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## 2010 International Trade law Decisions of the Federal Circuit

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## 2010 International Trade law Decisions of the Federal Circuit

# 2010 INTERNATIONAL TRADE LAW DECISIONS OF THE FEDERAL CIRCUIT

KEVIN J. FANDL\*

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## INTRODUCTION

The United States Court of Appeals for the Federal Circuit had a very active docket in 2010 and handed down nineteen precedential decisions related to international trade. These decisions included important issues, such as: the implementation of a World Trade Organization (WTO) decision affecting the controversial United States practice of zeroing in antidumping cases;<sup>1</sup> a reversal of the United States Department of Commerce (DOC or Commerce) method of calculating normal value for products sold by nonmarket economies;<sup>2</sup> the inclusion of disaster payments in net farm income;<sup>3</sup> and a finding that a party may not reverse its position on appeal

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1. *See ThyssenKrupp Acciai Speciali Terni S.p.A. v. United States*, 603 F.3d 928, 934–35 (Fed. Cir. 2010) (affirming the United States Department of Commerce’s interpretation of an antidumping statute where Congress was found to have not clearly spoken on the issue).

2. *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1372–73 (Fed. Cir. 2010).

3. *Hacker v. United States*, 613 F.3d 1380, 1383 (Fed. Cir. 2010).

without reasonable justification.<sup>4</sup> Of the Federal Circuit's nineteen precedential cases about international trade, six reversed the United States Court of International Trade (CIT).<sup>5</sup>

By way of background, it is important to understand the context of the Federal Circuit. The court was established in 1982 by merging the United States Court of Customs and Patent Appeals and the appellate division of the United States Court of Claims.<sup>6</sup> The Federal Circuit has jurisdiction over a number of matters, including intellectual property, international trade, and government contracts, among other issues.<sup>7</sup> As an Article III court, judges are appointed by the President, confirmed by the Senate, and serve for life.<sup>8</sup> There are twelve active judges on the court, including one chief judge.<sup>9</sup> The current Chief Judge, Randall R. Rader, assumed his position on June 1, 2010.<sup>10</sup> Appeals are heard by a panel of at least three judges.<sup>11</sup>

In the 2010 term, the vast majority of international trade cases brought before the CAFC involved antidumping duties. Dumping is the act of selling goods in an export market at less than what the same goods are sold for in the exporter's home market and is regulated under the Tariff Act of 1930 (Tariff Act).<sup>12</sup> In the United States, the home market must be a market economy, meaning that nonmarket economy sales are not generally calculated and surrogate countries are used for comparison instead.<sup>13</sup> Countries are generally permitted to take actions to prevent harm to their domestic manufacturers when harmed or threatened by allegedly-dumped imports. Once a party files a petition with the DOC and the United

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4. See *Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1356 (Fed. Cir. 2010) (applying the doctrine of judicial estoppel to bar a party from maintaining an inconsistent position on appeal because it would, in part, prejudice the opposing party).

5. See *infra* Parts I–III (discussing the Federal Circuit's nineteen international trade cases in 2010 and the disposition of each case).

6. Ellen E. Sward & Rodney F. Page, *The Federal Courts Improvement Act: A Practitioner's Perspective*, 33 AM. U. L. REV. 385, 386 (1984).

7. *Id.* at 390.

8. *Id.* at 392.

9. *Id.*

10. *Randall R. Rader, Chief Judge*, U.S. CT. OF APPEALS FOR FED. CIR., <http://www.cafc.uscourts.gov/judges/randall-r-rader-chief-judge.html> (last visited Apr. 11, 2011).

11. See FED. CIR. R. 47.2 (“Cases and controversies will be heard and determined by a panel consisting of an odd number of at least three judges, two of whom may be senior judges of the court.”).

12. See *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1576 (Fed. Cir. 1993) (explaining dumping). See generally Tariff Act of 1930, 19 U.S.C. §§ 1304–1683g (2006).

13. See Calculation of Normal Value of Merchandise from Nonmarket Economy Countries, 19 C.F.R. § 351.408 (2009) (describing the special methodology for nonmarket economies). This rule was invalidated by *Dorbest Ltd. v. United States*, 604 F.3d 1363 (Fed. Cir. 2010).

States International Trade Commission (ITC), an investigation is opened and a final determination is made as to whether there is dumping.<sup>14</sup> An affirmative finding leads to the establishment of an antidumping duty, meant to raise the price of the imported goods to their fair market value.<sup>15</sup> United States Customs and Border Protection (CBP) is required by law to collect the resulting dumping duties from the importer.<sup>16</sup>

Once an antidumping order is issued, it remains in effect for five years pursuant to the WTO Antidumping Agreement.<sup>17</sup> Interested parties may challenge an antidumping order by claiming changed circumstances—market or production conditions affecting the calculation of the margin have changed—or by requesting administrative review.<sup>18</sup> The order might also be changed or terminated based upon the mandatory recalculation during the sunset review, which is initiated every five years following the issuance of the order,<sup>19</sup> or based upon agreement between the parties, known as suspension.<sup>20</sup> Challenges are generally brought first to the DOC, followed by appeals to the CIT, and then the Federal Circuit.

Four of the nineteen precedential international trade cases during the Federal Circuit's 2010 term addressed matters related to the Harmonized Tariff Schedule of the United States (HTSUS).<sup>21</sup> The HTSUS is a comprehensive listing of all products and variations of products traded in international commerce and includes descriptions of those products along with negotiated duty rates for entry into the U.S. market.<sup>22</sup> The cases brought to the Federal Circuit in this area of

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14. 19 U.S.C. § 1673a(b)–(c) (2006).

15. *Id.* § 1673.

16. *Id.* § 1673e.

17. See *Understanding the WTO: The Agreements: Anti-dumping, subsidies, safeguards: contingencies, etc*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm8\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm) (last visited Apr. 11, 2011) (“Anti-dumping measures must expire five years after the date of imposition, unless an investigation shows that ending the measure would lead to injury.”).

18. See § 1675(b)(3)(A) (“[T]he party seeking revocation of an [antidumping] order or finding . . . shall have the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant such revocation . . .”).

19. See *id.* § 1675(c)(1) (requiring the International Trade Administration (ITA) and the ITC to examine any countervailing duty order five years after its issuance).

20. See generally *id.* §§ 1671c(b)–(c), 1673c(b)–(c) (allowing for the termination or suspension of countervailing duties if certain parties, including foreign governments, reach an agreement that completely eliminates the harmful effects of exports on the United States).

21. See *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335 (Fed. Cir. 2010); *Honda of Am. Mfg., Inc. v. United States*, 607 F.3d 771 (Fed. Cir. 2010); *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346 (Fed. Cir. 2010); *Outer Circle Prods. v. United States*, 590 F.3d 1323 (Fed. Cir. 2010).

22. See generally *CUSTOMS LAW & ADMINISTRATION* § 31.2 (Lawrence J. Bogard ed., 3d ed. 2009) (providing an overview of the HTSUS).

law involve challenges to the classification decisions of CBP, which is the agency that is ultimately responsible for determining into which category an imported good falls.<sup>23</sup>

Other issues that were raised in the 2010 term included payments by the United States Department of Agriculture for crop destruction following a natural disaster;<sup>24</sup> the application of the Harbor Maintenance Tax to exports;<sup>25</sup> and a procedural case involving the question of whether judicial estoppel prevents a party from reversing its position on appeal in a trade matter.<sup>26</sup> All of these issues are discussed in the following three sections: antidumping cases; harmonized tariff schedule cases; and other trade law issues.

### I. ANTIDUMPING CASES

In *Diamond Sawblades Manufacturers Coalition v. United States*,<sup>27</sup> the Federal Circuit considered the appropriate standard of review that should be applied to an appeal of a CIT decision to remand an ITC finding for reconsideration.<sup>28</sup> In this antidumping case, Diamond Sawblades Manufacturers Coalition (DSMC) petitioned the ITC for the imposition of antidumping duties against imports of finished diamond sawblades and diamond sawblade parts from China and Korea.<sup>29</sup> The ITC initiated an investigation of the subject imports covering the period 2003 through 2005 and unanimously found that although there had been a significant increase in subject imports that undersold domestic like products and the domestic producers had subsequently lost market share, the increase in imports did not significantly affect domestic prices for the subject goods.<sup>30</sup> The ITC based its conclusion on the fact that foreign producers were largely focused on different end-users (for example, retailers and consumers, rather than construction companies and custom users) and that foreign producers generally sold smaller, general-use blades, whereas domestic producers sold large, custom-design blades.<sup>31</sup> Accordingly,

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23. See, e.g., *Honda of Am. Mfg., Inc.*, 607 F.3d at 772–73 (challenging a CBP classification of parts imported by Honda for use in its motorcycles and cars).

24. *Hacker v. United States*, 613 F.3d 1380, 1383 (Fed. Cir. 2010).

25. *Chrysler Corp. v. United States*, 592 F.3d 1330, 1331 (Fed. Cir. 2010).

26. *Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1356 (Fed. Cir. 2010).

27. 612 F.3d 1348 (Fed. Cir. 2010).

28. *Id.* at 1356.

29. *Id.* at 1350–51.

30. *Id.* at 1351.

31. See *id.* (noting the ITC's finding that the "large and growing volume of subject imports was largely concentrated in size ranges and customer types other than those served principally by the domestic industry" (quoting *Diamond Sawblades and Parts Thereof from China and Kor.*, Inv. Nos. 731-TA-1092, 731-TA-

the ITC concluded that the domestic industry was not materially injured by the subject imports.<sup>32</sup>

The majority of the ITC found that the increasing subject imports did not threaten the domestic industry with material injury.<sup>33</sup> However, two of the six commissioners issued a dissenting opinion alleging that “import trends, together with declining prices and the weakening condition of the domestic industry, will result in material injury by reason of subject imports unless antidumping orders are issued.”<sup>34</sup> They based their conclusions on the overlap between many of the competing imports with domestic products and the likelihood that the domestic industry would not be able to sustain its efforts to remain competitive by lowering prices.<sup>35</sup>

DSMC disputed ITC’s initial decision at the CIT, asserting that ITC’s findings were not supported by “substantial evidence.”<sup>36</sup> The CIT concluded that the ITC’s findings with respect to sales volume, price effects, domestic impact, threat analysis, and competition required further examination.<sup>37</sup> The CIT remanded the case to the ITC for reconsideration.<sup>38</sup> By the time the case was re-examined by the ITC, two new commissioners had been appointed.<sup>39</sup> The ITC again concluded that the domestic industry suffered no material injury from competing imports from Korea and China.<sup>40</sup> However, the new commissioners aligned with the former dissenters to yield a tie vote on the issue of whether there was a threat of material injury.<sup>41</sup> A tie vote is considered an affirmative finding by the ITC.<sup>42</sup> The two foreign exporters appealed, and the CIT affirmed the ITC’s decision.<sup>43</sup>

The exporters challenged both CIT determinations before the Federal Circuit.<sup>44</sup> The most significant issue in this case was what

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1093, USITC Pub. 3862, at 32 (July 5, 2006) (Final [hereinafter Sawblades Final Report])).

32. *Id.* at 1352.

33. *Id.*

34. *Id.* (quoting Sawblades Final Report, *supra* note 31, at 43 (Aranoff & Hillman, Comm’rs, dissenting)) (internal quotation marks omitted).

35. *Id.*

36. *Id.*

37. *Id.* at 1352–53.

38. *Id.* at 1353.

39. *Id.* On February 1, 2007, the Senate confirmed the nominations of Irving Williamson and Dean Pinkert to the ITC. 153 CONG. REC. S1543 (daily ed. Feb. 1, 2007).

40. *Diamond Sawblades*, 612 F.3d at 1353.

41. *Id.* at 1354.

42. *Id.* (explaining that “a tie vote is deemed to be an affirmative determination pursuant to 19 U.S.C. § 1677(11)”).

43. *Id.* at 1355.

