the expedited review procedure is not upheld.[122]

Finally, the Canadian Parties assert that Commerce's Draft Remand is not responsive to the Court's *Remand Order* or Commerce's legal obligations because Commerce has reversed its position that it has legal authority to conduct CVD expedited reviews and has taken actions that threaten the reliance interests of the expedited review companies and United States' compliance with its WTO obligations.[123]

Commerce's Position:

Because we have determined, for the reasons explained above, in accordance with the Court's analysis and *Remand Order*, that Commerce must find on remand that it lacks the statutory authority to conduct CVD expedited reviews, if the CIT affirms this remand redetermination, we intend to issue a Notice of Court Decision Not in Harmony with the *Final Results of Expedited Review* in the *Federal Register* which rescinds those final results. We do not intend to adopt the steps suggested by the COALITION to withdraw 19 CFR 351.214(k) at this time and to void all prior liquidation and cash deposit instructions. Rather, by statute,[124] the effect of this decision would be prospective so that the rates established as a result of the expedited review would cease to apply 10 days after the publication of that Notice of Court Decision Not in Harmony in the *Federal Register*.

With respect to the Canadian Parties' "reliance" arguments, unlike the Court, Commerce does not have the authority to enact equitable remedies based on the interests of the interested parties in interpreting the statute. Although we have been conducting expedited reviews for

[122] *Id.*
[123] *Id.* at 12.
[124] *See* 19 U.SC. § 1516a(c)(1).

many years, past agency practice does not confer statutory authority when a court deems such authority is lacking.

It is worth noting, however, that as part of their reliance argument, Canada claims that it relied on Commerce's citations in previous cases to section 751(a) of the Act as a basis for Commerce's authority for conducting CVD expedited reviews, pointing to, in particular, Commerce's reference to that authority in the *Irving Paper* litigation. To be clear, Canada's arguments in this regard are, at best, a mischaracterization. In *Irving Paper*, the United States did not, as the Canadian Parties allege, cite section 751(a) of the Act as its statutory basis of authority for *conducting* CVD expedited reviews and promulgating 19 CFR 351.214(k), but rather invoked section 751(a) of the Act for the *jurisdictional* argument that CVD expedited reviews are reviewable by this Court under 28 U.S.C. § 1581(c), rather than 28 U.S.C. § 1581(i).[125] The United States in *Irving Paper* actually cited to section 103(a) of the URAA for its authority to *conduct* a CVD expedited review, stating that "section {103(a) of the URAA} provides Commerce with the authority to promulgate the regulation governing expedited countervailing duty reviews {at 19 CFR 351.214(k)}…"[126] Canada's arguments conflate these two different legal principles and interpretations of the Act, when in fact, the United States was clear in the *Irving Paper* litigation to distinguish between them.

In this proceeding, the United States made the same arguments to the Court as it did in *Irving Paper*, citing section 751(a) of the Act to assert that this Court has jurisdiction over expedited reviews pursuant to 19 U.S.C. § 1581(c),[127] but that Commerce derives its authority to

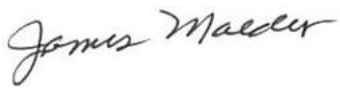
[125] *See Irving Paper Limited v. United States*, Court No. 17-00128, Defendant's Response to the Court's December 28, 2017 Order, dated January 30, 2018 (United States Response to Questions from the Court), at Answer 1, at Petitioner's February 2, 2018 Comments on the Department's Conduct of Any "Expedited Reviews" of This Order, Exhibit 2.
[126] *Id.* at Answers 1 and 3.
[127] *See* ECF No. 84.

conduct CVD expedited reviews under section 103(a) of the URAA. As we've noted, Commerce does not have the authority to take actions in response to Canada's equitable reliance arguments on remand. Nonetheless, it is important that the Court understand that in consideration of this argument, the United States did not rely on section 751(a) of the Act for authority to conduct an expedited review in its filings in *Irving Paper*, despite Canada's contrary claims.

E. Final Results of Redetermination

For these reasons, in accordance with the CIT's analysis, conclusions, and *Remand Order*, Commerce is issuing these final results of redetermination determining that sections 705(c), 751(a), 751(b), and 777A(e) of the Act; sections 101, 103(a), and 103(b) of the URAA; and the inherent authority of agencies to reconsider prior decisions, are not adequate bases for the promulgation of the CVD expedited review regulations under 19 CFR 351.214(k).

2/17/2021

X 

Signed by: JAMES MAEDER

James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations