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## 2008 INTERNATIONAL TRADE DECISIONS OF THE FEDERAL CIRCUIT

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## INTRODUCTION

The United States is the world's largest importing country, with nearly \$2 trillion in imports of goods during 2007.<sup>1</sup> Given the ever-increasing volume of international trade, the United States has put in place an intricate body of laws designed to regulate the flow of goods and has created federal agencies responsible for the enforcement of those laws, including U.S. Customs and Border Protection ("CBP"),<sup>2</sup> the U.S. Department of Commerce ("Commerce"), the U.S. International Trade Commission ("ITC" or "Commission"), and the Office of the U.S. Trade Representative ("USTR"). Each agency is charged with different responsibilities over the fair and efficient administration of the United States' international trade regime. Certain international trade disputes arise at the agency level, however, which in turn creates a role for the U.S. courts.

The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"), created in 1982,<sup>3</sup> has exclusive jurisdiction over any "appeal from a final decision of the United States Court of International Trade."<sup>4</sup> The U.S. Court of International Trade ("CIT"), in turn, has exclusive jurisdiction over numerous types of civil actions arising under the international trade laws including, *inter alia*, disputes related to the classification and valuation of imported merchandise,<sup>5</sup> Commerce's and the ITC's determinations in antidumping and countervailing duty proceedings,<sup>6</sup> and any other action relating to the administration and enforcement of international trade laws.<sup>7</sup> Given the broad range of issues under the CIT's exclusive jurisdiction, the Federal Circuit is frequently called upon to address a multitude of different legal questions involving international trade issues.

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1. U.S. CENSUS BUREAU, U.S. BUREAU OF ECONOMIC ANALYSIS, U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES: ANNUAL REVISION FOR 2007 4 (2008), *available at* <http://www.census.gov/foreign-trade/Press-Release/2008pr/04/ft900.pdf> (reporting that the United States imported \$1.97 trillion in goods during calendar year 2007).

2. The U.S. Customs Service became U.S. Customs and Border Protection under the Homeland Security Act of 2002, Pub. L. No. 107-296, § 1502, 116 Stat. 2135, 2308-09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108-32, at 4 (2003). For simplicity, this Article refers to the agency as "CBP" throughout even though some cases arose from events that occurred when the agency was still known as the U.S. Customs Service.

3. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982) (creating the U.S. Court of Appeals for the Federal Circuit and detailing the court's structure).

4. 28 U.S.C. § 1295(a)(5) (2006).

5. *Id.* § 1581(a).

6. *Id.* § 1581(c).

7. *Id.* § 1581(i).

In 2008, the Federal Circuit considered numerous appeals in international trade cases, ranging from basic procedural questions such as whether the CIT had jurisdiction over a matter or whether a plaintiff had standing to raise a claim, to substantive questions involving CBP's tariff classifications or Commerce's methodologies for calculating antidumping duty margins. This Article subdivides these issues into four categories: U.S. customs laws, U.S. trade remedies laws, actions by the USTR, and trade and the environment. Although the case summaries focus primarily on the complex factual and legal issues at the center of each dispute, they also offer insights into the varying standards of review and levels of deference that the appeals court extends depending on the type of action under review.

### I. U.S. CUSTOMS LAWS

Under Article III of the U.S. Constitution, Congress has the power “[t]o lay and collect Taxes, Duties, Imposts and Excises”<sup>8</sup> and “[t]o regulate Commerce with foreign Nations.”<sup>9</sup> Through legislation codified in Title 19 of the U.S. Code, “Customs Duties,” Congress delegated to CBP significant responsibilities with respect to the facilitation of entry of merchandise into the United States and the collection of duties, taxes, and fees on imported merchandise.<sup>10</sup> In 2008, the Federal Circuit issued numerous decisions concerning CBP's administration of the customs laws. As described in this section, more than half of the customs cases related to questions of classification under the Harmonized Tariff Schedule of the United States (“HTSUS”).<sup>11</sup> The remaining cases concerned substantive issues regarding the appraisal of imported merchandise, the imposition of penalties on importers, and the constitutionality of a CBP regulation, as well as jurisdictional questions.

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8. U.S. CONST. art. I, § 8, cl. 1.

9. *Id.* § 8, cl. 3.

10. *See generally* 19 U.S.C. § 1401 (2006) (setting forth the statutory provisions governing CBP's administration of the customs laws).

11. *See* 19 U.S.C. § 1202 (2006) (setting forth the authorization for the HTSUS). The actual HTSUS does not appear in the U.S. Code but, rather, is maintained by the ITC and published on the agency's website pursuant to 19 U.S.C. § 3007 (2006). From its Tariff Information Center webpage, users can link to either the full HTSUS or to an index that will direct them to the text of specific chapters. *See* U.S. International Trade Commission, Tariff Information Center, <http://www.usitc.gov/tata/hts/> (last visited Feb. 24, 2009). For the full HTSUS, see U.S. INTERNATIONAL TRADE COMMISSION, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (21st ed. 2009) [hereinafter HARMONIZED TARIFF SCHEDULE], <http://hotdocs.usitc.gov/docs/tata/hts/bychapter/0901htsa.pdf>.

### A. *Tariff Classification*

The CIT has exclusive jurisdiction over civil actions involving CBP's tariff classification determinations under the HTSUS.<sup>12</sup> The HTSUS represents a hierarchical system for classifying articles and is organized into ninety-nine separate chapters that consolidate different commodities.<sup>13</sup> Within each chapter, the HTSUS identifies distinct articles based on ten-digit subheadings.<sup>14</sup> Tariff classifications are extremely important because they determine the appropriate rate of duty, if any, which applies to articles upon importation into the U.S. customs territory, and they are also used to compile official import data.<sup>15</sup> The first six digits of each HTSUS subheading are internationally agreed upon product classifications pursuant to the International Convention on the Harmonized Commodity Description and Coding System.<sup>16</sup> The final four digits are specific to the United States, with the seventh and eighth digits conveying the applicable rate of normal customs duties and the ninth and tenth digits used only for statistical reporting purposes.<sup>17</sup>

Importers have an obligation to exercise reasonable care with respect to the classification of merchandise upon entry,<sup>18</sup> and CBP has the authority to impose penalties if importers misclassify articles due to negligence, gross negligence, or fraud.<sup>19</sup> When a genuine ambiguity exists with respect to the proper classification of an article, importers will of course seek to classify the articles under the HTSUS subheading that imposes the lowest possible duty rate and, thus, may be aggressive with respect to their classifications. However, after reviewing the entry documentation (and possibly the article itself), CBP may reclassify the imported articles into different HTSUS

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12. § 1581(a)-(b).

13. See U.S. International Trade Commission, Tariff Information Center, By Chapter Harmonized Tariff Schedule of the United States (last visited Feb. 24, 2009), <http://www.usitc.gov/tata/hts/bychapter/index.htm> (establishing the HTSUS, listed by chapter and general notes).

14. See generally *id.* (listing the classifications of articles by heading and subheading).

15. *Preface* to HARMONIZED TARIFF SCHEDULE, *supra* note 11, available at [http://hotdocs.usitc.gov/docs/tata/hts/bychapter/0901\\_Preface.pdf](http://hotdocs.usitc.gov/docs/tata/hts/bychapter/0901_Preface.pdf).

16. See generally 19 U.S.C. § 3001 (2006) (explaining that the HTSUS implements "the nomenclature established internationally by the" International Convention on the Harmonized Commodity Description and Coding System).

17. *Preface* to HARMONIZED TARIFF SCHEDULE, *supra* note 11, [http://hotdocs.usitc.gov/docs/tata/hts/bychapter/0901\\_Preface.pdf](http://hotdocs.usitc.gov/docs/tata/hts/bychapter/0901_Preface.pdf).

18. See 19 U.S.C. § 1484(a) (2006) (setting forth importers' obligations to exercise reasonable care when filing entry summaries with CBP and declaring the applicable tariff classification and appraised values of the imported articles).

19. See *id.* § 1592 (authorizing the imposition of penalties against importers for negligence, gross negligence, or fraud with respect to the importation of merchandise).

subheadings with different rates of duty than the importer claimed. In 2008, the Federal Circuit decided seven classification cases in which importers appealed CBP's reclassification of imported articles under HTSUS subheadings that carried higher duty rates than the ones that they originally declared upon entry.

The first tariff classification case decided in 2008, *MetChem, Inc. v. United States*,<sup>20</sup> involved the proper classification of basic nickel carbonate. MetChem, Inc. ("MetChem") classified the article under HTSUS subheading 7501.20.00, which encompasses, "Nickel mattes, nickel oxide sinters, and other intermediate products of metallurgy: . . . Nickel oxide sinters and other intermediate products of metallurgy," and extends duty-free treatment.<sup>21</sup> Upon liquidation, however, CBP reclassified the article under HTSUS subheading 2836.99.50, "Carbonates; peroxocarbonates (percarbonates); commercial ammonium carbonates containing ammonium carbamate," which imposes an ad valorem duty of 3.7 percent.<sup>22</sup> MetChem appealed CBP's decision to the CIT, which ruled in MetChem's favor after concluding that HTSUS heading 2836 did not apply to MetChem's imported basic nickel carbonate because it was limited to "[s]eparate chemical elements and separate chemically defined compounds."<sup>23</sup> The lower court held that basic nickel carbonate represented an "intermediate product of metallurgy" and should be classified instead under HTSUS heading 7501.<sup>24</sup>

In affirming the CIT's decision, the Federal Circuit first explained that interpretations of HTSUS headings and subheadings are questions of law that it examines de novo, without deference to the lower court, as opposed to the CIT's factual findings that it examines only for "clear error."<sup>25</sup> The court then agreed with the CIT that CBP improperly classified the basic nickel carbonate under HTSUS heading 2836 because the article was neither a "separate chemical element" nor a "separate chemically defined compound."<sup>26</sup> First, the

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20. 513 F.3d 1342 (Fed. Cir. 2008).

21. *Id.* at 1344.

22. *Id.*

23. *Id.* at 1345 (citing *Metchem, Inc. v. United States*, 441 F. Supp. 2d 1269, 1275 (Ct. Int'l Trade 2006)).

24. *Id.* at 1346 (citing *Metchem*, 441 F. Supp. 2d at 1275).

25. *See id.* at 1345 (explaining that the Federal Circuit "has an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms") (citing *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005)).

26. *See id.* at 1346 (defining a "separate chemically defined compound" as "a substance which consists of one molecular species (e.g. covalent or ionic) whose composition is defined by a constant ratio of elements and can be represented by a

Federal Circuit observed that all parties agreed that the imported article was not a “separate chemical element.”<sup>27</sup> Second, the court concluded that the basic nickel carbonate at issue was not a “separate chemically defined compound,” as defined by the Explanatory Notes accompanying Chapter 28 of the HTSUS,<sup>28</sup> because it consisted of an unspecified mixture of “several chemical compounds in a variable ratio” that “cannot be represented by a precise formula.”<sup>29</sup> As such, the court agreed that the basic nickel carbonate could not be classified under HTSUS heading 2836 but, rather, should be classified under HTSUS subheading 7501.20.00 because it was an intermediate product.<sup>30</sup>

In *Fuji America Corp. v. United States*,<sup>31</sup> the Federal Circuit reviewed the tariff classification of: (1) “chip placers,” which are machines used to place various electrical components onto blank printed circuit boards (“PCBs”) that, in turn, create finished printed circuit assemblies (“PCAs”); and (2) “parts feeders,” which supply the various electrical components to the chip placers.<sup>32</sup> CBP classified both the chip placers and the parts feeders under HTSUS subheading 8479.89.97, which covers “[m]achines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof . . . .”<sup>33</sup> The importer, Fuji America Corporation (“Fuji”), maintained that CBP should classify the chip placers under HTSUS subheading 8428.90.00, “Other lifting,

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definitive structural diagram” (quoting HARMONIZED TARIFF SCHEDULE, *supra* note 11, at ch. 28, n.1(a), <http://hotdocs.usitc.gov/docs/tata/hts/bychapter/0901c28.pdf>).

27. *Id.*

28. See generally *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (explaining that the Explanatory Notes constitute a supplement to the HTSUS that are “generally indicative of . . . [its] proper interpretation . . . .” (quoting H.R. Conf. Rep. No. 100-576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582)); *Mita Copystar Am., Inc. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (clarifying that, although the Explanatory Notes “do not constitute controlling legislative history,” they “are intended to clarify the scope of HTSUS . . . and to offer guidance in interpreting” the HTSUS headings and subheadings (citing *Lynteq*, 976 F.2d at 699)).

29. *MetChem*, 513 F.3d at 1347. In so holding, the Federal Circuit noted that, when evaluating the appropriate tariff classification for an imported article, the courts must first rely upon the HTSUS “headings and any relative section or chapter notes,” and then “may consult the Explanatory Notes of the relevant chapters, although they are not binding . . . .” *Id.* at 1346 (citing *Michael Simon Design v. United States*, 501 F.3d 1303, 1307 (Fed. Cir. 2007) (internal citation omitted)).

30. See *id.* at 1348 (rejecting the Government’s claim that the basic nickel carbonate did not qualify as an “intermediate” metallurgical product because the HTSUS does not impose any requirements about the particular nickel content applicable to “intermediate products of metallurgy”).

31. 519 F.3d 1355 (Fed. Cir. 2008).

32. See *id.* at 1356 (describing the functions of chip placers and parts feeders).

33. *Id.* at 1357–58.

handling, loading or unloading machinery (for example, elevators, escalators, conveyers, teleferics): Other machinery,” and the parts feeders under HTSUS heading 8431, “Parts suitable for use solely or principally with the machinery of headings 8425 to 8430.”<sup>34</sup>

Fuji commenced an action at the CIT after CBP denied its protest. With respect to the chip placers, the CIT granted summary judgment to the Government after concluding that CBP properly classified them under HTSUS heading 8479.<sup>35</sup> The lower court reasoned that HTSUS heading 8479 covers machines with a principal purpose that is not otherwise covered by any other HTSUS heading, and the chip placers’ principal function—“to perform an active and integral role in making PCAs”—was not specifically described anywhere in Chapter 84 of the HTSUS.<sup>36</sup> With respect to the parts feeders, however, the CIT disagreed with both parties and ruled that they should be classified under subheading 8479.90.9595 covering “other” parts of machines and mechanical appliances.<sup>37</sup>

After the CIT denied the Government’s motion for partial rehearing with respect to the classification of the parts feeders, Fuji filed an appeal with the Federal Circuit concerning the classification of the chip placers and the Government filed a cross-appeal concerning the parts feeders.<sup>38</sup> The Federal Circuit affirmed the CIT’s ruling with respect to both articles.<sup>39</sup> First, the court noted that “for purposes of HTSUS Chapter 84, the *principal purpose* of the goods determines their tariff classification.”<sup>40</sup> Because the chip placers served multiple purposes, but their principal purpose was “to perform an active and integral role in making PCAs”—a function that neither HTSUS heading 8428 nor any other heading under HTSUS Chapter 84 specifically described—they were properly classified under the catchall heading 8479, the court concluded.<sup>41</sup>

Second, with respect to the parts feeders, the Federal Circuit observed that Explanatory Note B to HTSUS heading 8479 sets forth two criteria for determining whether a device that depends on another machine can nevertheless be classified as an independent machine: “[T]he device’s function (i) is distinct from that which is

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34. *Id.*; see also HARMONIZED TARIFF SCHEDULE, *supra* note 11, at ch. 84, p. 34, 37, <http://hotdocs.usitc.gov/docs/tata/hts/bychapter/0901c84.pdf>.

35. *Fuji Am. Corp.*, 519 F.3d at 1357.

36. *Id.* at 1357 (quoting *Fuji Am. Corp. v. United States*, 03-CV-00126 2006 Ct. Int’l Trade LEXIS 116, at \*27 (July 26, 2006)).

37. *Id.* (citing *Fuji Am. Corp.*, 2006 Ct. Int’l Trade LEXIS 116, at \*34).

38. *Id.*

39. *Id.* at 1346.

40. *Id.* at 1358–59 (emphasis added).

41. *Id.* at 1357 (quoting *Fuji Am. Corp.*, 2006 Ct. Int’l Trade LEXIS 116, at \*27).

performed by the machine or appliance whereon they are to be mounted, . . . and (ii) [the device] does not play an integral and inseparable part in the operation of such machine, appliance, or entity.”<sup>42</sup> All parties agreed that the first criterion had been satisfied because the function of parts feeders is distinct from the chip placers.<sup>43</sup> The court rejected the Government’s contention that parts feeders are machines with individual functions, instead affirming the CIT’s ruling that parts feeders “are integral and inseparable for the operation of the chip placers” and, therefore, should be classified under HTSUS subheading 8479.90.9595 because no other specific subheading existed for them.<sup>44</sup>

Thus, in *Fuji America Corp.*, the Federal Circuit consulted the Explanatory Notes for guidance in interpreting the HTSUS headings and subheadings.<sup>45</sup> In two other cases, the Federal Circuit provided more in-depth discussions of the role of the Explanatory Notes in guiding its review of CIT classification decisions. In *Agfa Corp. v. United States*,<sup>46</sup> the Federal Circuit relied heavily on the Explanatory Notes to support its legal analysis. CBP classified Agfa Corporation’s (“Agfa”) entries of metal plates coated with photosensitive emulsion under HTSUS subheading 3701.30.00 covering “[p]hotographic plates and film in the flat, sensitized, unexposed, of any material other than paper, paperboard or textiles; instant print film in the flat, sensitized, unexposed, whether or not in packs: . . . [o]ther plates and film, with any side exceeding 255 mm” and requiring an ad valorem duty of 3.7 percent.<sup>47</sup> Agfa filed a protest in which it argued that the articles should be classified under HTSUS subheading 8442.50.10, which covers “printing plates” and were entitled to duty-free treatment, because the trade referred to the articles as “printing plates” and because they were used for printing applications.<sup>48</sup> Agfa commenced an action at the CIT after CBP denied the protest.<sup>49</sup>

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42. *Id.* at 1359–60 (citing WORLD CUSTOMS ORGANIZATION, HARMONIZED COMMODITY DESCRIPTION AND CODING SYSTEM, EXPLANATORY NOTES § XVI, ch. 84.79(B)).

43. *Id.* at 1360.

44. *See id.* (explaining that parts feeders are not machines with individual functions because they depend on the chip placers’ operations).

45. *Id.* at 1359–60.

46. 520 F.3d 1326 (Fed. Cir. 2008), *reh’g en banc denied*, No. 05-00352 2008 U.S. App. LEXIS 14019 (Fed. Cir. June 4, 2008), *cert. denied*, No. 08-299 2008 U.S. LEXIS 7752 (U.S. Oct. 14, 2008) (discussing the Explanatory Notes of the HTSUS), at 1329–30.

47. *Id.* at 1329.

48. *Id.* at 1328.

49. *Id.* at 1327–28.

The CIT affirmed CBP's classification of Agfa's metal plates under HTSUS subheading 3701.30.00 in part because of information derived from the Explanatory Notes to headings 3701 and 8442.<sup>50</sup> The lower court found that the Explanatory Notes for HTSUS heading 3701 stated that "photographic plates" for purposes of that heading "may be made from a variety of materials and used in photomechanical processes."<sup>51</sup> In contrast, the Explanatory Notes for HTSUS heading 8442, where Agfa sought classification, did not refer to photosensitive materials and, in fact, specifically excluded "plates coated with a photographic emulsion" similar to those at issue.<sup>52</sup>

On appeal, the Federal Circuit affirmed the CIT's decision to sustain CBP's classification after reviewing the definition of "photographic" in the headnote to Chapter 37 of the HTSUS and the Explanatory Notes to HTSUS heading 3701.<sup>53</sup> It concluded that those sources demonstrated that the imported plates were *prima facie* classifiable under HTSUS heading 3701 because they constituted "photographic" plates, as described by the Explanatory Notes, because "a visible image is formed directly on the photosensitive surface by the action of light on that surface, and visible images are formed indirectly on paper by the action of light on that surface."<sup>54</sup> At the same time, the Federal Circuit rejected Agfa's argument that the imported plates were *per se* classifiable under HTSUS heading 8442 because that heading refers to "printing plates."<sup>55</sup> The court explained that "[w]hile the language of heading 8442 might allow for some ambiguity, the Explanatory Notes to heading 8442 do not" because they explicitly clarify that heading 8442 excludes metal plates coated with sensitized photographic emulsion, which is precisely what Agfa had imported.<sup>56</sup> Thus, the Federal Circuit relied on the text of the Explanatory Notes to affirm the CIT's holding that the imported metal plates were properly classifiable under HTSUS subheading

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50. *Id.* at 1330.

51. *Id.* at 1328.

52. *Id.*

53. *Id.* at 1329–30. The appeals court employed a two-step standard for reviewing whether, as a matter of law, the CIT's classification decision was reasonable: "(1) determining the proper meaning of the tariff provisions, which is a question of law; and (2) determining which heading the particular merchandise falls within, which is a question of fact." *Id.* at 1328 (citing *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)).

54. *Id.* at 1329.

55. *Id.* at 1330.

56. *See id.* (clarifying that "while the Explanatory Notes are not binding, they are persuasive authority, and Agfa provides no convincing reason to disregard such clearly relevant guidance").

3701.30.00, whereas the HTSUS excludes plates with photosensitive coatings from heading 8442.<sup>57</sup>

Another case decided in 2008, *Drygel, Inc. v. United States*,<sup>58</sup> addressed the relevance of the Explanatory Notes. In that case, the Federal Circuit reviewed the tariff classification of a breath-freshening product labeled “Gel-A-Mint MagikStrips®,” which consisted of “thin, sugar-free, flavored strips of consumable material that dissolve when placed on the tongue.”<sup>59</sup> Upon entry, Drygel, Inc. (“Drygel”) classified the articles under HTSUS subheading 3306.90.00, which covers “[p]reparations for oral or dental hygiene . . . [o]ther” and extended duty-free treatment.<sup>60</sup> CBP, however, reclassified them under a catchall HTSUS subheading 2106.90.99, which applies to “[f]ood preparations not elsewhere specified or included: . . . [o]ther” and imposes a 6.4 percent ad valorem duty.<sup>61</sup>

In a court action commenced by Drygel over CBP’s reclassification, the CIT granted the Government’s motion for summary judgment and sustained CBP’s classification of the articles under HTSUS subheading 2106.90.99.<sup>62</sup> In doing so, the CIT relied on *Warner-Lambert Co. v. United States*,<sup>63</sup> in which the Federal Circuit previously held “Certs® Powerful Mints” should be classified under HTSUS subheading 3306.90.00—and not under HTSUS subheading 2106.90.99—because they performed “breakdown, absorption, and purging” oral cleansing activities despite not containing any antimicrobial agents for hygienic functions.<sup>64</sup> Thus, the CIT in *Drygel* reasoned that the Gel-A-Mint MagikStrips® did not constitute “preparations for oral or dental hygiene” because, unlike Certs® Powerful Mints, they did not perform “breakdown, absorption, and purging” cleansing activities or otherwise contain antimicrobial agents.<sup>65</sup> In addition, the CIT dismissed as “non-binding” and

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57. See *id.* at 1329–30 (“Explanatory notes are not legally binding but may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision.” (quoting *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (internal citation omitted))).

58. 541 F.3d 1129 (Fed. Cir. 2008).

59. *Id.* at 1131.

60. *Id.*

61. *Id.*

62. *Id.* at 1130.

63. 407 F.3d 1207 (Fed. Cir. 2005).

64. *Drygel, Inc.*, 541 F.3d at 1132–33 (citing *Warner-Lambert Co.*, 407 F.3d at 1208, 1210–11). The Federal Circuit observed that the Explanatory Note to Chapter 33 of the HTSUS provides that “products of heading 3306 need not ‘contain subsidiary pharmaceutical or disinfectant constituents,’ nor be held out ‘as having therapeutic or prophylactic value.’” *Id.* at 1131 (citing *Warner-Lambert*, 407 F.3d at 1210).

65. *Id.* at 1133.

irrelevant the Federal Circuit's previous finding in *Warner-Lambert* that HTSUS heading 3306 covers "mouth washes and oral perfumes" pursuant to the clarifications in the Explanatory Notes, instead interpreting *Warner-Lambert* as holding that the mints at issue there constituted a "hygiene" product for purposes of heading 3306 because they performed cleansing activities, whereas Drygel's Gel-A-Mint MagikStrips® did not.<sup>66</sup>

On appeal, the Federal Circuit reversed the CIT and instead found that the Gel-A-Mint MagikStrips® should be classified under HTSUS subheading 3306.90.00.<sup>67</sup> The court held that the CIT's "interpretation of *Warner-Lambert* was too restrictive."<sup>68</sup> Products do not need to contain antimicrobial agents in order to be classified under HTSUS heading 3306, the court reasoned.<sup>69</sup> Although the articles at issue in *Warner-Lambert* contained "breakdown, absorption, and purging effects," the court clarified that it did not hold that articles *must* contain these cleansing properties in order to be classified under HTSUS subheading 3306.90.00.<sup>70</sup> It then held that all "oral perfumes" are not *prima facie* classifiable under heading 3306, but that heading 3306 nonetheless encompasses articles that "mask oral malodors" (i.e., "perfume" the mouth) even if they do not contain additional cleansing agents that "deodorize" (i.e., "chemically neutralize") the mouth.<sup>71</sup> Thus, the Federal Circuit clarified its previous finding in *Warner-Lambert* and held that articles do not require cleansing effects to be classified under HTSUS subheading 3306.90.00.<sup>72</sup>

However, in another case decided in 2008, the Federal Circuit departed from the guidelines in the Explanatory Notes in favor of the plain language of the HTSUS. *Airflow Technology, Inc. v. United States*<sup>73</sup> involved the tariff classification of Sperifilt filter media used in air filtration mechanisms for filtering dirt and other particles from circulating air supply.<sup>74</sup> CBP classified the imported filter media

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66. *Id.* at 1132–33 (citing *Drygel, Inc. v. United States*, 507 F. Supp. 2d 1371, 1379 (Ct. Int'l Trade 2007)).

67. *Id.* at 1136.

68. *Id.* at 1134.

69. *Id.*

70. *Id.* (clarifying that *Warner-Lambert* did not establish exclusive criteria for determining whether an article is classifiable under HTSUS heading 3306).

71. *Id.* at 1135. In so holding, the Federal Circuit found that the Explanatory Notes to HTSUS heading 3306 were "persuasive" and "'generally indicative' of the proper interpretation of a tariff provision . . . absent persuasive reasons to disregard it." *Id.* at 1134 (citations omitted).

72. *Id.* at 1135–36.

73. 524 F.3d 1287 (Fed. Cir. 2008).

74. *Id.* at 1289.

under HTSUS subheading 5911.40.00, which covers “[t]extile products and articles, for technical uses, . . . ; [s]training cloth *of a kind used in oil presses or the like*” and imposed ad valorem duty rates of 11 percent in 1998 and 10.5 percent in 1999.<sup>75</sup> Airflow Technology, Inc. (“Airflow”) protested the decision, arguing that the limiting language “of a kind used in oil presses or the like” meant that HTSUS subheading 5911.40.00 applied only to straining cloths that separate solids from liquids—as oil presses do—and not to products like its filter media that separate solids from gases (e.g., air).<sup>76</sup> Airflow argued that its filter media should instead be classified under HTSUS subheading 5603.94.90, which covers “[n]onwovens, whether or not impregnated, coated, covered or laminated . . . other” and carries duty-free treatment, because, according to the Explanatory Notes, heading 5603 covers “sheets for filtering liquids or air.”<sup>77</sup>

Airflow commenced an action at the CIT after CBP denied its protest. The CIT sustained CBP’s classification under HTSUS subheading 5911.40.00, interpreting the term “straining cloth” under that subheading to include both filters that separate solids from liquids *and* filters that separate solids from gases.<sup>78</sup> It further interpreted the phrase “oil presses and the like” under HTSUS subheading 5911.40.00 as covering “‘oil presses and other filtering mechanisms,’ including filtering mechanisms that filtered solids from gases.”<sup>79</sup> Because the Sperifilt filter media separated solids from gases, the CIT ruled that it fell within the definition of HTSUS subheading 5911.40.00.<sup>80</sup>

On appeal, the Federal Circuit held that the CIT erroneously interpreted the term “straining cloth” under HTSUS subheading 5911.40.00 as including products that separate solids from gases, and it reversed and remanded the CIT’s ruling.<sup>81</sup> The court first held that the plain meaning of the term “straining cloth” refers only to articles that separate solids from liquids, whereas the plain meaning of the term “filtering” refers to the separation of solids from liquids or gases.<sup>82</sup> Thus, the Federal Circuit concluded that “straining” cloths

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75. *Id.* at 1290 (emphasis added).

76. *Id.* at 1289.

77. *Id.* at 1289–90.

78. *Id.* at 1290.

79. *Id.* (citing *Airflow Tech., Inc. v. United States*, 483 F. Supp. 2d 1337, 1345 (Ct. Int’l Trade 2007)).

80. *Id.*

81. *Id.* at 1293.

82. *Id.* at 1291–92.

and “filtering” cloths are not interchangeable and that the CIT erroneously equated Airflow’s filtering media to straining cloths.<sup>83</sup>

The Federal Circuit next performed an *ejusdem generis* analysis of the phrase “of a kind used in *oil presses or the like*” appearing in HTSUS subheading 5911.40.00. The court explained that, under the principle of *ejusdem generis*, articles covered by the general phrase “or the like” must “possess the same essential characteristic of the specific enumerated article.”<sup>84</sup> The court then reasoned that because oil presses only separate solids from liquids, whereas Airflow’s filter media separates solids from gases, the filter media did not have the same essential characteristic as oil presses and, thus, should not be classified under HTSUS subheading 5911.40.00.<sup>85</sup> Finally, although the Explanatory Note to heading 5911 indicates that subheading 5911.40.00 applies broadly to any type of filtering cloth, including those filtering air, the Federal Circuit nonetheless concluded that the Explanatory Note should not be accorded any weight because it contradicted the plain and unambiguous language of HTSUS subheading 5911.40.00, which limited that subheading to only those products that separate solids from liquids.<sup>86</sup> Accordingly, the Federal Circuit remanded the case to the CIT with instructions to determine the appropriate HTSUS classification of the Sperifilt filter media.<sup>87</sup>

The court implicated the principle of *ejusdem generis* in another 2008 decision, *Deckers Corp. v. United States*,<sup>88</sup> which addressed the proper tariff classification of Teva® Sport Sandals. The article at issue consisted of athletic footwear with open toe and heel sections and upper sections that did not enclose the wearer’s foot and ankle.<sup>89</sup> CBP classified these sandals under HTSUS subheading 6404.19.35, which covers “[f]ootwear with outer soles of rubber, plastics . . . and uppers of textile materials . . . [o]ther . . . with open toes or open heels . . . [o]ther,” and carries an ad valorem duty rate of 37.5 percent.<sup>90</sup> The importer, Deckers Corporation (“Deckers”), argued that its sandals should be classified under the more specific HTSUS subheading 6404.11.80 covering athletic footwear described as “[f]ootwear with outer soles of rubber, plastics, leather or

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83. *Id.* at 1292.

84. *Id.*

85. *Id.*

86. *Id.* at 1292–93.

87. *Id.* at 1293.

88. 532 F.3d 1312 (Fed. Cir. 2008), *reh’g denied*, No. 08-1011 2008 U.S. App. LEXIS 25137 (Fed. Cir. Oct. 10, 2008).

89. *Id.* at 1313.

90. *Id.*

composition leather and uppers of textile materials . . . [f]ootwear with outer soles of rubber or plastics: . . . [s]ports footwear; tennis shoes, basketball shoes, gym shoes, training shoes *and the like* . . . [v]alued over \$6.50 but not over \$12/pair,” with an ad valorem duty rate of 20 percent plus \$0.90 per pair.<sup>91</sup> According to Deckers, its Teva® sandals were athletic footwear “like the exemplars ‘tennis shoes, basketball shoes, gym shoes, [and] training shoes’” referenced in HTSUS subheading 6404.11.80 and, therefore, should be classified thereunder.<sup>92</sup>

After CBP denied a protest that Deckers filed, an action followed at the CIT, which affirmed CBP’s determination that the Teva® sandals should be classified under HTSUS subheading 6404.19.35.<sup>93</sup> On appeal, the Federal Circuit affirmed the CIT’s classification ruling.<sup>94</sup> First, the court held that the plain language of HTSUS subheading 6404.11.80 demonstrated that Congress intended to include therein only athletic footwear that were “tennis shoes, basketball shoes, gym shoes, training shoes,” or athletic footwear like these exemplars.<sup>95</sup> The court explained that Deckers improperly interpreted HTSUS subheading 6404.11.80 as covering all athletic footwear “regardless of whether such athletic footwear bears any similarity to the exemplars specifically enumerated in the subheading” or are used in the same types of athletic activities.<sup>96</sup>

Second, the Federal Circuit rejected Deckers’ *ejusdem generis* claim that the Teva® sandals had the same essential characteristics as the exemplars enumerated under HTSUS subheading 6404.11.80.<sup>97</sup> The court reasoned that the factual record demonstrated that tennis shoes, basketball shoes, gym shoes, and training shoes all share a common design, namely, an “enclosed upper, which contains features that stabilize the foot, and protect against abrasion and impact.”<sup>98</sup> In contrast, the Teva® sandals “have open toes and open

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91. *Id.* (emphasis added).

92. *Id.* at 1314.

93. *Id.*

94. *Id.* at 1313.

95. *Id.* at 1316.

96. *Id.* at 1315.

97. *See id.* at 1316 (quoting *Airflow Tech., Inc. v. United States*, 524 F.3d 1287, 1292 (Fed. Cir. 2008)) (explaining that for purposes of classifying imported merchandise, “[t]he principle of *ejusdem generis* requires anything falling under the general term ‘or the like’ to possess the same essential characteristic of the specific enumerated articles”). The court further clarified that “[t]he phrase ‘or the like’ means ‘the same, or very similar to,’” and that “[t]o determine the essential characteristic, courts may consider attributes such as the purpose, character, material, design, and texture.” *Id.* (citations omitted).

98. *Id.* at 1317.

heels, and lack the features of the named exemplars of 6404.11.80. . . .”<sup>99</sup> Accordingly, the Federal Circuit agreed with CBP and the CIT that the Teva® Sandals were not sufficiently similar to the types of footwear to which subheading 6404.11.80 referred but, rather, met the plain description of HTSUS subheading 6404.19.35.<sup>100</sup>

Finally, in *Timber Products Co. v. United States*,<sup>101</sup> the Federal Circuit addressed an importer’s burden of proof for establishing a “commercial designation” for tariff classification purposes. This case involved the importation of certain plywood products from Brazil. For customs purposes, importers identify plywood based on the species of wood used for the outer ply (or “face” ply).<sup>102</sup> The importer, Timber Products Co. (“Timber”), could not identify the precise species of wood used for the face ply because its suppliers combined multiple species of wood during the production process.<sup>103</sup> On its invoices and shipping documents, Timber identified the plywood products as containing different species of woods in the face ply, such as “Sumauma,” “Faveira,” “Amesclao,” “Brazilian White Rotary,” “White Virola (*Virola* spp.),” and “Edaiply Faveira.”<sup>104</sup> Timber claimed that the plywood trade considered “Virola” to be a commercial designation covering thirty-five different species of wood, including each of these species identified on its entry documents.<sup>105</sup> Timber further asserted that its articles should be classified under subheading 4412.13.40 of the HTSUS<sup>106</sup>—which carried duty-free

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99. *See id.* (explaining that unlike the exemplars of HTSUS subheading 6404.11.80, the Teva® sandals did not contain an enclosed upper to stabilize the foot or enclosed toes and heels to protect against abrasion and impact).

100. *Id.* at 1318.

101. 515 F.3d 1213 (Fed. Cir. 2008), *reh’g en banc denied*, No. 07-1136 2008 U.S. App. LEXIS 16218 (Fed. Cir. July 16, 2008).

102. *See id.* at 1217 (describing plywood as consisting of two outer wooden sheets called the “face” ply and the “backing,” and one or more middle plies comprising the “core,” which are pressed together to form the finished plywood product).

103. *Id.*

104. *Id.*

105. *Id.* at 1217–18 (citing *Timber Prods. Co. v. United States*, 462 F. Supp. 2d 1342, 1347 (Ct. Int’l Trade 2006)) (explaining that “‘Virola’ refers to a botanical genus consisting of approximately 45 to 60 different species of tropical hardwood. The term ‘*Virola* spp.’ denotes all species of the genus *Virola*. ‘*Virola*’ is also a commercial term used within the plywood trade”). In contrast, “[t]he terms ‘Sumauma,’ ‘Faveira,’ ‘Edaiply Faveira,’ ‘Amesclao,’ and ‘Brazilian White’ are each trade or common terms for various species of tropical hardwood from botanical genera other than ‘*Virola*.’” *Id.* at 1218 (citing *Timber Prods. Co.*, 462 F. Supp. 2d at 1347).

106. Subheading 4412.13.40 covers “Plywood, veneered panels and similar laminated wood; . . . [w]ith at least one outer ply of the following tropical woods: Dark Red Meranti, Light Red Meranti, White Lauan, Sipo, Limba, Okoume, Obeche, Acajou d’Afrique, Sapelli, *Virola*, Mahogany, Palissandre de Para, Palissandre de Rio or Palissandre de Rose.” *Id.* at 1217 n.2 (emphasis added).

treatment—because it was specific to “Virola” plywood.<sup>107</sup> However, CBP disagreed that a commercial designation for “Virola” plywood existed, and it classified Timber’s products under the more general HTSUS subheading 4412.14.30 that imposes an ad valorem duty rate of 8 percent.<sup>108</sup>

The CIT upheld CBP’s classification of the merchandise under HTSUS subheading 4412.14.30, finding that Timber failed to establish a commercial designation for Virola that applied throughout *every trade* that imported “Virola” products.<sup>109</sup> On appeal, the Federal Circuit vacated the CIT’s decision because the “relevant trade for analyzing whether a tariff term has an established commercial meaning is determined by the merchandise before the court in a particular case, not by all merchandise to which the tariff term might apply.”<sup>110</sup> Therefore, the court remanded the case with instructions for the CIT to consider whether Timber had established a commercial designation for “Virola” within only the plywood trade and, if so, whether Timber’s imported plywood met the definition of that commercial designation.<sup>111</sup> On remand, the CIT again sustained CBP’s classification under HTSUS subheading 4412.14.30 after concluding that Timber had not established a commercial designation for “Virola” specifically within the plywood trade.<sup>112</sup>

Timber again appealed the CIT’s remand determination to the Federal Circuit, but, this time, the appeals court affirmed the CIT. The Federal Circuit guided its analysis with prior case law addressing “commercial designations,” finding that the party alleging the existence of a commercial designation must establish by a preponderance of the evidence “a definite, uniform, and general commercial meaning for a term that is so widespread throughout the relevant industry that, for tariff purposes, it effectively supersedes the common meaning of the term.”<sup>113</sup> In reviewing the CIT’s legal

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107. *Id.* at 1218.

108. *Id.* at 1216 n.1 (citing HTSUS, 19 U.S.C. § 1202 (1997), subheading 4412.14.30) (explaining that subheading 4412.14.30 covers “[p]lywood, veneered panels and similar laminated wood; . . . [o]ther, with at least one outer ply of nonconiferous wood: . . . [o]ther”).

109. *Id.* at 1218 (citing *Timber Prods. Co. v. United States*, 341 F. Supp. 2d 1241, 1248–51 (Ct. Int’l Trade 2004)).

110. *Id.* (citing *Timber Prods. Co. v. United States*, 417 F.3d 1198, 1202 (Fed. Cir. 2005)).

111. *Id.* (citing *Timber Prods. Co.*, 417 F.3d at 1203).

112. *Id.* at 1219 (explaining that “the testimonial and documentary evidence revealed a commercial meaning for the term [Virola] that was ‘general,’ but neither ‘uniform’ nor ‘definite’”).

113. *Id.* at 1217 n.3. The Federal Circuit continued that “[t]he concept of commercial designation ‘was intended to apply to cases where the trade designation is so universal and well understood that Congress, and all the trade, are supposed to

conclusions de novo, the court agreed that Timber had failed to establish a commercial designation for the term “Virola” that was *uniform* and *definite* throughout the plywood trade.<sup>114</sup>

At the outset, the Federal Circuit rejected the Government’s claim that clear congressional intent existed that precluded the CIT from undertaking a commercial designation analysis.<sup>115</sup> Instead, the court agreed with the CIT that “there was no clear Congressional intent that would preclude a commercial designation analysis with respect to the term ‘Virola.’”<sup>116</sup> The Federal Circuit then held that the CIT did not make any clearly erroneous findings of fact or law with respect to its conclusion that Timber’s proposed commercial designation was neither uniform nor definite.<sup>117</sup>

First, with respect to uniformity, the court concluded that “the testimonial and documentary evidence demonstrates that Timber was unable to establish a commercial designation for ‘Virola’ that was the same throughout the plywood trade,”<sup>118</sup> and that Timber failed to “prove a widely understood commercial meaning that applies everywhere throughout the relevant industry.”<sup>119</sup> Second, the Federal Circuit stated that “[i]n order for a commercial designation to be definite, it must be certain of understanding.”<sup>120</sup> The court then held that the CIT reasonably found that Timber’s proposed “Virola” designation was not of certain understanding throughout the plywood trade, as demonstrated by the lack of general consensus among the witnesses and documents presented at trial.<sup>121</sup> Accordingly, the Federal Circuit sustained CBP’s classification of Timber’s entries under HTSUS subheading 4412.14.30.<sup>122</sup>

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have been fully acquainted with the practice at the time the law was enacted.” *Id.* at 1219 (quoting *Jas. Akeroyd & Co. v. United States*, 15 Ct. Cust. 440, 443 (1928)).

114. *Id.* at 1220.

115. *Id.*

116. *Id.*

117. *Id.* at 1221–23.

118. *Id.* at 1221.

119. *Id.* at 1222.

120. *Id.*

121. *Id.* at 1222–23.

122. The Federal Circuit also rejected Timber’s claim that one specific entry containing an article that it identified on the invoice as “White Virola (*Virola* spp.)” was entitled to classification under HTSUS subheading 4412.13.40 because Timber could not substantiate that the face ply actually contained Virola wood. *See id.* at 1223 (holding that “[i]t is not the invoice but the goods that determine classification”).

*B. Valuation Issues*

Another issue affecting CBP's administration of the customs laws is the proper appraisal of imported merchandise.<sup>123</sup> The customs statute and CBP's regulations provide that the customs value will normally be the "transaction value," which is the "price actually paid or payable for the merchandise when sold for exportation to the United States," subject to certain adjustments enumerated under the law.<sup>124</sup> Determining the appropriate entered value is critical because CBP uses that value to assess duties, taxes, and fees, including the deposits for estimated antidumping and countervailing duties (if applicable).

In 2008, the Federal Circuit issued two decisions related to claimed adjustments to the entered value reported by an importer, Volkswagen of America, Inc. ("VW"). Both *Volkswagen of America, Inc. v. United States*<sup>125</sup> appeals (hereinafter referred to as *Volkswagen Fed. Cir. I* and *Volkswagen Fed. Cir. II*) involved the same basic set of facts. VW imported automobiles into the United States, which CBP appraised based on the transaction price that VW actually paid at the time of importation.<sup>126</sup> VW later discovered that many of the automobiles contained manufacturing and design defects that were not apparent at the time of importation, and it repaired those defects pursuant to consumer warranties—after it had already completed the sale to the ultimate U.S. purchaser.<sup>127</sup> VW then filed protests with CBP claiming that, pursuant to 19 C.F.R. § 158.12,<sup>128</sup> CBP should reduce the appraised value by an amount equal to the warranty costs incurred to repair the defective automobiles and then refund import duties and fees assessed on that portion of the transaction value.<sup>129</sup> VW also filed protests with CBP challenging the appraised value of automobiles that it expected to repair at a later time.<sup>130</sup>

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123. See 19 U.S.C. § 1401a (2006) (setting forth the guidelines for valuing imported articles).

124. *Id.* § 1401a(b). In certain circumstances, the transaction value may not be appropriate, for example, where the importer and exporter are related parties or where the importer is unable to ascertain the transaction value. *Id.* § 1401a(a)(1), (b)(2).

125. *Volkswagen Fed. Cir. I*, 532 F.3d 1365 (Fed. Cir. 2008); *Volkswagen Fed. Cir. II*, 540 F.3d 1324 (Fed. Cir. 2008), *reh'g denied*, No. 07-1518 2008 U.S. App. LEXIS 25392 (Fed. Cir. Nov. 20, 2008).

126. *Volkswagen Fed. Cir. II*, 540 F.3d at 1327.

127. *Id.*

128. See 19 C.F.R. § 158.12(a) (2008) ("Merchandise which is subject to ad valorem or compound duties and found by the port director to be partially damaged at the time of importation shall be appraised in its condition as imported, with an allowance made in the value to the extent of the damage.").

129. *Volkswagen Fed. Cir. II*, 540 F.3d at 1327–28.

130. *Volkswagen Fed. Cir. I*, 532 F.3d at 1368.

After CBP denied each of VW's claims, the importer commenced an action at the CIT, which made three separate findings.<sup>131</sup> First, the CIT concluded that it lacked jurisdiction over claims covering repairs that VW made after it filed its protests with CBP.<sup>132</sup> Second, with respect to claims based on repairs that VW made before filing its protests to correct design defects in response to government-mandated recalls, the CIT held that VW was not entitled to allowances because VW had ordered automobiles containing design defects.<sup>133</sup> Third, with respect to claims based on pre-protest repairs to correct defects unrelated to government recalls, the CIT also held that VW did not establish its entitlement to allowances because it had provided insufficient evidence to prove that the defects existed at the time of importation.<sup>134</sup> After the CIT denied a motion for rehearing, VW filed an appeal that became the subject of *Volkswagen Fed. Cir. II*.<sup>135</sup>

VW subsequently filed claims with CBP requesting that it provide allowances to the appraised value of automobiles under 19 C.F.R. § 158.12 for repairs occurring after the protest period had expired, which CBP refused to address.<sup>136</sup> VW then commenced a separate action at the CIT under the Administrative Procedure Act ("APA"),<sup>137</sup> and sought jurisdiction under 28 U.S.C. § 1581(i).<sup>138</sup> However, the CIT dismissed the action for failure to state a claim upon which relief could be granted based on its conclusions that: (1) 19 U.S.C. § 1514—which governs challenges to CBP appraisals—precluded judicial review under the APA for any claims made after the expiration of the protest period; and (2) VW could not bring a separate cause of action under 19 C.F.R. § 158.12 to challenge appraisals for defective merchandise.<sup>139</sup> VW then docketed a second appeal that the Federal Circuit decided in *Volkswagen Fed. Cir. I*.<sup>140</sup>

131. *Volkswagen Fed. Cir. II*, 540 F.3d at 1326.

132. *Id.* at 1328 (citing *Volkswagen of Am., Inc. v. United States*, 277 F. Supp. 2d 1364, 1369 (Ct. Int'l Trade 2003)).

133. *Id.* at 1329–30.

134. *Id.* at 1329.

135. *Id.* at 1330.

136. *Volkswagen Fed. Cir. I*, 532 F.3d 1365, 1368–69 (Fed. Cir. 2008) (noting that the deadline to file a protest was 90 days from the date of notice of liquidation). In 2004, Congress amended 19 U.S.C. § 1514(c)(3) to extend the protest period from 90 days to 180 days from the date of liquidation. See 19 U.S.C. § 1514(c)(3), amended by Pub. L. No. 108-429, § 2103 (Dec. 3, 2004).

137. See 5 U.S.C. § 702 (2006) (providing that causes of action are available to persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute").

138. *Volkswagen Fed. Cir. I*, 532 F.3d at 1369.

139. *Id.*

140. *Id.* at 1369.

In *Volkswagen Fed. Cir. I*, the Federal Circuit affirmed the CIT's dismissal for failure to state a claim. After concluding that VW's claim for an allowance under 19 C.F.R. § 158.12 actually relied on the APA for standing purposes, the court held that 19 U.S.C. § 1514 precluded judicial review under the APA.<sup>141</sup> It reasoned that VW could not circumvent the procedural time limits established by 19 U.S.C. § 1514 merely by bringing a separate cause of action under 19 C.F.R. § 158.12 because nothing in 19 C.F.R. § 158.12 contradicted the statutory deadlines for filing protests.<sup>142</sup> Thus, according to the court, 19 U.S.C. § 1514 sets forth the only procedure for bringing a cause of action for allowances for defects discovered and repaired after importation.<sup>143</sup> In a concurring opinion, Senior Circuit Judge Friedman agreed with the court's legal analysis but expressed concern about the fact that VW had no recourse under the existing law to challenge the appraisal of automobiles with latent defects discovered after the expiration of the protest period, despite incurring repair costs that would normally reduce the appraised value.<sup>144</sup>

In *Volkswagen Fed. Cir. II*, the Federal Circuit partially affirmed and partially reversed the CIT with respect to VW's denied protests.<sup>145</sup> The court first affirmed the CIT's ruling that the lower court lacked jurisdiction under 19 U.S.C. § 1514(c)(1) over VW's claims for automobile repairs completed *after* the date that it filed its protests.<sup>146</sup> The court reasoned that protests must "distinctly and specifically" describe the nature of the merchandise subject to the protest in order to be considered valid, but VW's protests failed to do so, thereby precluding the CIT from obtaining jurisdiction under 28 U.S.C. § 1581(a).<sup>147</sup>

The Federal Circuit next affirmed the CIT with respect to claims based on pre-protest repairs to correct manufacturing defects other than recall repairs. The court held that the CIT did not commit any "clear errors" in concluding that VW had provided insufficient evidence to establish by a preponderance of the evidence that the

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141. *Id.* at 1370.

142. *Id.* at 1370-71.

143. *See id.* at 1371 (holding that 19 U.S.C. § 1514 governs claims made under 19 C.F.R. § 158.12 unless a statutory exception applies, but that VW failed to establish that any of the statutory exceptions existed in its case).

144. *Id.* at 1374-76.

145. *Volkswagen Fed. Cir. II*, 540 F.3d 1324, 1327 (Fed. Cir. 2008).

146. *Id.* at 1331.

147. *Id.* (citing 19 U.S.C. § 1514(c)(1) and 19 C.F.R. § 174.13(a)(5)-(6)).

defects at issue existed at the time of importation.<sup>148</sup> The court observed that VW had supplied only warranty agreements to support its claim that it made repairs subject to warranties and held that, “[w]ithout more, [the court] cannot conclude from the mere fact that Volkswagen made a determination that the repair was covered under its warranty that the alleged defect existed at the time of importation.”<sup>149</sup>

However, with respect to claims based on pre-protest repairs to correct design defects in response to government-mandated recalls, the Federal Circuit disagreed with the CIT’s conclusion that VW had contracted for automobiles containing design defects.<sup>150</sup> Rather, the importation sales agreements showed that VW had contracted for automobiles free from both design and manufacturing defects.<sup>151</sup> The court concluded that VW had demonstrated that it made repairs to correct defects existing at the time of importation to comply with federal safety statutes and recall notices.<sup>152</sup> The court stated that “the very nature of a government mandated safety recall establishes the high likelihood that any defects repaired pursuant to the recall existed at the time of importation.”<sup>153</sup> It then held that an importer is entitled to an allowance under 19 C.F.R. § 158.12 for the costs to repair latent defects pursuant to a government recall because evidence of the recall sufficiently demonstrates that the defects existed at the time of importation.<sup>154</sup> Accordingly, the Federal Circuit reversed the CIT’s ruling regarding VW’s claimed allowances in response to government recalls and remanded the issue to determine whether the recalls at issue covered latent defects that may have existed in VW’s automobiles at the time of importation.<sup>155</sup>

### C. Jurisdictional Issues

In 2008, the Federal Circuit decided two customs cases that raised jurisdictional questions under 28 U.S.C. § 1581(i), the residual (or

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148. *Id.* at 1333 (quoting *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1373 (Fed. Cir. 2006)) (holding, with respect to a warranty repair claim, that an importer must “provide[] critically probative evidence that the defects in question actually existed at importation”).

149. *Id.* at 1334.

150. *Id.* at 1335.

151. *Id.*

152. *Id.* at 1327, 1335–36.

153. *Id.* at 1336.

154. *Id.* at 1327.

155. *Id.* at 1336. The Federal Circuit also held that the CIT did not err in denying VW’s motion for a rehearing on its claim that 19 U.S.C. § 1401a, which permits exclusions from entered value for post-importation “maintenance” expenses, entitled it to relief because VW failed to raise that claim before the CIT. *Id.* at 1336–37.

“catch-all”) jurisdictional provision under the U.S. Code.<sup>156</sup> *Hartford Fire Insurance Co. v. United States*<sup>157</sup> addressed whether the CIT had subject matter jurisdiction over a claim filed by a surety regarding the enforceability of its bonds. CBP assessed antidumping duties on certain entries of polyethylene carrier bags for which Hartford Fire Insurance (“Hartford”) was the surety.<sup>158</sup> When CBP issued a formal demand against the surety bonds to pay the antidumping duties, Hartford filed suit with the CIT claiming that the bonds had been rendered unenforceable by the Continued Dumping and Subsidy Offset Act of 2000 (“CDSOA”)<sup>159</sup>—a mechanism under which CBP distributes collected antidumping and countervailing duties to affected U.S. domestic producers, whereas previously such duties were deposited into the general U.S. treasury.<sup>160</sup> Hartford argued that the amended law “materially altered its bond agreements, which it claims required funds paid on the bonds to be distributed to the United States, and not to any individual or company.”<sup>161</sup>

Hartford claimed that the CIT had subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i) because that provision confers jurisdiction to determine the common law surety issue of the enforceability of bonds.<sup>162</sup> However, the CIT ruled that the challenge actually represented a challenge to a customs charge, which is a protestable action over which the CIT has jurisdiction pursuant to a separate provision, 28 U.S.C. § 1581(a).<sup>163</sup> Because Hartford failed to file a protest with the agency and could not otherwise demonstrate that the protest remedy was “manifestly inadequate,” the CIT dismissed Hartford’s suit for lack of subject matter jurisdiction.<sup>164</sup>

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156. See 28 U.S.C. § 1581(i) (2006) (conferring exclusive jurisdiction to the CIT over civil actions arising out of U.S. laws providing for: (1) revenue from imports; (2) tariffs, duties, fees, or taxes on imports for reasons other than raising revenue; (3) embargoes or other quantitative restrictions on imports; or (4) the administration and enforcement of the international trade laws).

157. 544 F.3d 1289 (Fed. Cir. 2008).

158. *Id.* at 1290.

159. 19 U.S.C. § 1675c (2000) (repealed 2006) (commonly referred to as the “Byrd Amendment”).

160. See discussion *infra* Part II.E (describing the CDSOA and an appeal the court decided in 2008).

161. *Hartford Fire Ins. Co.*, 544 F.3d at 1290–91 (explaining that Hartford alleged that “it was not obligated to pay a subsidy to the U.S. domestic industry”).

162. *Id.* at 1291.

163. *Id.* (citing *Hartford Fire Ins. Co. v. United States*, 507 F. Supp. 2d 1331 (Ct. Int’l Trade 2007)); see also 28 U.S.C. § 1581(a) (2006) (“The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.”).

164. *Hartford Fire Ins. Co.*, 544 F.3d at 1291.

Hartford appealed the CIT's dismissal, arguing that the CIT erred in holding that jurisdiction was available under 28 U.S.C. § 1581(a).<sup>165</sup> However, the Federal Circuit affirmed the CIT, noting first that the court has consistently held that a litigant may not invoke jurisdiction under 28 U.S.C. § 1581(i) if jurisdiction was, or could have been, available under another subsection of 28 U.S.C. § 1581 unless the other subsection was found to be "manifestly inadequate."<sup>166</sup> The court emphasized that the CIT may look to both the form and substance of claims in determining whether it has subject matter jurisdiction.<sup>167</sup> It then characterized Hartford's claim regarding the unenforceability of the bonds as "artful pleading" because, in substance, Hartford sought to avoid payment of a customs charge.<sup>168</sup> The court agreed with the CIT that Hartford could have challenged the demand for payment of antidumping duties through CBP's administrative protest mechanism and then obtained jurisdiction via 28 U.S.C. § 1581(a) if and when CBP denied the protest.<sup>169</sup> Because Hartford failed to file a protest within the statutory time limit, CBP's demand for payment of duties became final. Consequently, jurisdiction under 28 U.S.C. § 1581(a) became unavailable as a recourse, and the Federal Circuit held that the CIT could not claim jurisdiction under 28 U.S.C. § 1581(i).<sup>170</sup> The court also held that the protest remedy was not "manifestly inadequate" because CBP "has the authority to cancel a bond or a charge against a bond in the event of the breach of any condition of the bond, the ultimate remedy Hartford seeks."<sup>171</sup>

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165. *Id.* at 1292–93.

166. *Id.* at 1292. The Federal Circuit further explained that "to prevent circumvention of the administrative processes crafted by Congress, jurisdiction under subsection 1581(i) may not be invoked if jurisdiction under another subsection of section 1581 is or could have been available, unless the other subsection is shown to be manifestly inadequate." *Id.* (citing *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006)).

167. *Id.* at 1293 ("Just as we must look to the true nature of the action in a district court in determining jurisdiction on appeal, the trial court was correct to look to the true nature of the action in determining jurisdiction at the outset.").

168. *Id.* (citations omitted).

169. *Id.* (citing 19 U.S.C. § 1514(a)(3), (c)(3)).

170. *Id.* The Federal Circuit also rejected Hartford's claim that CBP does not have authority to determine the enforceability of bonds. *Id.* at 1294. It held that CBP "does have broad authority over the administration and forms of bonds, including determining their validity and enforceability and a surety's liability pursuant to the bonds." *Id.* (citing *Am. Pillowcase & Lace Co. v. United States*, 20 Cust. Ct. 53, 61 (1948)).

171. *Id.* (citing 19 U.S.C. § 1623(c)).

*Sakar International, Inc. v. United States*<sup>172</sup> represents another interesting decision involving a jurisdictional issue. CBP determined that travel chargers and mini-keyboards for personal digital assistants (“PDAs”), which Sakar International, Inc. (“Sakar”) imported from China, were counterfeit because they were marked with certain U.S. trademarks without the trademark owners’ authorization.<sup>173</sup> Pursuant to its authority under 19 U.S.C. § 1526(e)-(f),<sup>174</sup> CBP seized and subsequently destroyed the merchandise and then imposed civil fines on Sakar for importing counterfeit goods, stating that the fines represented a “final administrative review.”<sup>175</sup> In an action that followed, the CIT agreed with Sakar that CBP’s seizure of the counterfeit goods constituted an embargo under 19 U.S.C. § 1526(e) because it was tantamount to a governmentally imposed import restriction.<sup>176</sup> The lower court then held that it had jurisdiction over the claim under 28 U.S.C. § 1581(i)(4), as it related to 28 U.S.C. § 1581(i)(3), which grants the CIT exclusive jurisdiction over the “administration and enforcement” of embargoes or other quantitative restrictions.<sup>177</sup> However, the CIT ultimately dismissed the action for failure to state a claim upon which relief could be granted after finding that CBP’s assessment of the civil fine did not constitute a “final agency action” under the APA because CBP “retained discretion over the ultimate decision of whether or not to sue Sakar in a district court in order to collect the fine.”<sup>178</sup>

On appeal, the Federal Circuit vacated the CIT’s ruling and instead held that the lower court did not have subject matter jurisdiction over the action.<sup>179</sup> Citing the U.S. Supreme Court’s decision in *K Mart*

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172. 516 F.3d 1340 (Fed. Cir. 2008), *reh’g en banc denied*, No. 07-1173 2008 U.S. App. LEXIS 10553 (Fed. Cir. Apr. 11, 2008), *cert. denied*, 129 S. Ct. 488 (2008), *appeal dismissed*, 2008 Ct. Intl. Trade LEXIS 126 (Ct. Int’l Trade Dec. 3, 2008).

173. *Id.* at 1342.

174. See 19 U.S.C. § 1526(e) (2006) (providing that any “merchandise bearing a counterfeit mark . . . imported into the United States . . . shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws”); *id.* § 1526(f)(1) (granting CBP the discretion to impose a civil fine on “[a]ny person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that is seized under subsection (e) of this section”).

175. *Sakar*, 516 F.3d at 1342–43.

176. *Id.* at 1343.

177. *Id.*; see 28 U.S.C. § 1581(i)(3) (2006) (granting the CIT the exclusive jurisdiction over civil actions involving “embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety”); *id.* § 1581(i)(4) (conferring jurisdiction to the CIT over actions involving the “administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of” § 1581(i)).

178. *Sakar*, 516 F.3d at 1344.

179. *Id.* at 1350.

*Corp. v. Cartier, Inc.*,<sup>180</sup> the Federal Circuit held that the seizure did not constitute an embargo under 19 U.S.C. § 1526(e) because that provision “does not constitute a governmentally imposed quantitative limit on importation, because under that provision the trademark owner, not the government, retains ultimate control over whether or not the ‘counterfeit’ merchandise is imported.”<sup>181</sup> Rather, CBP’s seizure represented an “intermediate step in the ultimate disposition of that merchandise”<sup>182</sup> through which “[t]he private party, not the Government . . . decid[es] whether and how to exercise its private right [and] determines the quantity of any particular product that can be imported.”<sup>183</sup> Because the seizure did not constitute an embargo within the meaning of 28 U.S.C. § 1581(i)(3), and none of the other statutory bases for jurisdiction existed, the Federal Circuit concluded that the CIT did not have jurisdiction over the matter.<sup>184</sup> Even though the CIT had already dismissed the action on alternate grounds, the Federal Circuit vacated the lower court’s decision and remanded it with instructions to dismiss Sakar’s complaint for lack of jurisdiction.<sup>185</sup>

#### D. Other Customs Issues

Finally, in 2008, the Federal Circuit reviewed two CIT decisions involving aspects of U.S. customs law other than those described in the foregoing sections. In *Nufarm America’s, Inc. v. United States*,<sup>186</sup> the Federal Circuit considered a constitutional challenge to 19 C.F.R. § 181.53 concerning CBP’s collection and waiver or reduction of duties under the North American Free Trade Agreement (“NAFTA”) duty-deferral programs. Nufarm America’s, Inc. (“Nufarm”) imported chemicals into the United States, which it processed into herbicides and then exported to Canada.<sup>187</sup> Upon export, CBP assessed a deferred duty on the articles pursuant to 19 C.F.R. § 181.53.<sup>188</sup> Nufarm filed a protest alleging that CBP’s regulation

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180. 485 U.S. 176 (1988).

181. *Sakar*, 516 F.3d at 1347 (concluding that, under 19 U.S.C. § 1526(a), no embargo exists where a governmental restriction “merely provides a mechanism by which a private party might, at its own option, enlist the government’s aid in restricting the quantity of imports in order to enforce a private right . . .”) (quoting *K Mart Corp.*, 485 U.S. at 185).

182. *Id.* at 1348.

183. *Id.* at 1347 (citing *K Mart Corp.*, 485 U.S. at 185).

184. *Id.* at 1348–49.

185. *Id.* at 1350.

186. 521 F.3d 1366 (Fed. Cir. 2008), *cert. denied*, 129 S. Ct. 569 (2008).

187. *Id.* at 1367.

188. *Id.* The Code of Federal Regulations explains:

violated the Export Clause of the U.S. Constitution—which provides that “[n]o Tax or Duty shall be laid on Articles exported from any State”<sup>189</sup>—because the regulation defers import duties on articles imported for repair, alteration, or processing until the articles are exported to NAFTA countries and, thus, constituted an illegal duty on exports.<sup>190</sup> After CBP denied Nufarm’s protest and the CIT subsequently granted summary judgment to the Government, Nufarm filed an appeal with the Federal Circuit.<sup>191</sup>

The Federal Circuit affirmed the CIT’s ruling that 19 C.F.R. § 181.53 did not violate the Export Clause because it imposes duties on *imports*, and not on exports.<sup>192</sup> The court held that the regulation on its face expressly “imposes an import duty, but postpones its collection until the time of export.”<sup>193</sup> Thus, the regulation did not violate the Constitution because it imposed an import tax assessed, in part, on the amount “payable on importation.”<sup>194</sup> Furthermore, the regulation as applied did not violate the Constitution because the liability for paying the duty attached at the time of importation but with collection deferred until the time of exportation.<sup>195</sup> The regulation requiring importers to identify the date of exportation on the CBP entry summary and to pay the duties within sixty days after exportation did not somehow transform the import duties into an export tax or otherwise render the regulation as applied unconstitutional, the court concluded.<sup>196</sup>

*United States v. National Semiconductor Corp.*<sup>197</sup> represents the Federal Circuit’s second decision in an action concerning the imposition of penalties and prejudgment interest on an importer, National Semiconductor Corporation (“NSC”), for underpayment of

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Where a good is imported into the United States pursuant to a duty-deferral program and is subsequently withdrawn from the duty-deferral program and entered into a duty-deferral program in Canada or Mexico . . . the withdrawn good shall be subject to duty which shall be assessed in accordance with paragraph (b) of this section.

19 C.F.R. § 181.53(a)(ii)(2)(B) (2008).

189. U.S. CONST. art. I, § 9, cl. 5.

190. *Nufarm America’s, Inc.*, 521 F.3d at 1367–68.

191. *Id.* at 1367.

192. *Id.* at 1369. Nufarm also challenged the CIT’s denial of class certification to include all individuals who paid duties under 19 C.F.R. § 181.53, but the Federal Circuit dismissed that claim as moot in light of its determination that the regulation is constitutional. *Id.* at 1370–71.

193. *Id.* at 1369.

194. *Id.* at 1370.

195. *Id.* (noting that “the regulation merely postpones collection of the import duty until the time of export”).

196. *Id.*

197. 547 F.3d 1364 (Fed. Cir. 2008).

merchandise processing fees on entries of integrated circuits and related articles.<sup>198</sup> After NSC voluntarily disclosed the underpayment, CBP accepted the tender of unpaid fees but still imposed penalties, as permitted under 19 U.S.C. § 1592, after finding that NSC's underpayments resulted from negligence.<sup>199</sup> Under 19 U.S.C. § 1592, when an importer voluntarily discloses to CBP a violation caused by its negligence or gross negligence, CBP may impose penalties but rewards the importer by capping the penalty amount to "the interest (computed from the date of liquidation at the prevailing rate of interest . . .) on the amount of lawful duties, taxes, and fees of which the United States is or may be deprived . . . ."<sup>200</sup> In NSC's case, the maximum penalty permitted under 19 U.S.C. § 1592, which CBP imposed, totaled \$250,840.<sup>201</sup>

CBP subsequently commenced an action at the CIT to collect the penalty amount.<sup>202</sup> After considering the fourteen factors cited in *United States v. Complex Machine Works Co.*<sup>203</sup> regarding the establishment of monetary penalties for customs violations, the CIT awarded CBP compensatory interest of \$250,840 for the underpayments pursuant to 19 U.S.C. § 1505(c),<sup>204</sup> *plus* a penalty award of \$10,000 pursuant to 19 U.S.C. § 1592(c)(4).<sup>205</sup> In the first

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198. *Id.* at 1366.

199. *Id.*

200. 19 U.S.C. § 1592(c)(4)(B) (2006).

201. *Nat'l Semiconductor Corp.*, 547 F.3d at 1366.

202. *Id.* at 1366-67.

203. 83 F. Supp. 2d 1307, 1315 (Ct. Int'l Trade 1999). The court identified the following fourteen factors for determining penalty awards under 19 U.S.C. § 1592(c)(4)(B):

[T]he defendant's good faith effort to comply with the statute; (2) the degree of culpability; (3) the defendant's history of previous violations; (4) the nature of the public interest in ensuring compliance with the regulations involved; (5) the nature and circumstances of the violation at issue; (6) the gravity of the violation; (7) the defendant's ability to pay; (8) the appropriateness of the size of the penalty to the defendant's business and the effect of the penalty on the defendant's ability to continue doing business; (9) that the penalty not otherwise be shocking to the conscience of the Court; (10) the economic benefit gained by the defendant through the violation; (11) the degree of harm to the public; (12) the value of vindicating the agency authority; (13) whether the party sought to be protected by the statute had been adequately compensated for the harm, and (14) such other matters as justice may require.

*Id.*

204. See 19 U.S.C. § 1505(c) (2006) (providing that "[i]nterest assessed due to an underpayment of duties, fees, or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation.").

205. *Nat'l Semiconductor Corp.*, 547 F.3d at 1366-67 (citing *United States v. Nat'l Semiconductor Corp.*, 28 Int'l Trade Rep. (BNA) 1929, 2006 WL 1663279, at \*6 (Ct. Int'l Trade 2006)).

appeal, the Federal Circuit vacated the CIT's award of compensatory interest to CBP pursuant to 19 U.S.C. § 1505(c) and remanded the case with instructions that the CIT reconsider the penalty amount under 19 U.S.C. § 1592(c)(4).<sup>206</sup> In its remand determination, the CIT reevaluated the *Complex Machine Works* factors and awarded CBP the maximum available penalty possible under 19 U.S.C. § 1592(c)(4)(B), \$250,840, *plus* prejudgment interest thereon.<sup>207</sup>

NSC subsequently appealed the remand determination to the Federal Circuit, claiming that the CIT abused its discretion by awarding CBP the maximum available penalty and by awarding prejudgment interest.<sup>208</sup> The court affirmed the CIT's decision to award CBP the maximum penalty for the negligent violations, but it reversed the lower court's award of prejudgment interest on the penalty.<sup>209</sup> The Federal Circuit first concluded that the CIT did not commit error or otherwise abuse its discretion by awarding the maximum penalty because, contrary to NSC's claim, the CIT did not base its remand analysis on any single factor.<sup>210</sup> Rather, the CIT found that at least six of the fourteen factors under the *Complex Machine Works* framework weighed *against* mitigating the penalty.<sup>211</sup> The court further concluded that nothing in 19 U.S.C. § 1592(c)(4)(B) limited the CIT's authority to grant the maximum penalty for negligent violations.<sup>212</sup>

However, the Federal Circuit next held that the CIT abused its discretion in awarding prejudgment interest on the 19 U.S.C. § 1592(c)(4)(B) penalty award.<sup>213</sup> The court explained that its precedent supported the position that “[p]rejudgment interest may not be awarded on punitive damages.”<sup>214</sup> It continued that the plain language of the statute clearly indicated that the “maximum penalties” allowable under 19 U.S.C. § 1592(c) are punitive in nature

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206. *Id.* at 1367 (citing *United States v. Nat'l Semiconductor Corp.*, 496 F.3d 1354, 1361 (Fed. Cir. 2007)).

207. *Id.*

208. *Id.* at 1368 (“An award of prejudgment interest is reviewed for abuse of discretion.”) (citing *United States v. Reul*, 959 F.2d 1572, 1578 (Fed. Cir. 1992)).

209. *Id.* at 1371.

210. *Id.* at 1368 (describing NSC's assertion that the CIT based its award on a single factor under the *Complex Machine Works* test, namely, compensating the government for lost interest).

211. *Id.*

212. *Id.* at 1369 (“Section 1592(c)(4)(B) provides the same maximum penalty for both negligent and grossly negligent violations, but does not provide additional guidance on how the court is to determine the penalty in a given case.”).

213. *Id.* at 1370.

214. *Id.* at 1369 (quoting *United States v. Reul*, 959 F.2d 1572, 1578 (Fed. Cir. 1992)).

because they are designed to deter future violations.<sup>215</sup> The court then held that the penalty amount remained uncertain prior to the CIT's final decision because the CIT itself, and not CBP, determined the penalty amount.<sup>216</sup> It explained that the CIT improperly awarded prejudgment interest because "[u]ncertainty in the amount of a claim is a ground for denying prejudgment interest."<sup>217</sup> In other words, the Federal Circuit's decision here favors importers because it stands for the proposition that the CIT may not award prejudgment interest on top of monetary penalties that CBP imposes in response to voluntary disclosures.

## II. TRADE REMEDIES LAWS

"Commerce among nations should be fair and equitable."<sup>218</sup> U.S. law seeks to establish a "fair and equitable" playing field for U.S. industries through the trade remedies laws, which impose tariffs on imported products as a form of relief for injury caused by the practices of dumping and subsidization. Under the antidumping laws, the United States will impose a tariff on imported goods if it determines that foreign exporters are selling their merchandise in the U.S. market at prices that are "less than . . . fair value," i.e., less than the price at which the same or similar merchandise is sold in the exporters' home market or a comparable third-country market.<sup>219</sup> The countervailing duty laws impose duties on imported products where the United States concludes that a foreign government or other public entity has directly or indirectly subsidized the merchandise imported into the U.S. market.<sup>220</sup>

Congress bifurcated the responsibilities for conducting U.S. antidumping and countervailing duty investigations. Commerce, through its International Trade Administration, Import Administration, is charged with determining whether producers or exporters from foreign countries are engaged in these unfair trade practices. Concurrent with Commerce's investigations, the ITC focuses on the domestic industry that made the dumping or subsidy allegations and determines whether that industry is being materially injured or threatened with material injury by imports from the

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215. *Id.* at 1369–70 (citations omitted).

216. *Id.* at 1370.

217. *Id.* (quoting *Van Vranken v. Atl. Richfield Co.*, 38 F.3d 1200, 1202 (Fed. Cir. 1994)).

218. Benjamin Franklin, Inscription, 15th Street Entrance, United States Department of Commerce Building, Washington, D.C.

219. 19 U.S.C. § 1673(1) (2006).

220. *Id.* § 1671.

foreign country (or countries) in question.<sup>221</sup> Thus, an investigation commences with the filing of a petition by a domestic industry at both agencies. If, through their investigations, both agencies make affirmative findings—that is, if Commerce determines that dumping or subsidization has occurred and the ITC determines that the dumping or subsidization has materially injured or threatened material injury to the domestic industry—the United States will impose definitive antidumping or countervailing duties on imports of the products under investigation from the subject countries.<sup>222</sup>

The antidumping or countervailing duty rates that Commerce determines during the investigation phase are only *estimates* of the actual liability of an importer on the particular entry. As a result of the investigations, Commerce instructs CBP to “suspend liquidation” on entries of merchandise covered by an antidumping or countervailing duty proceeding and to collect estimated duties at the antidumping or countervailing duty rates determined during the investigation phase.<sup>223</sup> Suspension of liquidation in this context means that CBP delays final review of an entry, including the determination of the actual rate and amount of duties owed, until after the completion of an administrative review. Thus, the estimated duties paid at the time of entry serve as security deposits for the amounts that the importers may ultimately owe. In each year following the anniversary of the antidumping or countervailing duty order, Commerce may initiate an administrative review—upon request by an exporter, importer, domestic producer, or (in a countervailing duty case) foreign governments<sup>224</sup>—and determine the actual duty liability for entries during the prior year.<sup>225</sup> If an exporter’s entries are not reviewed, then its final liability for duties

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221. *Id.* § 1673(2)(A).

222. *See generally id.* §§ 1671, 1673 (noting the general criteria necessary for the imposition of antidumping and countervailing duties). Although it may find the existence of dumping or subsidization, Commerce may only issue an antidumping or countervailing order, as appropriate, upon an affirmative finding of injury by the ITC. *Id.*

223. *Id.* §§ 1671d(c)(1), 1673d(c)(1); *see* 19 C.F.R. § 351.210(d) (2008) (describing CBP’s collection process pursuant to Commerce’s instruction following an affirmative final determination).

224. *See* 19 C.F.R. § 351.213(b) (2008) (identifying the parties that have standing to request administrative reviews). Unlike Commerce, the ITC does not conduct annual reviews of its injury determination.

225. *See* 19 U.S.C. § 1675(a)(2)(C) (2006) (describing the conditions by which Commerce determines the actual duty liabilities); *see also* 19 C.F.R. § 351.221(b)(6) (2008) (stating that CBP is to promptly assess duties after Commerce publishes its final results of administrative review).

equals the amount that it deposited.<sup>226</sup> If an exporter does participate in an administrative review, then its final liability for antidumping or countervailing duties may be more or less than the amount deposited, depending on the outcome of the review. At the conclusion of each administrative review, Commerce instructs CBP to lift the suspension of liquidation and assess antidumping or countervailing duties for each reviewed exporter's entries during the review period at the final rates determined in the administrative review (unless liquidation becomes enjoined pursuant to a court-ordered injunction). This process continues every year in the anniversary month of the order to permit review of all U.S. entries or sales of subject merchandise that occur during the time in which the antidumping or countervailing duty order remains in effect.

#### A. Procedural Issues in Antidumping Proceedings

In 2008, the Federal Circuit decided three cases arising out of antidumping proceedings in which it resolved questions of civil procedure and did not actually reach the merits of the substantive issues. In each case, the Federal Circuit vacated or reversed at least part of the CIT's ruling.

In *Gerdau Ameristeel Corp. v. United States*,<sup>227</sup> the Federal Circuit held that a plaintiff's appeal of a Commerce determination had not been rendered moot by the plaintiff's failure to seek an injunction to enjoin liquidation of the entries covered by the underlying administrative review where a live controversy existed beyond the liquidation of entries for which the courts could provide relief. The underlying proceeding involved an antidumping duty order against steel concrete reinforcing bars ("rebar") from Turkey.<sup>228</sup> In the fifth administrative review of the order, Commerce calculated a de minimis antidumping duty rate of less than 0.5 percent for respondent ICDAS Celik Enerji Tersane ve Ulasim Sanayi, A.S. ("ICDAS")—meaning that, for purposes of the antidumping laws, ICDAS did not dump its rebar during the applicable review period.<sup>229</sup> In the sixth administrative review, which was the subject of the *Gerdau*

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226. See *id.* § 351.212(c) (providing that Commerce will instruct CBP to "automatically assess" antidumping or countervailing duties if no review is requested of an exporter at the deposit rates in effect at the time of entry).

227. 519 F.3d 1336 (Fed. Cir. 2008).

228. *Id.* at 1337.

229. *Id.* at 1337–38 (citing Certain Steel Concrete Reinforcing Bars from Turkey, 68 Fed. Reg. 53,127, 53,128 (Dep't Commerce Sept. 9, 2003) (final admin. review)); see also 19 C.F.R. § 351.106(c) (establishing that a weighted-average dumping margin is considered "de minimis" in an administrative review if it is less than 0.5 percent ad valorem).

case, Commerce again calculated a de minimis rate for ICDAS.<sup>230</sup> Under Commerce's regulations, if ICDAS obtained a third consecutive de minimis rate in the seventh administrative review—which it ultimately did—then it became eligible for revocation from the antidumping duty order.<sup>231</sup> If revoked from the antidumping duty order, ICDAS's entries after the effective date of revocation would no longer be subject to suspension of liquidation or antidumping duty deposit requirements.

Gerdau Ameristeel Corporation ("Gerdau"), a domestic producer that benefited from the continued imposition of antidumping duties against ICDAS, filed an action with the CIT challenging various aspects of Commerce's calculation methodology in the final results of Commerce's sixth administrative review.<sup>232</sup> Typically, when a party challenges the outcome of an administrative review determination, it will seek a preliminary injunction to enjoin liquidation of the entries covered by the administrative review so that, if it prevails, the results of the litigation can be applied to those entries.<sup>233</sup> However, Gerdau did not move to enjoin ICDAS's entries during the sixth review period, explaining that its goal in the appeal was to obtain on remand an above de minimis rate for ICDAS that would, in turn, preclude ICDAS from obtaining the three consecutive de minimis rates necessary to qualify for partial revocation from the antidumping duty order.<sup>234</sup> CBP consequently liquidated ICDAS's entries during the sixth review period.<sup>235</sup> Citing *Zenith Radio Corp. v. United States*,<sup>236</sup> where the Federal Circuit held that the liquidation of entries prior to decisions on the merits deprives a plaintiff of its "statutory right to obtain judicial review of [an antidumping] determination,"<sup>237</sup> the CIT held that the appeal had been rendered moot because the

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230. *Gerdau*, 519 F.3d at 1337 (citing Certain Steel Concrete Reinforcing Bars from Turkey, 69 Fed. Reg. 64,731, 64,733 (Dep't Commerce Nov. 8, 2004) (final admin. review)).

231. See 19 C.F.R. § 351.222 (2008) (providing that an individual producer or exporter is entitled to revocation, in part, of an antidumping duty order if it: (1) demonstrates that it has not engaged in dumping for at least three consecutive review periods; (2) agrees in writing to the immediate reinstatement of the order if Commerce later concludes that the producer or exporter has resumed dumping; and (3) demonstrates that the continued application of the order against it is no longer necessary).

232. *Gerdau*, 519 F.3d at 1338–39.

233. See 19 U.S.C. § 1516a(c)(2) (2000) (authorizing the CIT to enjoin the liquidation of entries subject to a Commerce or ITC proceeding if an interested party requests injunctive relief and demonstrates that injunctive relief is warranted).

234. *Gerdau*, 519 F.3d at 1339.

235. *Id.*

236. 710 F.2d 806 (Fed. Cir. 1983).

237. *Id.* at 810.

liquidation of ICDAS's entries had eliminated the only remedy available to Gerdau, and it dismissed the action for lack of subject matter jurisdiction.<sup>238</sup>

On appeal, the Federal Circuit vacated the CIT's dismissal and remanded the case for further proceedings. The court first explained that, under the mootness doctrine, a live "case or controversy" must exist at all stages of the litigation.<sup>239</sup> It next clarified that its prior holding in the *Zenith* case "did not establish a blanket rule that there can never be a post-liquidation review of an administrative review determination, even when that determination affects matters other than the specific liquidated goods."<sup>240</sup> Rather, if the challenged aspects of an antidumping duty determination have future consequences for substantive issues other than the liquidation of entries, then a live controversy exists for which the courts can provide relief.<sup>241</sup> The Federal Circuit concluded that Gerdau had demonstrated that a live controversy existed because the de minimis rate in the sixth review impacted ICDAS's ability to seek revocation in the seventh review and, therefore, it held that the CIT erred in dismissing Gerdau's action.<sup>242</sup>

The Federal Circuit resolved another procedural issue involving revocation of an antidumping duty order when, in *Tokyo Kikai Seisakusho, Ltd. v. United States*,<sup>243</sup> it recognized Commerce's inherent authority to reconsider the results of an antidumping duty administrative review that had been tainted by fraud. In the underlying antidumping proceeding of large newspaper printing presses ("LNPPs") from Japan, Commerce partially revoked the order with respect to respondent Tokyo Kikai Seisakusho, Ltd. and TKS (U.S.A.), Inc. (collectively "TKS") after determining that the company had not engaged in dumping for three consecutive

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238. *Gerdau*, 519 F.3d at 1339.

239. *Id.* at 1340 (citing U.S. CONST., art. III).

240. *Id.* at 1341.

241. *Id.*

242. *Id.* at 1341–42. The Federal Circuit also dismissed the Government's claim that Gerdau lacked jurisdiction to challenge aspects of Commerce's sixth administrative review determination as they pertained to partial revocation of the antidumping duty order because revocation was not possible until the seventh administrative review. *Id.* at 1342. The court reasoned that the statute permits judicial review for challenges against "any factual findings or legal conclusions upon which [Commerce's antidumping] determination is based," including the calculation of antidumping duty margins calculated in an administrative review. *Id.* (citing 19 U.S.C. § 1516(a)(2)).

243. 529 F.3d 1352 (Fed. Cir. 2008).

administrative review periods.<sup>244</sup> Commerce later revoked the antidumping duty order in its entirety through a five-year “sunset review”<sup>245</sup> because the sole domestic interested party, Goss International Corporation (“Goss”), did not express an interest in the order’s continued application, as the statute and Commerce’s regulations require.<sup>246</sup>

Sometime later, TKS became involved in a federal civil action during which it revealed that it had supplied Commerce with false information regarding a “secret rebate” to a U.S. customer.<sup>247</sup> This rebate directly impacted the calculation of TKS’s antidumping duty rate during one of the three administrative reviews forming the basis of its revocation application.<sup>248</sup> Upon learning this, Commerce self-initiated a “changed circumstances review” through which it concluded that TKS had provided false information during the administrative review at issue and assigned the company an antidumping duty rate of 59.67 percent for that review.<sup>249</sup> Commerce then reinstated the antidumping duty order with respect to TKS because the company no longer had three consecutive de minimis rates.<sup>250</sup> Commerce further stated its intention to reopen and reconsider the five-year sunset review that had led to the total revocation of the order on LNPPs from Japan.<sup>251</sup>

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244. *Id.* at 1356 (citing 19 C.F.R. § 351.222(b) and Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan, 67 Fed. Reg. 2,190, 2,191–92 (Dep’t Commerce Jan. 16, 2002) (final admin. review)).

245. *See* 19 U.S.C. § 1675(c) (2006) (providing that, every five years after the publication of an antidumping or countervailing duty order, Commerce will review the order to determine whether revocation of the order would likely lead to a continuation or recurrence of dumping or a countervailable subsidy, and the ITC will review the order to determine whether revocation would likely lead to a continuation or recurrence of material injury to the domestic industry). If either Commerce or the ITC issues a negative determination during their respective five-year sunset reviews, then Commerce will revoke the applicable order. *Id.*

246. *Tokyo Kikai Seisakusho*, 529 F.3d at 1356–57 (citing 19 U.S.C. § 1675(c)(3)(A); 19 C.F.R. § 351.218(d)(1)(iii)(B)(3); Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan (A-588-837) and Germany (A-428-821), 67 Fed. Reg. 8,522, 8,523 (Dep’t Commerce Feb. 19, 2002) (final sunset review)).

247. *Id.* at 1357.

248. *Id.*

249. *Id.* at 1357–58 (citing Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan, 71 Fed. Reg. 11,590, 11,591 (Dep’t Commerce Mar. 8, 2006) (final changed circ. review)); *see also* 19 U.S.C. § 1675(b) (2006) (authorizing Commerce to conduct reviews of antidumping or countervailing duty determinations upon receipt of information from an interested party that shows “changed circumstances sufficient to warrant a review of such determination”).

250. *Tokyo Kikai Seisakusho*, 529 F.3d at 1358.

251. *Id.*

In response to a complaint filed by TKS, the CIT first held that Commerce had the “inherent authority” to conduct a changed circumstances review and reconsider the results of an antidumping duty determination based on allegations of fraud.<sup>252</sup> It then held that Commerce’s decision to reopen and reconsider the sunset review was ripe for judicial review but that Commerce lacked the authority to reconsider its sunset review determination.<sup>253</sup> The Government and Goss appealed the CIT’s second holding regarding ripeness to the Federal Circuit, while TKS cross-appealed the CIT’s first holding regarding Commerce’s authority to reconsider its administrative review determination through a changed circumstance review.<sup>254</sup>

With respect to Commerce’s authority to reconsider its administrative review determinations, the Federal Circuit affirmed the CIT’s holding that Commerce “possessed inherent authority to reconsider” the results of its administrative reviews based on allegations of fraud.<sup>255</sup> It first reiterated the longstanding principles of administrative law that “administrative agencies possess inherent authority to reconsider their decisions, subject to certain limitations, regardless of whether they possess explicit statutory authority to do so,”<sup>256</sup> and that “[a]n agency’s power to consider is even more fundamental when . . . it is exercised to protect the integrity of its own proceedings from fraud.”<sup>257</sup> The court then observed that nothing in the statute precluded Commerce from reconsidering its previously conducted administrative review in light of allegations of fraud and that the statute did not prescribe any procedures for conducting such redeterminations.<sup>258</sup> Thus, the court held that the CIT “correctly ruled that Commerce, under the circumstances presented, acted within its inherent authority to protect the integrity of its proceedings from fraud . . . within a reasonable time after learning of the fraud,”<sup>259</sup> and it affirmed the CIT’s holding on this issue.

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252. *Id.* (citing *Tokyo Kikai Seisakusho, Ltd. v. United States*, 473 F. Supp. 2d 1349, 1355 (Ct. Int’l Trade 2007)).

253. *Id.* (citing *Tokyo Kikai Seisakusho*, 473 F. Supp. 2d at 1360).

254. *Id.*

255. *Id.* at 1364.

256. *Id.* at 1360 (citing *Macktal v. Chao*, 286 F.3d 822, 825–26 (Fed. Cir. 2002)).

257. *Id.* at 1361 (citing *Alberta Gas Chems., Ltd. v. Celanese Corp.*, 650 F.2d 9, 12 (2d Cir. 1981)).

258. *Id.* The Federal Circuit did caveat that the statutory changed circumstances provisions under 19 U.S.C. § 1675(b)(1) did not expressly authorize the type of changed circumstances review that Commerce conducted in the underlying proceeding and, therefore, Commerce should not have labeled its reconsideration as a “changed circumstances review.” *Id.* at 1361–62.

259. *Id.*

However, the Federal Circuit reversed the CIT's holding regarding the ripeness of Commerce's stated intention to reopen and reconsider the sunset review.<sup>260</sup> The court explained that an issue becomes ripe for judicial review only if it is "fit for judicial decision" and withholding judicial consideration would cause the parties undue hardship.<sup>261</sup> It then concluded that Commerce's stated intention to reopen the sunset review did not constitute a final agency action because it "neither 'mark[s] the consummation . . . of the decisionmaking process' nor defines rights or obligations with respect to TKS or causes legal consequences to flow."<sup>262</sup> Accordingly, the Federal Circuit held that the appeal was *not* ripe for judicial review because Commerce's stated intention did not represent a final agency action but, rather, was merely an open-ended statement that the agency could theoretically reverse, and deferring judicial consideration would not impose undue hardships on the parties.<sup>263</sup>

Finally, in *Ad Hoc Shrimp Trade Action Committee v. United States*,<sup>264</sup> the Federal Circuit addressed the CIT's authority to review a final determination concerning the products covered by the "scope" of an antidumping proceeding. When a domestic industry files a petition seeking the imposition of antidumping duties, it must include in that petition a detailed description of the imported products against which it seeks relief—referred to as the "scope" of the proceeding.<sup>265</sup> The scope must be defined clearly so that Commerce and CBP can efficiently administer the antidumping duty proceeding by determining which products are subject to duty deposit requirements upon entry into the United States and to reporting to Commerce in the context of its investigations and administrative reviews. In circumstances where questions as to product coverage arise, Commerce must determine whether a particular product is included or excluded from the scope.<sup>266</sup> Commerce's scope definition also

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260. *Id.* at 1362.

261. *Id.* (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

262. *Id.* at 1363 (quoting *Bennett v. Spear*, 520 U.S. 152, 177–78 (1997)).

263. *Id.* at 1364.

264. 515 F.3d 1372 (Fed. Cir. 2008), *reh'g denied*, No. 07-1230 2008 U.S. App. LEXIS 12725 (Fed. Cir. Apr. 28, 2008).

265. See 19 C.F.R. § 351.202(b)(5) (2008) (requiring that petitioning industries include within an antidumping or countervailing duty petition "[a] detailed description of the subject merchandise that defines the requested scope of the investigation, including the technical characteristics and uses of the merchandise and its current U.S. tariff classification number"). The same rules regarding scope definition apply equally to countervailing duty proceedings.

266. See *generally id.* § 351.225 (prescribing the rules and procedures for determining whether a particular product is covered by the scope of an antidumping or countervailing duty proceeding).

guides the analysis that the ITC undertakes to determine whether dumped imports have caused, or threaten to cause, material injury to the domestic industry.

In the antidumping proceeding on appeal, the domestic industry filed a petition against six countries that produced and exported frozen and canned warmwater shrimp.<sup>267</sup> The petition's proposed scope language covered all frozen and canned warmwater shrimp, but expressly excluded "breaded" shrimp and certain other products.<sup>268</sup> In the final determination of that investigation, and in response to arguments raised by certain respondent parties, Commerce determined that the term "breaded" shrimp also included "dusted" shrimp—which is an intermediate product dedicated to the production of breaded shrimp—and, thus, Commerce clarified that the scope of the case excluded dusted shrimp.<sup>269</sup> The ITC also relied on Commerce's final scope definition, which excluded dusted shrimp, in determining that the domestic industry had been materially injured by reason of dumped imports of frozen warmwater shrimp from the six subject countries.<sup>270</sup> Because Commerce made an affirmative finding of dumping and the ITC made an affirmative injury determination, Commerce subsequently published antidumping duty orders against the six countries in which it reiterated the scope language that excluded dusted shrimp.<sup>271</sup>

The petitioner in the underlying proceeding, the Ad Hoc Shrimp Trade Action Committee ("Committee"), commenced an action at the CIT challenging Commerce's decision to exclude dusted shrimp from the scope. In its complaint, the Committee requested that the CIT order Commerce to rescind its scope exclusion of dusted shrimp and instruct Commerce to amend its antidumping duty orders to

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267. *Ad Hoc Shrimp Trade Action Comm.*, 515 F.3d at 1376.

268. *Id.* at 1377 (citing *Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam*, 69 Fed. Reg. 3,876, 3,877 (Dep't Commerce Jan. 27, 2005) (initiation)).

269. *Id.* (describing dusted shrimp as "shrimp coated with a light layer of flour . . . used as an intermediate to making the already excluded breaded shrimp . . ."). Commerce similarly included "battered" shrimp in the definition of "breaded" shrimp because it too constituted an intermediate product used to produce breaded shrimp. *Id.* However, the plaintiff-appellant limited its challenge to Commerce's scope determination to the treatment of dusted shrimp. *Id.*

270. *Id.* at 1378. The ITC determined that canned warmwater shrimp did not cause or threaten to cause material injury to the domestic industry, which resulted in the exclusion of canned shrimp from the final scope language. *Id.* at 1378, n.4 (citing *Certain Frozen Warmwater Shrimp from the People's Republic of China*, 70 Fed. Reg. 5,149, 5,152 (Dep't Commerce Feb. 1, 2005) (amended final determination and antidumping duty order)).

271. *Id.*

include dusted shrimp within the scope definition.<sup>272</sup> The CIT ruled that it had subject matter jurisdiction to review Commerce's final scope determination, but *sua sponte* dismissed the Committee's complaint based on its conclusion that it did not have the authority to order the specific remedy that the Committee had requested, i.e., amendments to the antidumping orders.<sup>273</sup> The CIT premised its dismissal on three separate holdings: (1) it did not have authority to order Commerce to revise its antidumping duty orders; (2) the Committee failed to request any relief other than revising the orders; and (3) the CIT had no power to order a remand even if one had been requested because the Committee never appealed the ITC's final determination.<sup>274</sup>

The Committee appealed all three grounds upon which the CIT dismissed the Committee's action—interestingly, with some support from Commerce, which agreed that the Federal Circuit should remand the case to the CIT for further proceedings on the merits of the dusted shrimp exclusion.<sup>275</sup> The Federal Circuit affirmed the lower court on the first ground, but, in a sternly worded decision, vacated the CIT's holding with respect to the second and third grounds. First, the Federal Circuit agreed that the CIT lacked the authority to order Commerce to amend its antidumping orders to include dusted shrimp because the statute precludes Commerce from issuing orders against products for which the ITC has not made an affirmative injury finding, as was the case with dusted shrimp.<sup>276</sup> Thus, the court held that the CIT could not order Commerce to revise the antidumping orders to include dusted shrimp because the ITC never made an affirmative injury finding for that product.<sup>277</sup>

Second, the Federal Circuit held that the CIT erroneously concluded that the Committee sought only amendment of the antidumping orders as a form of relief.<sup>278</sup> Rather, the Committee had requested the lower court to remand Commerce's final scope determination for reconsideration based on the Committee's claim that the dusted shrimp scope exclusion was unsupported by substantial evidence.<sup>279</sup> The court held that the Committee's request

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272. *Id.* at 1379.

273. *Id.*

274. *Id.* at 1380 (citing *Ad Hoc Shrimp Trade Action Comm. v. United States*, 473 F. Supp. 2d 1336, 1337 (Ct. Int'l Trade 2007)).

275. *Id.* at 1375.

276. *Id.* at 1381.

277. *Id.* (citing 19 U.S.C. § 1673).

278. *Id.*

279. *Id.* at 1381–82.

for a remand did not depend on its separate request that the CIT instruct Commerce to amend its antidumping orders.<sup>280</sup>

Third, the Federal Circuit vacated the CIT's holding—that it lacked the authority to remand Commerce's final scope determination—to the extent that it held the determination to be unsupported by substantial evidence.<sup>281</sup> The court held that 19 U.S.C. § 1516a(a)(2)(B)(ii) expressly grants the CIT the power to review final scope determinations made by Commerce and that nothing in the statute bars the CIT from considering such challenges if they are made against Commerce and not the ITC.<sup>282</sup> The Federal Circuit next admonished the CIT for holding that the lower court lacked the authority to remand Commerce's final scope determination because “doing so ‘might well prove to be a useless exercise’ if the ITC refused to act voluntarily to modify its final injury determination.”<sup>283</sup> Rejecting the CIT's rationale, the court declared that a “federal court cannot avoid ruling on the legality of a government action when review of the action is otherwise properly before the court simply because there is no guarantee that fixing the error will change the ultimate result.”<sup>284</sup> It then explicated that:

The statute provides . . . [the Committee] with a right to appeal not only a final antidumping order, but also the exclusion of certain products from Commerce's final determination. If the exclusion of dusted shrimp was not supported by substantial evidence or was otherwise legally erroneous, . . . [the Committee has] a right to have the final determination remanded to the agency to correct the error, irrespective of the fact that ITC action will also be necessary before the antidumping order itself can be amended. To hold otherwise would nullify the clear statutory command that Commerce's final scope determinations are independently reviewable in federal court.<sup>285</sup>

Accordingly, the Federal Circuit vacated the CIT's holding and remanded the case to the lower court to address the merits of

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280. *Id.* at 1382.

281. *Id.*

282. *Id.* (citing 19 U.S.C. § 1516a(a)(2)(B)(ii)) (providing interested parties with the right to judicial review of a final antidumping duty determination by Commerce or the ITC related to product exclusions).

283. *Id.* (citing *Ad Hoc Shrimp Trade Action Comm. v. United States*, 473 F. Supp. 2d 1336, 1338 (Ct. Int'l Trade 2007)).

284. *Id.* at 1382–83.

285. *Id.* at 1383. The Federal Circuit also concluded that the Committee could not commence an action against the ITC for excluding dusted shrimp because “the ITC has no independent authority to expand the scope of an antidumping investigation.” *Id.* at 1384.

Commerce's exclusion of dusted shrimp from the scope of its final determination.<sup>286</sup>

### *B. Deemed Liquidation Issues*

Commerce and the ITC are responsible for conducting antidumping and countervailing duty proceedings to determine whether dumping or subsidization has occurred (Commerce) and whether dumped or subsidized imports have injured a domestic industry (ITC), but the responsibility for administering the actual collection of those duties falls under CBP's jurisdiction.<sup>287</sup> In recent years, the Federal Circuit has considered numerous challenges involving CBP's liquidation of imported merchandise subject to antidumping and countervailing duties, including legal questions concerning the "deemed liquidation" rules.<sup>288</sup> Under 19 U.S.C. § 1504(a), an entry is "deemed liquidated" by operation of law at the rate of duty declared at the time of entry if the entry is not liquidated within one year from the date of entry.<sup>289</sup> If liquidation has been suspended either by operation of statute—as is the case with entries of merchandise subject to antidumping or countervailing duty orders—or by court order, then 19 U.S.C. § 1504(d) provides that entries are deemed liquidated at the entered rate if they have not been liquidated within six months after the lifting of suspension of

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286. *Id.* at 1384–85.

287. *See, e.g.*, *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994) (noting that CBP has a "ministerial role" in the assessment of antidumping and countervailing duties based on Commerce's instructions).

288. *See, e.g.*, *Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231 (Fed. Cir. 2007) (holding that deemed liquidation does not eliminate an importer's right of protest); *SKF USA v. United States*, 246 F. App'x 692 (Fed. Cir. 2007) (vacating and remanding a CIT decision because deemed liquidation had rendered the case moot); *Int'l Trading Co. v. United States*, 412 F.3d 1303 (Fed. Cir. 2005) (concluding that the deemed liquidation period for an entry commences when Commerce publishes the final results of the applicable administrative review in the Federal Register); *Cemex S.A. v. United States*, 384 F.3d 1314, 1322 (Fed. Cir. 2004) (holding that domestic interested parties "have no specific avenue of relief for improper liquidation[s]"); *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1277 (Fed. Cir. 2002) (explaining that publication of the final results of an administrative review in the Federal Register represents "unambiguous and public" notice to CBP of the lifting of suspension of liquidation).

289. 19 U.S.C. § 1504(a) (2006). Specifically, the statute provides:

Unless an entry is . . . suspended as required by statute or court order, except as provided in section 1675(a)(3) of this title, an entry of merchandise not liquidated within one year from: (1) the date of entry of such merchandise; (2) the date of the final withdrawal of all such merchandise covered by a warehouse entry; . . . shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record.

*Id.*

liquidation.<sup>290</sup> In 2008, the Federal Circuit reviewed two appeals of CIT holdings that invoked the deemed liquidation statute, with markedly different outcomes.<sup>291</sup>

In *U.S. Tsubaki, Inc. v. United States*,<sup>292</sup> the Federal Circuit addressed whether the older or newer version of the deemed liquidation statute applied to an importer's entries. The importer, U.S. Tsubaki, Inc. ("Tsubaki"), made fifty-six entries of roller chains from Japan between 1979 and 1983 that were subject to an antidumping duty order.<sup>293</sup> Thus, CBP (then, the U.S. Customs Service) suspended liquidation on these entries. At the time of the entries, the roller chains were subject to a zero percent antidumping duty rate and, therefore, Tsubaki was not required to pay any cash deposits for estimated antidumping duties.<sup>294</sup> Subsequently, Commerce conducted two antidumping duty administrative reviews covering Tsubaki's roller chain entries during the 1979–83 period to determine the actual antidumping duty liability.<sup>295</sup> In 1986 and 1987, Commerce published its final results of review in which it calculated positive antidumping duty margins for Tsubaki's entries, meaning that Tsubaki actually owed antidumping duties on them.<sup>296</sup> Although Commerce's notices of final results meant that suspension of liquidation had been lifted and also placed CBP on notice that the suspension of liquidation had been lifted, CBP did not actually liquidate the entries until sometime during 2000-01 (i.e., more than thirteen years after the lifting of suspension of liquidation), at which time it sent Tsubaki a bill for the antidumping duties due.<sup>297</sup>

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290. 19 U.S.C. § 1504(d) (2006). The statute provides:

[W]hen a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry . . . within 6 months after receiving notice of the removal from the Department of Commerce . . . . Any entry . . . not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

*Id.*

291. The deemed liquidation statute technically falls under the category of "customs laws." Because these cases discuss substantive aspects of antidumping duty procedures and relate to the administration of the United States' trade remedies laws, this discussion has been included among the trade remedies cases.

292. 512 F.3d 1332 (Fed. Cir. 2008).

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* (citing Roller Chain, Other than Bicycle, from Japan, 52 Fed. Reg. 17,425 (Dep't Commerce May 8, 1987) (final admin. review); Roller Chain, Other than Bicycle, from Japan, 51 Fed. Reg. 43,755 (Dep't Commerce Dec. 4, 1986) (final admin. review)).

297. *United States Tsubaki, Inc.*, 512 F.3d at 1332.

Tsubaki filed a protest asserting that the entries had been deemed liquidated at the entered rate of zero percent pursuant to the amended version of 19 U.S.C. § 1504(d) enacted in 1993, which was in effect at the time of liquidation, because CBP liquidated the entries more than six months after suspension of liquidation had been lifted.<sup>298</sup> CBP denied the protest, and Tsubaki then commenced an action at the CIT.<sup>299</sup> For fifty-one of the entries subject to the appeal, the CIT held that the entries had not been deemed liquidated under the pre-1993 version of the statute,<sup>300</sup> which provided that deemed liquidation did not occur where liquidation had been suspended for four years or more.<sup>301</sup> The CIT further held that CBP correctly assessed duties pursuant to Commerce's administrative review determinations, notwithstanding the long delay between the lifting of suspension of liquidation (1986-87) and the ultimate liquidation (2000-01).<sup>302</sup>

Tsubaki then appealed to the Federal Circuit, which affirmed the CIT's holding that the pre-1993 version of 19 U.S.C. § 1504(d) applied to Tsubaki's entries and that Tsubaki owed the antidumping duties assessed on them.<sup>303</sup> The court held that, pursuant to the 1993 version of 19 U.S.C. § 1504(d), the date on which CBP receives notice of the lifting of suspension of liquidation constitutes the "trigger event" for determining which version of the deemed liquidation statute applies.<sup>304</sup> Moreover, neither the statutory language in the 1993 amendments nor the legislative history indicated any congressional intent to give the amended statute retroactive effect.<sup>305</sup> The Federal Circuit also cited its prior decision in *American Permac*,

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298. *Id.* at 1334. The court explained:

Any entry of merchandise not liquidated at the expiration of four years from the applicable date specified in subsection (a) of this section, shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record, unless liquidation continues to be suspended as required by statute or court order. When such a suspension of liquidation is removed, the entry shall be liquidated within 90 days therefrom.

*Id.* (quoting 19 U.S.C. § 1504(d) (1988)).

299. *Id.* at 1335.

300. *Id.* at 1333 (citing *U.S. Tsubaki, Inc. v. United States*, 461 F. Supp. 2d 1339 (Ct. Int'l Trade 2006)). For the remaining five entries, all parties conceded that the entries had been deemed liquidated at the zero percent antidumping duty rate in effect at the time of entry. *Id.* at 1334.

301. *Id.*

302. *Id.*

303. *Id.* at 1337.

304. *Id.*

305. *Id.* at 1336 (citing *Am. Permac, Inc. v. United States*, 191 F.3d 1380, 1381 (Fed. Cir. 1999)).

*Inc. v. United States*,<sup>306</sup> as standing for the proposition that “the 1993 version of section 1504(d) should not be applied to cases in which suspension of liquidation was lifted and notice to Customs of the lifting of suspension occurred prior to the effective date of the 1993 amendment.”<sup>307</sup> In light of *American Permac*, the court held that “the 1993 version of section 1504(d) does not apply in this case because the lifting of the suspension of liquidation and the notice to Customs of the lifting of the suspension of liquidation occurred long before the effective date of the amendment.”<sup>308</sup>

The Federal Circuit’s decision in *Shinyei Corp. of America v. United States*<sup>309</sup> involved the second appeal of an action involving the deemed and actual liquidation of certain entries of ball bearings subject to antidumping duties. This case had a particularly complex procedural history and culminated in a stern mandate from the Federal Circuit to the CIT. In 1990–91, the importer, Shinyei Corporation of America (“Shinyei”), imported ball bearings from Japan that were subject to an antidumping duty order and paid cash deposits for estimated antidumping duties at the applicable ad valorem rate, 45.83 percent.<sup>310</sup> Commerce conducted an administrative review covering Shinyei’s entries in which Commerce calculated a final antidumping duty rate that was significantly lower than Shinyei’s deposit rate—meaning that Shinyei was entitled to substantial refunds of its antidumping duty deposits.<sup>311</sup> Liquidation of the entries became enjoined as part of a court challenge to Commerce’s final results.<sup>312</sup> The Federal Circuit issued its final court decision in 1997 affirming Commerce’s review results and, in 1998, Commerce issued instructions to CBP to liquidate Shinyei’s entries during the 1990-91 review period.<sup>313</sup> Due to a drafting error, however, the liquidation instructions covered some but not all of Shinyei’s entries during the 1990-91 period.<sup>314</sup> Consequently, the entries that were not covered by the liquidation instructions were deemed liquidated at the

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306. *Am. Permac*, 191 F.3d 1380.

307. *United States Tsubaki, Inc.*, 512 F.3d at 1335 (referencing *Am. Permac*, 191 F.3d 1380).

308. *Id.* at 1337 (holding that the earlier version of 19 U.S.C. § 1504(d) applied to Tsubaki’s fifty-one entries because it was in effect when the triggering event, i.e., CBP’s receipt of notice of the removal of suspension of liquidation in 1986–87, occurred).

309. 524 F.3d 1274 (Fed. Cir. 2008).

310. *Id.* at 1278.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

substantially higher 45.83 percent deposit rate—although CBP did not actually liquidate the entries.<sup>315</sup>

Shinyei subsequently appealed the deemed liquidation of the disputed entries to the CIT, seeking a writ of mandamus to order the entries' liquidation at the actual and much lower final calculated rates.<sup>316</sup> While that action was pending, Commerce issued "clean-up" instructions ordering CBP to liquidate any remaining unliquidated entries of ball bearings during the 1990-91 review period and, as a result, CBP *actually* liquidated Shinyei's disputed entries at the 45.83 percent deposit rate.<sup>317</sup> In response to this development, Shinyei withdrew its request for mandamus relief to force liquidation, and it filed separate actions with the CIT challenging the actual liquidations (after CBP denied timely filed protests).<sup>318</sup> The CIT then dismissed Shinyei's original action for lack of jurisdiction because "Shinyei's claim and the relief requested became moot as a result of Customs' [actual] liquidation of the entries at issue."<sup>319</sup> In the first appeal arising out of this case, the Federal Circuit reversed the CIT's decision and held that "despite Customs' actual liquidation of Shinyei's entries (pursuant to Commerce's 'clean-up' instructions), the Court of International Trade retained jurisdiction . . . under 28 U.S.C § 1581(i)(4), the court's catch-all jurisdictional provision, covering challenges to Commerce's 'administration and enforcement' of duty laws."<sup>320</sup> The court then remanded the case with instructions that the CIT "reach the merits of Shinyei's case to determine if Shinyei is indeed entitled to the requested relief."<sup>321</sup> The Federal Circuit did not address the deemed liquidation issue in the first appeal because the disputed entries had been actually liquidated pursuant to Commerce's clean-up instructions.<sup>322</sup>

On remand, however, the CIT did not address the merits of Shinyei's case as the Federal Circuit had instructed.<sup>323</sup> Instead, it granted summary judgment to the Government and held that "because Shinyei's entries 'were deemed liquidated by operation of law [before actual liquidation occurred], [the final duty [owed] by

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315. *Id.*

316. *Id.*

317. *Id.* at 1279.

318. *Id.*

319. *Id.* (citing *Shinyei Corp. of Am. v. United States*, 248 F. Supp. 2d 1350, 1358-59 (Ct. Int'l Trade 2003)).

320. *Id.* at 1280 (citing *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1305 (Fed. Cir. 2004)).

321. *Id.* (quoting *Shinyei Corp. of Am.*, 355 F.3d at 1311).

322. *Id.*

323. *Id.* at 1280.

Shinyei was the rate and amount of duty deposited at the time of entry or withdrawal from warehouse, not the rate of duty determined by the administrative review.”<sup>324</sup> It also dismissed Shinyei’s claim that CBP erroneously liquidated the entries because Shinyei had not filed a timely protest against the deemed liquidation but, rather, had only protested the actual liquidations made in response to Commerce’s clean-up instructions.<sup>325</sup>

Expressing deep frustration with the CIT, the Federal Circuit on the second appeal “again remand[ed] with instructions to the Court of International Trade to *reach the merits of Shinyei’s case*” concerning the alleged errors in Commerce’s original liquidation instructions to determine whether reliquidation of the disputed entries was appropriate.<sup>326</sup> Recognizing that it had not addressed the deemed liquidation issue during the first appeal, the court held that “nothing in the deemed-liquidation statute forbids the Court of International Trade from ordering reliquidation as a remedy for Commerce’s failure to comply with 19 U.S.C. § 1675(a)(2)(C) in its liquidation instructions to Customs.”<sup>327</sup> In other words, the Federal Circuit found that 19 U.S.C. § 1504(d) did not address reliquidation of deemed liquidated entries and, therefore, the CIT could order reliquidation of the disputed entries so that Shinyei could receive the refund of antidumping duty deposits to which it was entitled—assuming that the CIT determined that CBP applied the wrong antidumping duty rate when it liquidated the disputed entries.<sup>328</sup> It further ruled that “a deemed liquidation may properly be protested to obtain reliquidation in accordance with Commerce’s final review results” to remedy the erroneous liquidation instructions.<sup>329</sup> Finally, the Federal Circuit held that CBP failed to provide Shinyei with notice of the deemed liquidations.<sup>330</sup> Therefore, the period to protest the deemed liquidation did not commence until Shinyei first became aware of the deemed liquidation when the actual liquidations occurred.<sup>331</sup> Because Shinyei filed timely protests of the actual liquidations, the court ruled that Shinyei had also timely filed protests of the deemed

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324. *Id.* at 1281 (citing *Shinyei Corp. of Am. v. United States*, 491 F. Supp. 2d 1209, 1220 (Ct. Int’l Trade 2007)).

325. *Id.* (citing *Shinyei Corp. of Am.*, 491 F. Supp. 2d at 1220).

326. *Id.* at 1276 (emphasis in original).

327. *Id.* at 1282.

328. *Id.* at 1283 (quoting *Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231, 1242 (Fed. Cir. 2007)) (explaining that “[u]nder the statutory tariff scheme enacted by Congress, the character of a deemed liquidation is procedural not substantive”).

329. *Id.* at 1284 (citing *Koyo Corp. of U.S.A.*, 497 F.3d at 1234, 1237).

330. *Id.*

331. *Id.*

liquidations.<sup>332</sup> In reversing the CIT, the court instructed the CIT to determine first “whether the deemed liquidation was unlawful and thus whether Customs should have granted Shinyei’s protests” and, if they were, “whether Shinyei is entitled to reliquidation” of the disputed entries at the lower rates.<sup>333</sup>

*C. Antidumping Duty Methodologies at the Department of Commerce*

The Federal Circuit once observed that “[t]he antidumping statute is highly complex and often confusing, and we accordingly rely on Commerce in its antidumping determinations to make sense of that statute. The more complex the statute, the greater the obligation on the agency to explain its position with clarity.”<sup>334</sup> Given the complexity of Commerce’s antidumping duty calculations, this section begins with a brief overview of the calculation methodology to provide context for the decisions that the Federal Circuit issued in 2008 related to it.

In its simplest form, a “dumping margin” represents “the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.”<sup>335</sup> That is, a dumping margin represents the difference between the U.S. price (i.e., the “export price” or “constructed export price”)<sup>336</sup> and the price at which comparable merchandise is sold in the exporter’s

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332. *Id.* at 1286–87.

333. *Id.* at 1287.

334. *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382–83 (Fed. Cir. 2001).

335. 19 U.S.C. § 1673(2) (2006).

336. *Id.* § 1677a(a). The antidumping statute defines the “export price” (“EP”) as:

[T]he price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted . . . .

*Id.*; The statute defines the “constructed export price” (“CEP”) as:

[T]he price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted . . . .

*Id.* § 1677a(b). Thus, an EP sale is consummated outside the United States prior to the importation of the subject merchandise whereas a CEP sale is consummated inside the United States either before or after the subject merchandise has been imported. *Id.* § 1677a(a)-(b). The distinction between EP and CEP is relevant because, under the statute, Commerce makes additional price adjustments to CEP to take into account the additional expenses associated with U.S. economic activities. *Id.* § 1677a(d).

home market or third country market (i.e., the “normal value”).<sup>337</sup> The normal value represents the benchmark against which the U.S. price is compared to determine whether and to what extent dumping is occurring. If the U.S. price is less than the normal value, then a positive dumping margin results, which means that the sale was dumped. Conversely, if the U.S. price exceeds the normal value, then the sale has a negative dumping margin and is considered not dumped. Thus, foreign respondents seek to minimize their antidumping duty liability by claiming adjustments that either reduce their normal value or increase their U.S. prices, whereas domestic interested parties conversely seek adjustments that increase the respondents’ normal value or reduce the respondents’ U.S. prices.

In order to calculate the U.S. price and normal value, Commerce begins with the gross prices at which the exporters sell the merchandise under consideration in the U.S. market and the home market (or third-country market),<sup>338</sup> and it then makes numerous statutorily prescribed adjustments in order to approximate ex-factory prices.<sup>339</sup> Commerce then determines which normal values should be used to calculate the dumping margins for each U.S. sale through a “model match” analysis in which it matches each U.S. sale to a normal value based on sales of identical products in the comparison market or, where identical matches are not possible, to a normal value calculated from comparison market sales of similar products.<sup>340</sup> If Commerce cannot identify identical or similar products in the comparison market against which to compare the U.S. sales, then Commerce will construct a normal value based on the exporter’s

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337. *Id.* § 1677b(a)(1)(A) (“The normal value of the subject merchandise shall be the price . . . at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price . . .”).

338. *Id.* § 1677b(a)(1)(B) (describing normal value as the price at which a “foreign like product” is sold in the exporting country or a third-country market).

339. *Id.* § 1677b(a)(6) (describing the adjustments made to comparison market prices to derive the normal value). These adjustments include, inter alia, deductions for movement expenses, direct and indirect selling expenses, packing costs, discounts and rebates, and commissions. *Id.*

340. The model match methodologies employed in antidumping investigations and administrative reviews differ slightly because, in investigations, Commerce compares period weighted-average U.S. prices to period weighted-average normal values on a model-specific basis, whereas it compares individual transaction-specific U.S. prices to monthly weighted-average normal values in administrative reviews. *Id.* § 1677f-1(d); *see also* 19 C.F.R. § 351.414(c) (prescribing the comparison methods to be used in investigations versus administrative reviews). In order to simplify the discussion, the narrative refers to the methodology employed in administrative reviews whereby Commerce calculates dumping margins for each individual U.S. sale before calculating the overall weighted-average dumping margin.

costs plus other statutory adjustments (known as “constructed value”).<sup>341</sup>

After Commerce calculates a dumping margin for each U.S. sale, it then calculates a weighted-average dumping margin, which is the overall antidumping duty rate assigned to an exporter, “by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.”<sup>342</sup> The numerator of the weighted-average dumping margin is the sum of the *positive* dumping margins calculated for individual U.S. sales, and the denominator represents the total U.S. sales value for *all* U.S. sales. In administrative reviews, Commerce currently employs a practice known as “zeroing” in which it does not permit non-dumped sales (i.e., sales where the U.S. price exceeds the normal value resulting in a negative dumping margin) to offset dumped sales (i.e., sales where the U.S. price is less than the normal value resulting in a positive dumping margin) in the numerator of the weighted-average dumping margin. As a result, exporters participating in administrative reviews do not receive a benefit from negative dumping margins, which are set equal to zero in the aggregation of the total dumping margins. The World Trade Organization (“WTO”) has ruled in multiple disputes that Commerce’s zeroing practice is inconsistent with its obligations under the WTO Antidumping Agreement.<sup>343</sup> Commerce has abandoned the use of zeroing in original antidumping investigations but, to date, has refused to do so in administrative reviews.<sup>344</sup>

During 2008, the Federal Circuit issued four separate judgments involving substantive antidumping duty calculation issues. In each of the four cases, the Federal Circuit reviewed the CIT’s judgments de novo and then agreed that Commerce’s determinations were supported by substantial record evidence and were otherwise in accordance with law—the same standard of review that the CIT itself

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341. See 19 U.S.C. § 1677b(a)(4) (providing for the use of constructed value if Commerce cannot determine normal value using home market or third-country prices).

342. *Id.* § 1677(35)(B).

343. See, e.g., Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007) (finding the United States violated the requirement to ensure compliance with provisions of General Agreement on Tariffs and Trade 1994 and the Anti-Dumping Agreement).

344. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 72 Fed. Reg. 77,722 (Dep’t Commerce Dec. 27, 2006) (abandoning the practice of zeroing when Commerce calculates the overall weighted-average dumping margin in antidumping investigations using its normal comparison methodology).

applies.<sup>345</sup> Although the appeals court did not extend deference to the CIT's legal conclusions, it still deferred to Commerce where the agency's "interpretation of ambiguous statutory language is based on a permissible interpretation of the statute."<sup>346</sup>

In *SKF USA v. United States*,<sup>347</sup> the Federal Circuit upheld Commerce's discretion to alter its model match methodology and to employ its longstanding practice of "zeroing" negative dumping margins when calculating weighted-average antidumping duty margins. The appeal arose out of an antidumping proceeding involving ball bearings, which went to order in 1989 and had been the subject of fifteen annual administrative reviews as of the commencement of the court action.<sup>348</sup> In the first administrative review, Commerce developed a model match methodology used to compare U.S. sales of ball bearings to sales of ball bearings sold in the exporting country (or a comparable third-country market).<sup>349</sup> Around the time of the fourteenth administrative review, however, Commerce announced its intention to modify the model match methodology in order to make it more consistent with the model match methodologies normally utilized in other antidumping proceedings.<sup>350</sup> Commerce subsequently implemented the new model match methodology in the context of the fifteenth administrative review, explaining that "compelling reasons exist[ed] to change the model-match methodology," among them the

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345. See 19 U.S.C. § 1516a(b)(1)(B)(i). The U.S. Supreme Court has explained that the "substantial evidence" standard requires only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The Federal Circuit has also clarified that substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Consol. Edison Co.*, 305 U.S. at 229).

346. *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1030 (Fed. Cir. 2007); see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999) ("Commerce is the 'master of antidumping law,' and reviewing courts must accord deference to the agency in its selection and development of proper methodologies." (internal citation omitted)).

347. 537 F.3d 1373 (Fed. Cir. 2008).

348. *Id.* at 1375.

349. *Id.* Under the existing approach, referred to as the "family model-match methodology," Commerce grouped U.S. and foreign market sales of ball bearings into "families" according to eight distinct physical product characteristics. If Commerce was unable to match U.S. sales of a product to sales in the comparison market within the identical family (according to the eight product characteristics), then it simply calculated normal value based on the constructed value. *Id.* at 1375-76.

350. *Id.* at 1376.

technological advances that made more sophisticated and accurate model matching possible.<sup>351</sup> Also in the fifteenth administrative review, Commerce continued its practice of zeroing when calculating the respondents' weighted-average dumping margins.<sup>352</sup>

SKF USA, an importer of ball bearings from various countries subject to antidumping duty orders, appealed both methodological decisions to the CIT, but the lower court sustained Commerce on both issues.<sup>353</sup> SKF USA then appealed to the Federal Circuit, which rejected SKF USA's arguments and agreed that Commerce's decisions were supported by substantial evidence and were in accordance with law.<sup>354</sup> With respect to the revised model match methodology, the Federal Circuit first observed that the antidumping statute was "silent with respect to the methodology that Commerce must use to match a U.S. product with a suitable home-market product."<sup>355</sup> Because the statute is silent with respect to model match, the court stated that it "must defer to an agency's reasonable interpretation of a statute even if [we] might have preferred another"<sup>356</sup> under the U.S. Supreme Court's holding in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>357</sup> It then deferred to the agency's expertise and held that Commerce's revised model match methodology constituted a reasonable interpretation of the statute and was consistent with court precedent requiring Commerce "to seek out product matches based on the most similar products

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351. *Id.* at 1377 (citation omitted). Under Commerce's revised model match methodology, Commerce redefined the "families" to constitute only the first four of the eight product characteristics used under the former approach. *Id.* at 1376. For each U.S. sale, Commerce then determined which comparison market product within the newly defined family was the most similar to the U.S. product based on a comparison with the four remaining product characteristics. *Id.* Thus, Commerce first attempted to identify products in the two markets that were identical with respect to all eight product characteristics. *Id.* Where that was not possible, Commerce's new approach permitted comparisons to the "most similar" products that were identical with respect to the first four characteristics (i.e., within the same family) but which differed with respect to the remaining four product characteristics and had the smallest differences in variable manufacturing costs. *Id.* If Commerce could not find any identical or similar matches, only then would it resort to comparing the U.S. sale to constructed value. *Id.* at 1376, 1378. See generally *Koyo Seiko Co. v. United States*, No. 2007-1556, 2007-1557, 2007-1558, 2007-1038, 2008 U.S. App. LEXIS 25663, at \*4-6 (Fed. Cir. Dec. 16, 2008) (describing Commerce's revisions to the model match methodology in the ball bearings proceedings).

352. *SKF USA*, 537 F.3d at 1377.

353. *Id.*

354. *Id.* at 1375.

355. *Id.* at 1379 (quoting *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1209 (Fed. Cir. 1995)).

356. *Id.* (quoting *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994)).

357. 467 U.S. 837 (1984).

rather than constructed values.”<sup>358</sup> The Federal Circuit upheld Commerce’s decision to replace the existing model match methodology after fourteen reviews, reasoning that Commerce may modify model match methodologies “where reasonable” and that Commerce had sufficiently cited “compelling reasons” for doing so.<sup>359</sup> The court also rejected SKF USA’s argument that Commerce impermissibly applied the new model match methodology retroactively to sales during the fifteenth administrative review period, explaining that “[c]hanges in methodology, like all other antidumping review determinations, permissibly involve retroactive effect”<sup>360</sup> and that Commerce had provided parties with sufficient notice and an opportunity to comment on the intended change.<sup>361</sup>

Finally, with respect to Commerce’s continued reliance on its zeroing practice, the Federal Circuit simply observed that the court had consistently upheld the practice in numerous prior cases as a reasonable interpretation of the U.S. antidumping statute, and it declined to reconsider the issue because SKF USA failed to raise any new arguments that the court had not already addressed in those prior cases.<sup>362</sup> The court also refused to consider the WTO’s declaration that Commerce’s use of zeroing in administrative reviews was inconsistent with the United States’ obligations under the WTO Antidumping Agreement<sup>363</sup> because the implementation and interpretation of WTO rulings is reserved for the Executive Branch.<sup>364</sup>

In *Koyo Seiko Co. v. United States*,<sup>365</sup> the Federal Circuit again affirmed the CIT on issues arising out of the fifteenth administrative review of the ball bearings proceeding. In this case, four Japanese

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358. *SKF USA*, 537 F.3d at 1380 (citing *Cemex, S.A. v. United States*, 113 F.3d 897, 902-04 (Fed. Cir. 1998)). The court further observed that “Congress has granted Commerce considerable discretion to fashion the methodology used to determine what constitutes [a] ‘foreign like product’ under the statute”. *Id.* at 1379 (quoting *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1384 (Fed. Cir. 2001) (citing *Koyo Seiko*, 66 F.3d at 1209)).

359. *Id.* at 1379–80 (ruling that Commerce’s “new model-match methodology not only reflects a reasonable interpretation of the statute but also comports with [court] precedent”).

360. *Id.* at 1381 (citing *Koyo Seiko Co. v. United States*, 516 F. Supp. 2d 1323, 1334 (Ct. Int’l Trade 2007)).

361. *Id.* (citing 19 U.S.C. § 1677m(g)).

362. *Id.* at 1382 (citing *NSK Ltd. v. United States*, 510 F.3d 1375, 1379 (Fed. Cir. 2007); *Corus Staal BV v. United States*, 502 F.3d 1370, 1374 (Fed. Cir. 2007); *Corus Staal BV v. Dep’t of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005); *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004)).

363. See discussion *supra* note 336 and accompanying text (noting that Commerce has abandoned the use of zeroing in original antidumping investigations but has yet to do so in administrative reviews).

364. *SKF USA*, 537 F.3d at 1382 (citing *Corus Staal BV*, 395 F.3d at 1349).

365. 551 F.3d 1286 (Fed. Cir. 2008).

ball bearing manufacturers and their U.S. affiliates similarly challenged Commerce's decision to modify its model match methodology and to continue employing its zeroing practice.<sup>366</sup> Additionally, they appealed several aspects of Commerce's antidumping duty calculations.<sup>367</sup> Concerning the revised model match methodology and use of zeroing, the Federal Circuit found that its prior decision in *SKF USA* was "controlling on the substance of those two issues and requires us to affirm Commerce's new model-match methodology and its use of 'zeroing' here."<sup>368</sup> Furthermore, with respect to the WTO's ruling that Commerce's use of zeroing violated the WTO Antidumping Agreement, the court reiterated that compliance with WTO determinations is reserved for the Executive Branch.<sup>369</sup> Accordingly, the Federal Circuit affirmed the CIT's decision with respect to these two issues.

Concerning the plaintiff-appellants' various challenges to Commerce's calculations in the fifteenth review, the Federal Circuit here too agreed that Commerce's determination was supported by substantial evidence and represented a reasonable exercise of its discretion.<sup>370</sup> First, the court affirmed Commerce's decision not to incorporate into its model match determination several bearing types proposed by a Japanese respondent, NTN, because the respondent failed to demonstrate that Commerce's ultimate choice of bearing types was unreasonable.<sup>371</sup> Second, the court upheld Commerce's decision to include NTN's costs associated with warehousing non-dumped merchandise in the total U.S. indirect selling expenses deducted in the U.S. price calculation—which, if excluded, would have increased NTN's U.S. prices and reduced the overall weighted-average margin—because NTN did not provide sufficient evidence demonstrating to Commerce's satisfaction that its calculation methodology did "not cause inaccuracies or distortions."<sup>372</sup> Third, the

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366. *Id.* at 1288.

367. *Id.* at 1290.

368. *Id.* (citing *SKF USA*, 537 F.3d at 1379–82).

369. *Id.* at 1291 (explaining that "[i]t would be most inappropriate for this court on its own to direct Commerce to reopen the Final Results of the 15th review to consider the impact on its decision of the subsequent WTO ruling").

370. *Id.* (agreeing that Commerce acted within its discretion with respect to the plaintiffs-appellants' various arguments concerning the antidumping duty calculations).

371. *Id.* at 1295.

372. *Id.* at 1292 (citing 19 C.F.R. § 351.401(g)(2)). Commerce's regulations express a preference for reporting expenses on a transaction-specific basis rather than on an allocated basis. 19 C.F.R. § 351.401(g)(1). Where a respondent cannot report an expense on a transaction-specific basis, then Commerce's regulations permit reporting on an allocated basis so long as the respondent can demonstrate "that the allocation is calculated on as specific a basis as is feasible" and that "the

court agreed with Commerce's decision to allocate NTN's "director's fees" between two NTN entities based on each company's total sales, rather than wholly excluding the director's fees from the one NTN entity that did not import ball bearings, because NTN had not demonstrated that its allocation methodology was as specific as possible and did not cause inaccuracies or distortions in the antidumping duty calculations.<sup>373</sup> Finally, the Federal Circuit held that Commerce reasonably included in the calculation of total U.S. indirect selling expenses the additional costs associated with benefits paid to Japanese nationals working in the United States on behalf of another Japanese manufacturer, NSK, because NSK incurred those expenses to compensate employees whose work benefited U.S. sales of ball bearings.<sup>374</sup>

The Federal Circuit ruled on another Commerce decision concerning the U.S. price calculations in *Florida Citrus Mutual v. United States*.<sup>375</sup> The issue on appeal was whether Commerce reasonably interpreted the phrase "United States import duties" under 19 U.S.C. § 1677a(c)(2)(A), which pertains to movement expenses deducted in the calculation of EP and CEP,<sup>376</sup> to reflect the *net* import duties that the importers paid to CBP upon entry of the subject merchandise into the United States.<sup>377</sup> In the underlying proceeding, Commerce permitted the respondents, Brazilian orange juice producers and exporters, to offset the U.S. customs duties that they paid by the amount of duty drawback that they applied for and received pursuant to CBP's drawback programs.<sup>378</sup> Under these programs, an importer may receive refunds of customs duties if articles that it imported were exported, destroyed, or used in further manufacturing within the United States instead of being sold commercially in the U.S. market.<sup>379</sup> By permitting this claimed offset,

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allocation methodology used does not cause inaccuracies or distortions." *Id.* § 351.401(g)(2).

373. *Koyo Seiko Co.*, 551 F.3d at 1293 (citing 19 C.F.R. § 351.401(g)(2)).

374. *Id.* (citing *Koyo Seiko Co. v. United States*, 516 F. Supp. 2d 1323, 1342 (Ct. Int'l Trade 2007)). The inclusion of these additional indirect selling expenses lowered NSK's U.S. prices and, in turn, increased its dumping margins.

375. No. 2008-1102, 2008 U.S. App. LEXIS 25359 (Fed. Cir. Dec. 18, 2008).

376. *See* 19 U.S.C. § 1677a(c)(2)(A) (requiring Commerce to deduct the costs associated with transporting subject merchandise from the original place of shipment in the exporting country to the designated U.S. place of delivery in the calculation of the U.S. prices used in the dumping calculations).

377. *Fla. Citrus Mut.*, 2008 U.S. App. LEXIS 25359, at \*2.

378. *Id.* at \*3-5.

379. *Id.* at \*3 (explaining that the "drawback programs allow foreign companies to receive refunds of duties paid on merchandise that is exported, or destroyed, within three years of entry into the United States"). *See generally* 19 U.S.C. § 1313 (authorizing drawbacks and refunds on imported merchandise); 19 C.F.R. § 191.2(i)

Commerce calculated lower net U.S. customs duties for the respondents, which in turn raised their U.S. prices (by virtue of a smaller deduction) and lowered their overall weighted-average dumping margins.

The domestic orange juice producers that brought the underlying petition seeking the imposition of antidumping duties on orange juice imports, Florida Citrus Mutual et al. ("FCM"), appealed Commerce's calculation of U.S. import duties to the CIT.<sup>380</sup> The CIT sustained Commerce's determination as a reasonable interpretation of the statute, concluding that "the refunds should be considered part of the movement expenses enumerated by the statute" and that permitting the offset resulted in a more accurate calculation of the respondents' antidumping duty margins by reflecting the import duties that they actually paid.<sup>381</sup>

In affirming the CIT, the Federal Circuit agreed that Commerce's methodology was a reasonable interpretation of the statute and resulted in a more accurate calculation of the respondents' antidumping duty margins because granting the offset better reflected the importers' overall liability for customs duties.<sup>382</sup> The court first observed that 19 U.S.C. § 1677a(c)(2)(A) was ambiguous insofar as it did not indicate whether "United States import duties" meant *gross* import duties (i.e., the duties collected at the time of importation) or *net* import duties (i.e., gross duties less any refunds).<sup>383</sup> Because the statute on its face was ambiguous and broadly worded, the court next concluded that Commerce's interpretation was reasonable under *Chevron* "because it accords with the statutory language and accurately reflects the overall duty costs to importers."<sup>384</sup> In addition, the court concluded that the drawback refunds were incidental to the importation of subject merchandise and should be deducted because they were "contingent upon and related to importing merchandise because they cannot be claimed

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(2008) (defining "drawback" as "the refund or remission, in whole or in part, of a customs duty, fee or internal revenue tax which was imposed on imported merchandise under Federal law because of its importation"); 19 C.F.R. § 191.32(a) (permitting importers to claim "drawback on merchandise which is commercially interchangeable with imported merchandise if the commercially interchangeable merchandise is exported, or destroyed under Customs supervision, before the close of the three-year period beginning on the date of importation of the imported merchandise").

380. *Fla. Citrus Mut.*, 2008 U.S. App. LEXIS 25359, at \*6.

381. *Id.* at \*7 (citing *Fla. Citrus Mut. v. United States*, 515 F. Supp. 2d 1324, 1334 (Ct. Int'l Trade 2007)).

382. *Id.* at \*15-16.

383. *Id.* at \*7.

384. *Id.* at \*13.

without first importing merchandise and paying the duties to Customs.”<sup>385</sup>

Finally, the Federal Circuit rejected FCM’s claims regarding the reasonableness of Commerce’s methodology for calculating the net import duties. It held that Commerce was not required to determine whether the drawback refunds had been “passed through” to the respondents’ U.S. customers.<sup>386</sup> It further concluded that Commerce reasonably incorporated duty refunds received on subject merchandise that entered the United States prior to the period covered by the antidumping investigation because 19 U.S.C. § 1677a(c)(2)(A) did not preclude Commerce from considering expenses incurred or refunds received after the time of importation.<sup>387</sup>

Finally, in *Mittal Steel Point Lisas Ltd. v. United States*,<sup>388</sup> the Federal Circuit affirmed the CIT’s judgment to uphold Commerce with respect to two calculation issues in an antidumping case involving steel wire rod from Trinidad and Tobago. The plaintiff-appellant, Mittal Steel Point Lisas Limited (“Mittal”),<sup>389</sup> argued that the CIT erroneously upheld Commerce’s determination to exclude Mittal’s composite steel rod from the antidumping calculations after classifying it as “non-prime merchandise.”<sup>390</sup> Separately, the defendant-cross appellants, Gerdau Ameristeel Corporation and Keystone Consolidated Industries, Inc. (collectively, “domestic producers”), argued that the CIT incorrectly affirmed Commerce’s remand determination in which Commerce calculated imputed credit expenses based on the period from the date of invoice to the date of payment, rather than on the period from the date of shipment to the payment date as is Commerce’s standard practice.<sup>391</sup>

First, the Federal Circuit agreed that the CIT had correctly classified Mittal’s composite steel rod as non-prime merchandise. As

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385. *Id.* at \*15 (noting that the phrase “incident to” means “contingent upon or related to something else”) (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 664 (1976)).

386. *Id.* at \*17.

387. *Id.* at \*18–19 (speculating that respondents may import merchandise during the investigation period for which they may claim duty drawback refunds after Commerce’s investigation ends and, thus, it is reasonable for respondents to benefit from refunds received during the investigation period that pertained to pre-period importations).

388. 548 F.3d 1375 (Fed. Cir. 2008).

389. Mittal was formerly known as “Caribbean Ispat Limited” and is now known as “Arcelormittal Point Lisas Limited.” *Id.* at 1378.

390. *Id.* (citing *Mittal Steel Point Lisas Ltd. v. United States*, 491 F. Supp. 2d 1222 (Ct. Int’l Trade 2007)).

391. *Id.* at 1381 (citing *Mittal Steel Point Lisas Ltd. v. United States*, 502 F. Supp. 2d 1345 (Ct. Int’l Trade 2007)).

described above, in its antidumping duty calculations, Commerce calculates antidumping duty margins by comparing the U.S. price (EP or CEP) to the normal value.<sup>392</sup> In calculating the normal value, Commerce's practice is to exclude foreign market sales of "non-prime" merchandise—that is, secondary merchandise that contains material defects or other commercially significant physical differences and, consequently, is sold for a lower price—but only if the respondent did not sell non-prime merchandise to customers in the U.S. market during the relevant period.<sup>393</sup> Mittal disputed Commerce's decision to classify its composite steel rods as non-prime merchandise—presumably because the inclusion of these lower-priced sales would have reduced its calculated normal value and, in turn, would have reduced its overall weighted-average dumping margin.<sup>394</sup> In any event, the Federal Circuit agreed that Commerce had correctly classified Mittal's composite rod as non-prime merchandise despite the fact that it was otherwise identical to the company's prime rod in terms of Commerce's model match criteria and the grade of steel used.<sup>395</sup> The court noted that Mittal had acknowledged that its composite rod was of lower quality and more inefficient to use than its prime rod because: (1) composite rod consisted of multiple smaller pieces whereas prime rod consisted of a single piece of steel; (2) composite rod was sold for a much lower price than prime rod; and (3) Mittal's price lists separately identified prime rod and composite rod.<sup>396</sup> The Federal Circuit agreed that

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392. See discussion *supra* note 336 and accompanying text (discussing the statutory definitions of EP and CEP).

393. *Mittal Steel Point Lisas*, 548 F.3d at 1378, 1381. If a respondent sold non-prime merchandise in both markets, then Commerce will compare U.S. sales of non-prime merchandise only to foreign market sales of non-prime merchandise, and likewise will compare U.S. sales of prime merchandise only to foreign market sales of prime merchandise. If a respondent sold non-prime merchandise in the U.S. market but not the foreign market, then Commerce typically will compare those sales of non-prime merchandise to constructed value rather than comparing them to foreign market sales of prime merchandise. See, e.g., *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 73 Fed. Reg. 14,220 (Dep't Commerce Mar. 17, 2008) (final admin. review) (citing Memorandum from Stephen J Claeys to David M. Spooner, Assistant Sec'y for Import Admin., cmt. 11 (Mar. 10, 2008), available at <http://www.ia.ita.doc.gov/frn/summary/KOREA-SOUTH/E8-5302-1.pdf>) (explaining that "U.S. sales of prime merchandise are never compared with home market sales of non-prime merchandise" and that Commerce's "model matching methodology in fact prevents any matches of prime to non-prime merchandise") (quoting *Stainless Steel Sheet and Strip in Coils From the Republic of Korea*, 64 Fed. Reg. 30,664, cmt. 6 (Dep't Commerce June 8, 1999)).

394. *Mittal Steel Point Lisas*, 548 F.3d at 1380–81 (explaining that Mittal argued that its prime rod and composite rod should be treated as identical products for purposes of the antidumping duty calculations).

395. *Id.* at 1382–83.

396. *Id.*

these differences were “commercially significant” and that the classification of composite rod as non-prime merchandise was supported by substantial evidence.<sup>397</sup>

Second, the Federal Circuit affirmed the CIT on the imputed credit expense issue after concluding that the domestic producers had failed to exhaust their administrative remedies on remand with respect to Commerce’s calculation methodology.<sup>398</sup> In Commerce’s antidumping calculations, it reduces the CEP by the amount of U.S. credit expenses, which represent the imputed opportunity cost incurred by a seller for the period between the time it sells the merchandise and the time it receives payment from the customer (i.e., the “credit period”).<sup>399</sup> As the length of the credit period increases, the amount of the credit expense also increases, which in turn lowers the U.S. price and increases the overall weighted-average dumping margin.<sup>400</sup> In a remand determination, Commerce departed from its normal methodology of calculating the credit period as the days between the payment date and date of shipment from the seller’s factory,<sup>401</sup> and it instead calculated the credit period as the days between the payment date and the date of the sales invoice.<sup>402</sup> This methodology resulted in a shorter credit period (and smaller credit expense) because the invoice date always followed the shipment date. Commerce then solicited comments on its remand determination, but the domestic producers never filed any comments and, thus, “effectively chose not to participate in the remand proceedings.”<sup>403</sup>

In affirming the CIT’s decision to uphold Commerce’s credit expense calculation, the Federal Circuit held that the domestic producers “failed to raise the issue at the appropriate time on

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397. *Id.* at 1383.

398. *Id.* at 1384.

399. *Id.* at 1379. For example, if a seller receives payment from its customer on the same day that it makes the sale, then it can deposit or invest the funds and earn interest on the principal. As payment remains outstanding, however, the seller loses the theoretical amount of interest that it could have earned if it had already received the payment. Commerce treats this lost interest revenue as an opportunity cost to the seller in its antidumping calculations.

400. When Commerce calculates U.S. price on an EP basis, it still makes an adjustment for imputed credit expenses but not by deducting them from the gross U.S. sales price. Instead, Commerce *adds* the U.S. credit expenses to the normal value used to calculate the dumping margin. Despite this difference in the calculation methodology, an increase to U.S. credit expenses for EP sales also causes the calculated dumping margin to increase because larger U.S. credit expenses increases the normal value.

401. *Id.* (describing Commerce’s normal practice for determining the credit period in the imputed credit expense calculation).

402. *Id.* at 1380.

403. *Id.* at 1380, 1383–84.

remand and thus abandoned [their] argument by failing to exhaust [their] administrative remedies before Commerce.”<sup>404</sup> It further held that neither the “purely legal argument” nor “futility” exceptions to the exhaustion principle applied.<sup>405</sup> Moreover, the court concluded that, even if it had to address the substantive merits of the domestic producers’ arguments, it would still uphold Commerce’s remand determination as supported by substantial evidence and in accordance with law because the record evidence showed that Mittal did not begin extending credit to its customers until it issued the sales invoice, making the date of invoice a more appropriate starting point for the credit period than the date of shipment.<sup>406</sup>

#### *D. Injury Analysis at the International Trade Commission*

Before the United States may impose antidumping duties, U.S. law requires that the ITC<sup>407</sup> determine affirmatively that the domestic industry that produces the “domestic like product”—i.e., a product that is similar in characteristics to the product that is the subject of the antidumping action<sup>408</sup>—is materially injured or threatened with material injury “by reason of” the dumped imports from foreign countries covered by the action.<sup>409</sup> In order to find that dumped imports have presently caused material injury to a domestic industry,

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404. *Id.* at 1384; *see also* Sandvik Steel Co. v. United States, 164 F.3d 596, 599 (Fed. Cir. 1998) (“[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”); AIMCOR v. United States, 141 F.3d 1098, 1111–12 (Fed. Cir. 1998) (holding that Aimcor “was precluded from raising . . . [an] issue *de novo* before the court” because it chose not to raise it on remand to Commerce).

405. *Mittal Steel Point Lisas*, 548 F.3d at 1384 (explaining that the domestic producers’ arguments regarding the use of shipment date versus invoice date in the credit expense calculation was not “purely legal” but, rather, raised factual questions regarding Commerce’s practice, and that raising arguments to Commerce would not have been “futile” in light of Commerce’s express solicitation of comments on the appropriateness of its proposed remand methodology).

406. *Id.* at 1384–85 (finding that the material sales terms were not established until after Mittal’s U.S. affiliate issued the invoice).

407. The ITC is an independent federal agency composed of six commissioners—three from each political party—each entitled to cast a single vote as to whether he or she believes that material injury or threat of material injury exists. Under the statute, in the event of a tie vote on whether injury exists, the agency will enter an affirmative determination favoring the domestic industry. 19 U.S.C. § 1677(11). For purposes of determining whether injury exists, a Commissioner’s vote is considered “affirmative” if he or she finds that material injury exists presently or if he or she finds that the domestic industry is threatened with material injury. *Id.*

408. *See* 19 U.S.C. § 1677(10) (defining “domestic like product”).

409. *See id.* § 1673 (prescribing the requirements for imposing antidumping duties). In countervailing duty cases, the ITC employs the same standards for evaluating whether subsidized imports have injured a domestic industry. *Id.* § 1671(a). For simplicity, this section refers to the ITC’s injury analysis only in the context of antidumping actions. *Id.* § 1671(a).

the ITC considers three factors: (1) the volume of subject imports; (2) the effects of subject imports on U.S. prices for the domestic like product; and (3) the impact of subject imports on the domestic industry's U.S. production operations.<sup>410</sup> Therefore, in a textbook case, the ITC typically finds that a domestic industry has been materially injured where, in the three years preceding the antidumping petition, subject import volumes have increased significantly, the prices of subject imports have either forced U.S. producers to lower their prices (price depression) or prevented them from increasing their prices (price suppression) of the domestic like product, and the condition of the industry has deteriorated as evidenced by, inter alia, declining financial indicators (including profitability), reduced production, capacity, or capacity utilization, increasing inventories, reduced commercial shipments, and declining employment levels.<sup>411</sup> In a threat case, the ITC finds that the domestic industry has not been materially injured during the prior three-year period, but that the trends of import volumes, prices, the U.S. industry's financial condition, and other economic factors strongly indicate that "further dumped . . . imports are imminent" and "material injury by reason of imports would occur unless an order is issued."<sup>412</sup>

A critical component of the ITC's injury analysis is causation—that is, whether the domestic industry had been materially injured, or is being threatened with material injury, "by reason of" dumped imports.<sup>413</sup> There must be a causal connection between the condition of the domestic industry and the presence of dumped imports in the U.S. market. In *Bratsk Aluminum Smelter v. United States*,<sup>414</sup> the Federal Circuit concentrated on the causation element of the injury analysis and set forth the "replacement/benefit test." The court held that

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410. *Id.* § 1677(7)(B)(i).

411. *Id.* § 1677(7)(C).

412. *Id.* § 1677(7)(F)(ii). In considering whether subject imports threaten to cause material injury, the ITC considers numerous economic factors, including the existence of unused production capacity or substantial increases in production capacity in the countries covered by the petition, significantly increasing import volumes or market penetration, demand for subject imports, whether imports have had significant price depressing or suppressing effects, inventories of subject merchandise, the potential for product-shifting in foreign production facilities, negative effects on the development and production efforts of the domestic industry, and any other adverse trends indicating the likelihood of material injury caused by subject imports. *Id.* § 1677(7)(F)(i).

413. *See id.* § 1673 (authorizing the imposition of antidumping duties if Commerce affirmatively finds that dumping has occurred and the ITC affirmatively finds that the domestic industry is materially injured, or is threatened with material injury, "by reason of" dumped imports).

414. 444 F.3d 1369 (Fed. Cir. 2006).

“whenever the antidumping investigation is centered on a commodity product, and price competitive non-subject imports are a significant factor in the market,” the ITC must “explain why—notwithstanding the presence and significance of the non-subject imports—it concluded that the subject imports caused material injury to the domestic industry.”<sup>415</sup> Thus, the *Bratsk* decision required the ITC to apply the replacement/benefit test in investigations involving fungible commodity products as part of the causation analysis. This additional analysis, in turn, could make it more difficult for domestic industries to prove the existence of material injury in such cases.

Litigation regarding the *Bratsk* replacement/benefit test ensued thereafter. In 2008, the Federal Circuit issued an opinion in *Mittal Steel Point Lisas Ltd. v. United States*<sup>416</sup> in which it clarified the scope of the replacement/benefit test. The appeal arose out of an antidumping duty investigation against steel wire rod from twelve countries, among them Trinidad and Tobago, in which the ITC concluded in its final determination that the domestic industry had been materially injured “by reason of” subject imports from Trinidad and Tobago.<sup>417</sup> *Mittal Steel Point Lisas Ltd.* (formerly, Caribbean Ispat Ltd.) appealed the ITC’s final determination with respect to Trinidad and Tobago, which the CIT upheld.<sup>418</sup> On appeal, the Federal Circuit remanded the decision with instructions that the ITC perform a *Bratsk* analysis and “make a specific causation determination” as to whether other dumped imports or imports from non-subject countries “would have replaced [Trinidad and Tobago’s] imports without any beneficial effect on domestic producers.”<sup>419</sup>

On remand, the ITC concluded that, if it strictly applied the statutory factors governing its injury analysis, then the record evidence supported an affirmative determination that subject imports from Trinidad and Tobago had caused present material injury and

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415. *Id.* at 1375.

416. 542 F.3d 867 (Fed. Cir. 2008).

417. *Id.* at 870. In its injury analyses, the ITC normally performs a single injury analysis by cumulating the data from all countries subject to the petition. However, in the case at issue, the ITC considered Trinidad and Tobago separately from the other eleven subject countries pursuant to a provision of the antidumping statute precluding the ITC from cumulating imports from countries covered by the Caribbean Basin Economic Recovery Act (“CBERA”), such as Trinidad and Tobago, with imports from non-CBERA countries in its injury analysis. 19 U.S.C. § 1677(7)(G)(ii)(III).

418. *Mittal Steel Point Lisas*, 542 F.3d at 869–70 (citing *Caribbean Ispat Ltd. v. United States*, 366 F. Supp. 2d 1300 (Ct. Int’l Trade 2005)).

419. *Id.* at 870 (citing *Caribbean Ispat Ltd. v. United States*, 450 F.3d 1336, 1341 (Fed. Cir. 2006)).

also threatened to cause material injury to the domestic industry.<sup>420</sup> Nevertheless, the ITC issued a negative injury determination, asserting that it felt compelled to do so by the Federal Circuit's remand instructions and by the analysis prescribed under *Bratsk*.<sup>421</sup> The ITC reasoned that the domestic industry could neither overcome a presumption that non-subject imports would have replaced subject imports from Trinidad and Tobago nor could the industry demonstrate that it would have benefited from the exclusion of subject imports from the U.S. market.<sup>422</sup> The ITC further stated that its conclusion applied equally to its analyses of present material injury and threat of material injury.<sup>423</sup> The CIT affirmed the ITC's remand determination.<sup>424</sup>

Two domestic producers, Gerdau Ameristeel Corp. and Keystone Consolidated Industries, Inc. (collectively, "the domestic producers"), appealed the CIT's remand determination.<sup>425</sup> The Federal Circuit held that its prior remand instructions and the *Bratsk* decision did not require the ITC to conclude that dumped imports from Trinidad and Tobago had not caused material injury and, therefore, it vacated the CIT's judgment with instructions that the CIT again remand the case to the ITC for further consideration of the injury issues.<sup>426</sup>

As part of its analysis, the Federal Circuit first clarified the purpose of the *Bratsk* "replacement/benefit test." According to the court, the ITC has considerable discretion to determine the methodology for evaluating whether present material injury or threat of material injury exist, but the governing law requires the agency to consider all relevant economic factors related to the injury analysis and articulate reasoned explanations for its determinations.<sup>427</sup> The *Bratsk* decision stands for the proposition that the ITC must consider all "important aspect[s] of the causation analysis," one of which is "whether non-subject imports would have replaced subject imports without any

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420. *Id.* at 870-71.

421. *Id.* at 871.

422. *Id.* Two Commissioners dissented from the ITC's negative injury determination after concluding that steel wire rod is not a fungible commodity product, whereas the other Commissioners presumed that steel wire rod was a fungible commodity product. *Id.* at 871-72. On this matter, the Federal Circuit held that the ITC wrongly interpreted the Federal Circuit's remand instructions as barring any further analysis of whether steel wire rod is a fungible commodity product, which is a prerequisite finding for a *Bratsk* analysis. *Id.* at 875. The court stated that the ITC could reconsider the issue of fungibility on remand. *Id.*

423. *Id.* at 871.

424. *Id.* at 872.

425. *Id.* at 869, 872.

426. *Id.* at 869.

427. *Id.* at 872.

benefit to the domestic industry,” the court reasoned.<sup>428</sup> The court explicated that if the ITC finds that the domestic industry would not have benefited from the absence of subject (dumped) imports in the U.S. market during the investigation period, that fact strongly indicates that the presence of subject imports did not cause any injury that the U.S. industry had experienced.<sup>429</sup>

The Federal Circuit next clarified its intended framework for the *Bratsk* test. According to the court, the ITC wrongly considered whether the elimination of subject imports from the market *after the imposition of an antidumping duty order* would benefit the domestic industry.<sup>430</sup> The ITC misapplied the *Bratsk* test by focusing on the potential effectiveness of an antidumping duty order, that is, whether non-subject imports would replace subject imports if subject imports disappeared from the U.S. market as a consequence of an antidumping duty order.<sup>431</sup> Rather, the ITC should have considered whether the domestic industry would have benefited from the *hypothetical* elimination of subject dumped imports during the three-year investigation period, or whether non-subject (or non-dumped) imports would have replaced the subject dumped imports with no corresponding benefit to the domestic industry.<sup>432</sup> By evaluating whether the domestic industry would have benefited from the theoretical elimination of subject imports in the past, the court reasoned, the ITC could determine if the domestic industry had been injured during the investigation period “by reason of” subject imports.<sup>433</sup>

The Federal Circuit continued that the ITC: (1) wrongly applied a rebuttable presumption, as part of its *Bratsk* analysis, that non-subject imports would replace subject imports if the subject imports were theoretically eliminated from the U.S. market; and (2) wrongly

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428. *Id.* at 874 (citing *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369, 1375–76 (Fed. Cir. 2006)).

429. *See generally* *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 722 (Fed. Cir. 1997) (requiring the ITC to demonstrate in its affirmative injury determinations that “the harm occurred ‘by reason of’ the [dumped] imports, not by reason of a minimal or tangential contribution to material harm caused by [dumped] goods”).

430. *Mittal Steel Point Lisas*, 542 F.3d at 876.

431. *See id.* (explaining that, under the *Bratsk* decision, “in cases involving commodity products in which [non-dumped] imported goods are present in the market, the Commission must give consideration to the issue of ‘but for’ causation by considering whether the domestic industry would have been better off if the dumped goods had been absent from the market”).

432. *Id.*

433. *Id.* at 877 (emphasizing that the Federal Circuit “regard[s] the inquiry into ‘but for’ causation as a proper part of the Commission’s responsibility to determine whether the injury to the domestic industry is ‘by reason of’ the subject imports” and cannot be reasonably attributed to factors other than subject imports).

concluded that it must issue a negative injury determination unless the domestic industry rebuts the presumption of replacement without benefit.<sup>434</sup> According to the court, the domestic industry is not required to “prove the negative” with respect to the causation analysis but, rather, the ITC must “give full consideration to the causation issue and . . . provide a meaningful explanation of its conclusions” as part of its statutory obligation to determine whether subject imports caused material injury to the domestic industry.<sup>435</sup> Under the holding of *Bratsk*, the ITC must consider and explain—for fungible commodity products—whether, during the investigation period, non-subject (non-dumped) imports would have replaced subject dumped imports in the U.S. market without any benefit to the domestic industry.<sup>436</sup>

Finally, the Federal Circuit did not rule on whether the *Bratsk* analysis applies to the ITC’s threat of injury analysis. Rather, the court simply observed that the ITC erred as a matter of law by applying a rebuttable presumption in the threat context, but it did not state that the ITC may not apply *Bratsk* to its threat analysis.<sup>437</sup> Thus, the court left open the question of whether the ITC must perform the replacement/benefit test in the context of a threat analysis.

#### *E. Byrd Amendment Issues*

In 2000, Congress amended the antidumping statute by enacting the Continued Dumping and Subsidy Offset Act of 2000 (“CDSOA”), or “Byrd Amendment,” which redirected antidumping and countervailing duties that CBP collected from the general U.S. Treasury to certain “affected domestic producers.”<sup>438</sup> Congress enacted the CDSOA to compensate those domestic producers who brought or supported the original antidumping or countervailing duty petition for the material injury that they experienced from

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434. *Id.* at 877 (“Contrary to the Commission’s interpretation, we do not regard the decision in *Bratsk* as requiring the Commission to presume that producers of non-subject goods would have replaced the subject goods if the subject goods had been removed from the market.”).

435. *Id.* at 878 (citing *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369, 1375–76 (Fed. Cir. 2006)).

436. *Id.* at 878–79 (internal citations omitted).

437. *Id.* at 879.

438. See 19 U.S.C. § 1675c (2000) (repealed 2006). See generally Valerie A. Slater & Jarrod M. Goldfeder, *14th Judicial Conference of the United States Court of International Trade: “Show Me the Money”: A Practitioner’s Guide to the Intersection of Customs and AD/CVD Law*, 28 U. PA. J. INT’L ECON. L. 51, 78–84 (2007) (providing a detailed description of the process by which CBP distributes antidumping and countervailing duties to affected domestic producers under the CDSOA).

unfairly traded imports.<sup>439</sup> The CDSOA directed CBP to distribute collected duties on an annual basis to domestic producers that satisfied certain regulatory requirements entitling them to distributions, which were designed to reimburse their “qualifying expenditure[s]” incurred after the issuance of the antidumping or countervailing duty orders and with respect to their production of the same product as that subject to the order(s).<sup>440</sup> Despite its enormous popularity with U.S. industries, Congress repealed the CDSOA in 2006<sup>441</sup> in response to mounting pressure from the United States’ trading partners that culminated in a WTO dispute settlement report finding that the CDSOA constituted “a non-permissible specific action against dumping or a subsidy” under the WTO agreements.<sup>442</sup> Under the terms of the repeal, however, affected domestic producers remained eligible to receive distributions of antidumping or countervailing duties collected on entries made through September 30, 2007.<sup>443</sup>

Since its passage, the CDSOA has been the subject of numerous legal challenges within the U.S. courts.<sup>444</sup> In 2008, the Federal Circuit

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439. See 19 U.S.C. § 1675c(a) (providing for distribution of assessed antidumping and countervailing duties to affected domestic producers); see also 19 C.F.R. § 159.61(a) (providing for distribution of assessed duties for certain qualified expenditures).

440. See 19 U.S.C. § 1675c(b)(4); 19 C.F.R. § 159.61(c) (identifying as “qualifying expenditure[s]” the costs for manufacturing facilities, equipment, research and development, personnel training, acquisition of technology, health care benefits for employees paid for by the employer, pension benefits for employees paid for by the employer, environmental equipment, training, or technology, acquisition of raw materials and other inputs, and working capital or other funds needed to maintain production).

441. See Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154-55 (2006) (repealing the CDSOA effective for entries on or after Oct. 1, 2007).

442. *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶¶ 273-74, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003).

443. Deficit Reduction Act § 7601(b).

444. See, e.g., *SKF USA Inc. v. United States*, Nos. 2008-1005-1008, 2009 U.S. App. LEXIS 2964 (Fed. Cir. Feb. 19, 2009) (holding that the CDSOA’s support provision did not violate the First Amendment because nothing in the statute or legislative history suggested that the CDSOA was intended to suppress expression of opposing views, and also that it did not violate the Equal Protection Clause of the Fifth Amendment because the provision of benefits to domestic producers who supported the underlying antidumping or countervailing duty petition was rationally related to the U.S. Government’s legitimate interest in enforcing the trade laws); *PS Chez Sidney v. U.S. Int’l Trade Comm’n*, 442 F. Supp. 2d 1329, 1330 (Ct. Int’l Trade 2006), *reh’g granted in part, reh’g denied in part*, 502 F. Supp. 2d 1318 (Ct. Int’l Trade 2007) (holding that the CDSOA’s definition of “affected domestic producers” as limited to only those companies that were part of the petitioning group or otherwise expressed support for an antidumping or countervailing duty petition violated the First Amendment’s protection against compelled speech because it conditioned eligibility for receipt of the government benefit on the particular opinion expressed on the underlying petition); *Cathedral Candle Co. v. U.S. Int’l Trade Comm.*, 285 F. Supp. 2d 1371 (Ct. Int’l Trade 2003), *aff’d*, 400 F.3d 1352 (Fed. Cir. 2005) (finding

decided another major case affecting domestic producers' entitlement to CDSOA distributions in *Canadian Lumber Trade Alliance v. United States*.<sup>445</sup> In this case, the court affirmed a CIT ruling that the application of the CDSOA to imports from Canada and Mexico violated section 408 of the North American Free Trade Agreement ("NAFTA") Implementation Act ("NIA").<sup>446</sup> Under section 408, any amendment to the U.S. antidumping laws that Congress enacted after the NAFTA went into effect "shall apply to goods from a NAFTA country *only to the extent specified in the amendment*."<sup>447</sup> In affirming the CIT, the Federal Circuit agreed that the CDSOA represented an amendment to the U.S. antidumping statute and that nowhere did the amendment expressly state that it applied to NAFTA countries.<sup>448</sup> As such, Commerce and CBP could not apply the CDSOA to imported merchandise from Canada and Mexico given the plain language of section 408 to the NIA.<sup>449</sup>

The Federal Circuit also addressed the appellants' various arguments that section 408 did not apply to the CDSOA. First, it rejected their argument that the CDSOA does not "apply to goods" within the meaning of section 408, reasoning that:

[W]hile it is true that the CDSOA does not regulate goods directly, such as by flatly prohibiting their sale or use, the CDSOA surely does "apply to goods" in the sense relevant to antidumping and countervailing duty laws, which are designed to regulate the *market* for goods in an attempt to compensate for anti-competitive behavior.<sup>450</sup>

Second, the court disagreed that Congress intended for section 408 to apply to the CDSOA, finding instead that Congress was cognizant

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that certain domestic producers were ineligible for CDSOA distributions because they filed their applications beyond the established deadline and did not timely petition the ITC to include them on the list of eligible recipients).

445. 517 F.3d 1319 (Fed. Cir. 2008), *cert. denied*, United States Steel Corp. v. Canadian Lumber Trade Alliance, 129 S. Ct. 344 (2008).

446. *Canadian Lumber Trade Alliance*, 517 F.3d at 1324; *see also* NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. §§ 3301-3473).

447. 19 U.S.C. § 3438 (2006) (emphasis added). The Code specifically states:

Any amendment enacted after the Agreement enters into force with respect to the United States that is made to—(1) section 303 or title VII of the Tariff Act of 1930, or any successor statute, or (2) any other statute which—(A) provides for judicial review of final determinations under such section, title, or successor statute, or (B) indicates the standard of review to be applied, shall apply to goods from a NAFTA country only to the extent specified in the amendment.

*Id.*

448. *Canadian Lumber Trade Alliance*, 517 F.3d at 1325, 1342.

449. *Id.*

450. *Id.* at 1342.

of the applicability of section 408 when it passed the CDSOA and would have explicitly stated that section 408 did not apply if it intended that outcome.<sup>451</sup> Third, the Federal Circuit dismissed the appellants' claim that the CDSOA falls outside the scope of section 408 because Congress enacted it as part of an appropriations bill.<sup>452</sup> Even if Congress passed this legislation pursuant to its constitutional spending power to assist domestic producers affected by unfair trade, the court concluded, Congress ultimately amended the antidumping statute in order to do so and, as such, it falls under the purview of section 408 of the NIA.<sup>453</sup> Accordingly, the Federal Circuit affirmed the CIT's holding that the CDSOA does not apply to antidumping and countervailing duties assessed on imports of goods from Canada or Mexico, and it affirmed the CIT's decision to issue a permanent injunction enjoining the continued distribution of antidumping and countervailing duties assessed on the orders against hard red spring wheat from Canada.<sup>454</sup>

Apart from addressing the merits of the NAFTA challenge, the Federal Circuit in *Canadian Lumber Trade Alliance* also decided a number of procedural issues related to standing, mootness, and causes of action of the claims brought by the plaintiffs (the Government of Canada and several Canadian producers of hard red spring wheat, magnesium, and softwood lumber) challenging CBP's distributions of duties under the CDSOA. First, with respect to standing, the Federal Circuit considered whether two plaintiffs, the Government of Canada and the Canadian Wheat Board ("CWB"), had satisfied the standing requirements.<sup>455</sup> At the outset, the court distinguished between: (1) Article III standing under the U.S. Constitution, which requires that a plaintiff demonstrate an "injury-in-fact" caused by the complained-of conduct and which can likely be redressed by a favorable court decision;<sup>456</sup> and (2) prudential standing

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451. *Id.* at 1343.

452. *Id.*

453. *Id.* at 1343-44.

454. *Id.* at 1325, 1344. Because the Federal Circuit vacated the CIT's judgment in favor of plaintiffs from the Canadian softwood lumber and magnesium industries, the permanent injunction applied only to antidumping and countervailing duties assessed on entries of hard red spring wheat from Canada pursuant to the claim raised by the Canadian Wheat Board. *Id.*

455. *Id.* The CWB became the only remaining plaintiff-appellant after the Federal Circuit concluded that the claims of the other plaintiffs-appellants had been rendered moot. *See id.* at 1342 (explaining that the CWB had both standing and a cause of action to bring its appeal involving Commerce's antidumping and countervailing duty case against hard red spring wheat from Canada).

456. *Id.* at 1331 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

under the APA, which confers standing if the interest for which the plaintiff seeks protection is “within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>457</sup> The court then affirmed the CIT’s ruling that the Government of Canada lacked independent Article III standing because Canada failed to demonstrate an injury-in-fact independent of the injury alleged by the Canadian producers.<sup>458</sup>

In contrast, the Federal Circuit held that the CWB satisfied Article III standing because the distribution of antidumping and countervailing duties to the affected domestic producers under the CDSOA “was likely to cause an economic injury to the Canadian Wheat Board” through increased competition and loss of market share resulting from the monetary assistance provided to its U.S. competitors, and “because this injury would be prevented by a declaratory judgment and injunction against such distribution.”<sup>459</sup> The court likewise concluded that the CWB had prudential standing because it sought protection under the auspices of section 408 of the NIA, which embodies a form of preferential tariff treatment in the form of limitations on the United States’ ability to amend the antidumping statute with respect to NAFTA countries.<sup>460</sup> The court agreed that the CWB has an interest in that preferential tariff treatment for which it sought protection, which therefore conferred prudential standing.<sup>461</sup>

Second, with respect to mootness, the Federal Circuit explained that no “case or controversy” exists for purposes of Article III of the U.S. Constitution if a plaintiff’s claims cease to exist at some point during the litigation.<sup>462</sup> The court then considered certain events that had occurred in the context of the softwood lumber and magnesium

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457. *Id.* (citing *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

458. *Id.* at 1338. The CIT originally dismissed the Government of Canada’s claim after concluding that Canada lacked standing because it had sought relief through the WTO dispute settlement system. *Id.* at 1331. The Federal Circuit disagreed with the CIT’s rationale because the Government of Canada did not seek to litigate the same claim in the WTO and before the U.S. courts, but it nevertheless agreed that Canada lacked standing on alternate grounds. *Id.* at 1336.

459. *Id.* at 1334 (explaining that the CIT correctly invoked the doctrine of “competitor standing” and found that the CWB had demonstrated injury-in-fact through increased competition or assistance to its competitors resulting from the distribution of antidumping and countervailing duties under the CDSOA).

460. *Id.* at 1335.

461. *Id.*

462. *Id.* at 1338 (citing *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980)) (explaining that a litigant’s claim must continue throughout the duration of the litigation).

cases since the CIT had issued its ruling.<sup>463</sup> It concluded that the plaintiffs from the Canadian softwood lumber industry no longer had a live injury-in-fact for which the courts could provide relief because the United States and Canada had entered into a bilateral agreement that revoked the orders against softwood lumber from Canada and retroactively terminated the distribution of antidumping and countervailing duties to the domestic industry.<sup>464</sup> Likewise, the court concluded that plaintiff Norsk Hydro Canada, the sole Canadian magnesium producer, no longer had a stake in the appeal because Commerce had revoked the countervailing duty order against pure and alloy magnesium and Norsk Hydro was closing its magnesium plant.<sup>465</sup> Accordingly, the Federal Circuit concluded that the softwood lumber and magnesium plaintiffs' appeals had been rendered moot, and it vacated the CIT's judgment with respect to their claims and remanded the case with instructions that the CIT dismiss their complaints.<sup>466</sup>

Finally, the Federal Circuit also considered whether the CWB had alleged a valid cause of action under section 102(c) of the NIA, which provides that "[n]o person other than the United States—(1) shall have any cause of action or defense under—(A) the Agreement or by virtue of Congressional approval thereof."<sup>467</sup> The court rejected the claim of defendants-appellants, a coalition of domestic producers, that the CWB could not raise a cause of action under section 102(c) of the NIA.<sup>468</sup> The court held that section 102(c) precludes causes of action under NAFTA itself or under section 101 of the NIA, which pertains to Congress's approval of the NAFTA treaty, but that section

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463. See generally *Borlem S.A.-Empreendimentos Industriais v. United States*, 913 F.2d 933, 939 (Fed. Cir. 1990) ("[A] reviewing court is not precluded . . . from considering events which have occurred between the date of an agency (or trial court) decision and the date of decision on appeal.").

464. *Canadian Lumber Trade Alliance*, 517 F.3d at 1339 (citing *Certain Softwood Lumber Products from Canada*, 71 Fed. Reg. 61,714 (Oct. 19, 2006) (revocation of countervailing duty order)) (noting that CBP liquidated all entries of softwood lumber from Canada and refunded all antidumping and countervailing duty deposits).

465. *Id.* at 1330, 1339 (citing *Pure Magnesium and Alloy Magnesium from Canada*, 71 Fed. Reg. 38,382 (July 6, 2006) (revocation of countervailing duty order)) (concluding that Norsk Hydro's plant closure meant that the company no longer competed with affected domestic producers of magnesium and no longer suffered competitive injury from CDSOA distributions).

466. *Id.* at 1344. Because the court concluded that the CWB's claim remained valid and that it had standing to bring its appeal, the Federal Circuit could proceed with considering the merits of its claim because at least one plaintiff had standing. *Id.* at 1339 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977)).

467. 19 U.S.C. § 3312(c).

468. *Canadian Lumber Trade Alliance*, 517 F.3d at 1339–40.

102(c) does not preclude causes of action from private parties under section 408.<sup>469</sup>

### III. UNITED STATES TRADE REPRESENTATIVE ACTIONS

The Federal Circuit most commonly hears appeals of international trade disputes involving the actions of CBP, Commerce, or the ITC. However, in 2008, it issued two separate decisions involving the USTR, which is responsible for developing and maintaining the administration's trade policy, including the resolution of trade disputes with the United States' trading partners.<sup>470</sup> *Gilda Industries, Inc. v. United States*<sup>471</sup> (hereinafter referred to as *Gilda Fed. Cir. I* and *Gilda Fed. Cir. II*), addressed the authority of the USTR to maintain products on a "retaliation list" pursuant to the Trade and Development Act of 2000. Under the "carousel provision" to this law, the USTR must adjust retaliation lists periodically unless one of two exceptions applies—either: (1) the USTR "determines that implementation of a recommendation made pursuant to a dispute settlement proceeding . . . is imminent," or (2) the USTR "together with the petitioner involved in the initial investigation . . . agree that it is unnecessary to revise the retaliation list."<sup>472</sup> The Federal Circuit's decisions in *Gilda* focused principally on issues of appellate procedure rather on the substantive aspects of the USTR's authority to compile and maintain retaliation lists.

The appellant, Gilda Industries, Inc. ("Gilda"), challenged the USTR's compilation and maintenance of a retaliation list authorized by the WTO as part of an ongoing dispute between the United States and European Community ("EC") over the EC's import ban on meat from hormone-treated animals.<sup>473</sup> The retaliation list included toasted breads, which Gilda imported.<sup>474</sup> Gilda commenced an action at the CIT seeking the court to compel the USTR to remove toasted breads from the retaliation list and recover duties paid on imports of toasted bread based on its claim that the USTR failed to satisfy its legal obligation under the carousel provision to review and adjust

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469. *Id.* at 1340–41.

470. See generally Office of the U.S. Trade Representative, Mission of the USTR, [http://www.ustr.gov/Who\\_We\\_Are/Mission\\_of\\_the\\_USTR.html](http://www.ustr.gov/Who_We_Are/Mission_of_the_USTR.html) (last visited Jan. 24, 2009) (outlining the responsibilities of the USTR in developing and coordinating "international trade, commodity, and direct investment policy, and overseeing negotiations with other countries").

471. *Gilda Fed. Cir. I*, 511 F.3d 1348 (Fed. Cir. 2008); *Gilda Fed. Cir. II*, No. 2008-1344, 2008 U.S. App. LEXIS 24182 (Fed. Cir. Nov. 28, 2008).

472. 19 U.S.C. § 2416(b)(2)(B).

473. *Gilda Fed. Cir. I*, 511 F.3d at 1349.

474. *Id.*

periodically the retaliation list.<sup>475</sup> The Government moved for dismissal based on its claim that the first exception under the carousel provision applied, but the CIT dismissed the appeal for failure to state a claim upon which relief could be granted after concluding that the second carousel exception relieved the USTR of its obligation to make a periodic adjustment.<sup>476</sup> However, the Federal Circuit vacated and remanded that decision for further proceedings to determine whether the USTR had lawfully made the required determination under the first exception.<sup>477</sup> On remand, the CIT again dismissed Gilda's complaint after holding that the USTR had lawfully concluded that no revisions to its retaliation list were necessary.<sup>478</sup>

Gilda decided to appeal the CIT's decision again, leading to events that the Federal Circuit addressed in *Gilda Fed. Cir. I*. On the final day of the sixty day period in which Gilda had to appeal the CIT's dismissal, Gilda's counsel attempted to docket an appeal electronically via the CIT's website, but logged off the website before obtaining final confirmation of receipt.<sup>479</sup> The next day, counsel discovered that Gilda's notice of appeal had not been recorded on the prior day, and counsel immediately completed the electronic form and provided the requisite payment, meaning that the CIT technically received the notice of appeal on day sixty-one.<sup>480</sup> A week later, after the CIT docketed the appeal, Gilda's counsel filed a motion for a one-day extension of the filing deadline for its notice of appeal, claiming excusable neglect.<sup>481</sup> The CIT denied the motion and subsequently dismissed the appeal after concluding that it lacked jurisdiction over the case by virtue of the untimely filed notice of appeal, and the Federal Circuit also dismissed the appeal because it was untimely filed.<sup>482</sup>

Gilda then commenced another appeal at the Federal Circuit regarding the CIT's denial of Gilda's motion to extend the filing

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475. *Id.*; *Gilda Fed. Cir. II*, 2008 U.S. App. LEXIS 24182, at \*2.

476. *Gilda Fed. Cir. II*, 2008 U.S. App. LEXIS 24182, at \*2-3 (explaining that the domestic beef industry agreed with the USTR that no revisions to retaliation list were necessary).

477. *Id.* at \*3 (citing *Gilda Indus., Inc. v. United States*, 446 F.3d 1271 (Fed. Cir. 2006)); see also *Gilda Fed. Cir. I*, 511 F.3d at 1349.

478. *Gilda Fed. Cir. I*, 511 F.3d at 1349 (citing *Gilda Indus., Inc. v. United States*, No. 03-00203, slip op. 06-149, 2006 Ct. Int'l Trade LEXIS 151 (Oct. 10, 2006)).

479. *Id.* at 1350.

480. *Id.*

481. *Id.*

482. *Id.* at 1350 (citing *Gilda Indus., Inc. v. United States*, 216 Fed. App'x 973 (Fed. Cir. 2007)).

deadline by one day.<sup>483</sup> This time, the Federal Circuit reversed and remanded the case to the CIT. Although Gilda's notice of appeal had been untimely filed, the court held that jurisdiction did not transfer from the CIT to the Federal Circuit as a result.<sup>484</sup> Rather, the CIT retained jurisdiction over the motion to extend the filing deadline because the untimely filing of the appeal "neither conferred jurisdiction on this court nor divested the trial court of jurisdiction to entertain Gilda's subsequent motion to extend the filing deadline."<sup>485</sup> The court, therefore, ruled that the CIT should have disregarded the clearly defective notice of appeal and considered the motion to extend the filing deadline.<sup>486</sup> Accordingly, the Federal Circuit instructed the CIT on remand to consider the merits of Gilda's motion for extension of time to file the notice of appeal.<sup>487</sup>

On remand, the CIT agreed that Gilda had demonstrated excusable neglect for its untimely filed appeal notice, and its original appeal concerning the USTR's exercise of its statutory responsibilities proceeded, which led to the issues addressed in *Gilda Fed. Cir. II*.<sup>488</sup> In this second appeal, Gilda challenged the CIT's decision to dismiss Gilda's complaint for failure to state a claim upon which relief could be granted.<sup>489</sup> Gilda claimed that the CIT exceeded its authority by considering whether the USTR satisfied its obligations under the second carousel exception because the Federal Circuit had limited its remand instructions to whether the first carousel exception had been satisfied.<sup>490</sup> However, the court held that the CIT was free to address whether the second exception had been satisfied because the issue of the second exception was not before the Federal Circuit at the time of its first opinion and, thus, had not been resolved.<sup>491</sup> Because the court's remand instructions did not preclude the CIT from considering the second exception, the Federal Circuit upheld the CIT's decision to consider whether it applied.<sup>492</sup>

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483. *Id.*

484. *Id.* ("Ordinarily, the act of filing a notice of appeal confers jurisdiction on an appellate court and divests the trial court of jurisdiction over matters related to the appeal.")

485. *Id.* at 1351.

486. *Id.* at 1351-52 (citing 20 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 303.32[2][b][iv][A] (3d ed. 1997)).

487. *Id.* at 1352.

488. *Gilda Fed. Cir. II*, No. 2008-1344, 2008 U.S. App. LEXIS 24182, at \*3-4 (Fed. Cir. Nov. 24, 2008).

489. *Id.* at \*4.

490. *Id.* at \*4.

491. *Id.* at \*5-6.

492. *Id.* at \*6-7.

## IV. TRADE AND THE ENVIRONMENT

The Federal Circuit considered an appeal arising out of an environmental case before the CIT in *Salmon Spawning & Recovery Alliance v. U.S. Customs & Border Protection*,<sup>493</sup> although, as in many other decisions in 2008, the holding focused solely on procedural issues. The plaintiff-appellants, a coalition of non-profit environmental organizations dedicated to protecting wild fish, sued multiple federal agencies and officials—including CBP and its commissioner—for alleged violations of the Endangered Species Act (“ESA”) of 1973.<sup>494</sup> Under section 9 of the ESA, it is illegal to import any species deemed “endangered” or “threatened.”<sup>495</sup> In order to ensure that the import bans are properly enforced, section 7(a)(2) of the ESA requires federal agencies to consult with Commerce’s National Marine Fisheries Service (“NMFS”) to “insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an ‘agency action’) is not likely to jeopardize the continued existence of any endangered species or threatened species.”<sup>496</sup>

The plaintiff-appellants asserted that the defendant federal agencies and officials had violated section 9 of the ESA by allowing

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493. 532 F.3d 1338 (Fed. Cir. 2008), *reh’g granted, withdrawn*, 550 F.3d 1121 (Fed. Cir. 2008). The Federal Circuit originally issued its opinion on July 15, 2008. However, the defendants subsequently petitioned for a rehearing concerning one aspect of the original determination, namely, whether the CIT could exercise supplemental jurisdiction over certain claims under 28 U.S.C. § 1367(a). After considering the defendants’ arguments, the court withdrew its original opinion and issued a revised opinion that rescinded its original analysis regarding the availability of supplemental jurisdiction. Accordingly, all references herein are to the Federal Circuit’s revised opinion issued on December 18, 2008. See *Salmon Spawning & Recovery Alliance v. U.S. Customs & Border Prot.*, 550 F.3d 1121 (Fed. Cir. 2008).

494. See *Salmon Spawning & Recover Alliance*, 550 F.3d at 125 (explaining that the ESA authorizes enforcement responsibility to the U.S. Fish and Wildlife Service (Department of Interior), National Marine Fisheries Service, CBP, and the Coast Guard).

495. 16 U.S.C. § 1540(g)(1). The statute states that:

[A]ny person may commence a civil suit on his own behalf—(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or (B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or (C) against the Secretary where there is alleged a failure Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

*Id.*

496. *Id.* § 1536(a)(2).

imports from Canada of certain types of salmon and steelhead that the ESA identified as threatened and endangered fish rather than enforcing an existing ban on such products.<sup>497</sup> They further alleged that the defendants had violated section 7(a)(2) of the ESA, as well as the APA, by failing to consult with the NMFS regarding the proper enforcement of the import ban.<sup>498</sup> The plaintiff-appellants originally commenced the action in the Western District Court of Washington, but that court transferred the case to the CIT after concluding that it lacked jurisdiction.<sup>499</sup> The CIT, in turn, found that it lacked subject matter jurisdiction over the section 9 claim “because the exercise of the agency’s enforcement powers ‘lie solely within the agency’s discretion.’”<sup>500</sup> The lower court further held that the plaintiff-appellants did not have standing to bring a claim under section 7.<sup>501</sup>

On appeal, the plaintiff-appellants sought reversal of the CIT’s dismissal for lack of jurisdiction (section 9) and lack of standing (section 7). The Federal Circuit affirmed the CIT’s dismissal of the section 9 claim regarding the enforceability of the import ban against the ESA-listed salmon and steelhead.<sup>502</sup> The court reviewed section 9 and concluded that the federal agencies’ enforcement provisions thereunder were discretionary in nature.<sup>503</sup> It then reasoned that, under the APA, “an agency’s decision not to undertake enforcement actions is ‘presumptively unreviewable.’”<sup>504</sup> Because the plaintiff-appellants failed to overcome the presumption of unreviewability, the Federal Circuit agreed that the CIT lacked subject matter jurisdiction over the section 9 claim.<sup>505</sup>

However, the Federal Circuit concluded that the CIT erred in dismissing the section 7 claim for lack of standing. The court explained that, in order to establish standing under Article III of the Constitution, a plaintiff must demonstrate that it has suffered an injury-in-fact from the defendants’ challenged conduct and that a favorable court decision could likely redress the alleged injury.<sup>506</sup> The CIT had dismissed the plaintiff-appellants’ section 7 claim after

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497. *Salmon Spawning & Recovery Alliance*, 550 F.3d at 1125–26 (citing 50 C.F.R. § 223.1102(c)).

498. *Id.* at 1126–27.

499. *Id.* at 1127.

500. *Id.* (citing *Salmon Spawning & Recovery Alliance v. Basham*, 477 F. Supp. 2d 1301, 1308 (Ct. Int’l Trade 2007)).

501. *Id.*

502. *Id.* at 1130.

503. *Id.* at 1129 (citing 16 U.S.C. § 1540(e)(3)).

504. *Id.* at 1128 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).

505. *Id.* at 1129.

506. *Id.* at 1130 (citing *Figueroa v. United States*, 466 F.3d 1023, 1029 (Fed. Cir. 2006) (internal citations omitted)).

concluding that a favorable court decision would not entitle them to relief for their alleged injury.<sup>507</sup> The Federal Circuit, in contrast, concluded that the CIT misinterpreted the “redressability” criterion. It reasoned that, “[u]nder a proper analysis, the plaintiffs have sufficiently alleged the elements of standing to preclude dismissing the case for lack of standing based on the pleadings.”<sup>508</sup> The court ruled that the plaintiff-appellants had alleged a sufficient injury-in-fact in the form of the “aesthetic, recreational, and environmental interests of their members” to observe the salmon and steelhead in their habitats.<sup>509</sup> Next, the court agreed that the defendants’ failure to enforce the import ban “adversely affected and irreparably injured” the plaintiff-appellants because their actions or inactions had “jeopardized the continued existence of the listed salmon.”<sup>510</sup> Because a favorable court decision enforcing section 7 would compel federal agencies to undertake additional consultations in furtherance of the import ban, which is the protected interest, the Federal Circuit agreed with plaintiff-appellants that the redressability criterion had been satisfied.<sup>511</sup> Accordingly, the court reversed the CIT’s dismissal of the section 7 claim for lack of standing and remanded the case with instructions that the CIT determine if it had exclusive jurisdiction to hear the section 7(a)(2) claim.<sup>512</sup> The Federal Circuit further held that, if the CIT determined on remand that it did not have jurisdiction over the section 7 claim, then it should transfer the case back to the federal district court.<sup>513</sup>

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507. *Id.*

508. *Id.* at 1131.

509. *Id.*

510. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63 (1992), and *Animal Legal Def. Fund v. Quigg*, 932 F.2d 920, 936 (Fed. Cir. 1991)).

511. *Id.* at 1130–31.

512. *Id.* at 1131. The Federal Circuit declined to rule on whether the CIT had exclusive jurisdiction over the section 7(a)(2) claim because the CIT had not yet considered the issue. *Id.* at 1133. Therefore, it remanded the issue to the CIT to determine whether the section 7 claim fell under its exclusive jurisdiction. *Id.* However, the court did opine that the CIT might find that it has exclusive jurisdiction over the section 7 claim under 28 U.S.C. § 1581(i)(3), which confers exclusive jurisdiction arising from any U.S. laws “providing for . . . embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety,” or under 28 U.S.C. § 1581(i)(4), which confers exclusive jurisdiction over civil actions arising from the “administration and enforcement with respect to the matters” referred to in 28 U.S.C. § 1581(i)(3). *Id.*; see also discussion *supra* Part I.C (concerning the CIT’s jurisdiction over civil actions involving alleged embargoes in *Sakar Int’l Inc. v. United States*, 516 F.3d 1340 (Fed. Cir. 2008), *reh’g en banc denied*, No. 07-1173 2008 U.S. App. LEXIS 10553 (Fed. Cir. Apr. 11, 2008), *cert. denied*, 129 S. Ct. 488 (2008), *appeal dismissed*, 2008 Ct. Intl. Trade LEXIS 126 (Ct. Int’l Trade Dec. 3, 2008)).

513. *Salmon Spawning & Recovery Alliance v. U.S. Customs & Border Prot.*, 550 F.3d 1121, 1135 (Fed. Cir. 2008).

## CONCLUSION

The Federal Circuit has repeatedly stated that it will not defer to the legal conclusions of the CIT.<sup>514</sup> Indeed, in the twenty-seven appeals from the CIT decided in 2008, the Federal Circuit fully affirmed the CIT on all issues in only fourteen of them, thus partially or fully reversing the CIT in nearly half the cases on appeal. Most cases where the Federal Circuit fully affirmed the CIT involved complex factual questions involving tariff classifications or Commerce's antidumping duty methodologies in which the courts defer more to the agency's expertise than to the lower court's judgment. Conversely, the Federal Circuit took a hard line with the CIT on procedural issues involving jurisdiction and standing, as evidenced by the significant number of reversed or vacated decisions that the appeals court issued. Thus, the decisions issued in 2008 were particularly instructive regarding general jurisprudence before the Federal Circuit with respect to the litigation of complex international trade disputes.

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514. See, e.g., *Agfa Corp. v. United States*, 520 F.3d 1326, 1328 (Fed. Cir. 2008).