44. *Id.*

standard of review the Federal Circuit should apply to the CIT's order to the ITC that the Commission "provide a more thorough explanation for [its] finding."<sup>45</sup> When the Federal Circuit reviews factual determinations made by the CIT, it does so by re-examining the case to determine whether the ITC's determinations were supported by substantial evidence and in accordance with the law.<sup>46</sup> However, when the Federal Circuit reviews decisions by the CIT ordering a remand to the ITC for further information, the court applies an abuse of discretion standard.<sup>47</sup> In *Diamond Sawblades*, all parties agreed that the substantive review standard should be applied to the second CIT decision; however, the parties disputed the proper standard to be applied to the initial CIT decision.<sup>48</sup>

The Federal Circuit evaluated the CIT's decision to remand the case to the ITC and concluded that it was based on a lack of sufficient information from the ITC rather than a substantive finding.<sup>49</sup> Accordingly, the Federal Circuit determined that the proper standard of review to apply was the abuse of discretion standard.<sup>50</sup> The Federal Circuit concluded that "[i]t was not an abuse of discretion for the [CIT] to require additional explanation from what it saw as a failure to adequately explain its conclusion regarding price/volume tradeoff."<sup>51</sup> Following its conclusion that the initial CIT decision was not an abuse of discretion, the court went on to affirm the second CIT decision, finding that substantial evidence supported the views of the ITC.<sup>52</sup>

Judge Dyk dissented from the majority opinion of *Diamond Sawblades*, finding that the CIT's initial decision to remand the case to the ITC was made on substantive grounds.<sup>53</sup> Judge Dyk argued that the CIT repeatedly referred to issues of substantial evidence in its opinion and that the CIT remanded the case based in part on the ITC's failure to provide substantial evidentiary support for its findings.<sup>54</sup> Accordingly, although Judge Dyk agreed with the CIT's decision to remand the case, he disagreed with the decision to

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45. *Id.* at 1353, 1356.

46. *See* *Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365, 1369 (Fed. Cir. 2002) (noting that the Federal Circuit must conduct its review of the CIT's factual findings by "stepping into the shoes" of that court).

47. *Diamond Sawblades*, 612 F.3d at 1356; *Altex, Inc. v. United States*, 370 F.3d 1108, 1117 (Fed. Cir. 2004).

48. 612 F.3d at 1356.

49. *Id.* at 1358, 1362.

50. *Id.* at 1358.

51. *Id.* at 1360.

52. *Id.* at 1362.

53. *Id.* at 1363 (Dyk, J., dissenting).

54. *Id.*

require the Federal Circuit to apply the abuse of discretion standard of review.<sup>55</sup>

In *Thai I-Mei Frozen Foods Co. v. United States*,<sup>56</sup> the Federal Circuit reviewed the DOC's interpretation of the antidumping statute.<sup>57</sup> The DOC investigated allegations that certain frozen shrimp exporters from Thailand were selling their shrimp in the United States below fair market value and, as a result, were hurting the domestic shrimp industry.<sup>58</sup> Since no actual sales data was available from the Thai domestic market, the DOC calculated a constructed value to estimate a dumping margin.<sup>59</sup> Thai I-Mei contended that Commerce improperly calculated this margin.<sup>60</sup>

To calculate this constructed value, the DOC relied on 19 U.S.C. § 1677b(e)(2)(B)(iii).<sup>61</sup> This statute requires the DOC to determine actual cost by adding the cost of: “(1) . . . materials and processing used to produce the merchandise in the ordinary course of business, (2) the actual selling, general, and administrative expenses and actual profits realized in production of a foreign like product in the ordinary course of trade, and (3) container costs.”<sup>62</sup>

Where actual selling, profit, administrative and general expenses are not available, the statute gives the agency three alternative means for determining the actual cost of the product: 1) utilize “actual amounts incurred by the specific exporter or producer for merchandise in the same general category of the subject merchandise;” 2) use “the weighted average of actual amounts incurred by other exporters or producers subject to investigation for the foreign like product;” or 3) determine “the amounts incurred and realized ‘based on any other reasonable method.’”<sup>63</sup>

In this case, the DOC chose the third alternative means of determining a constructed value.<sup>64</sup> The “reasonable method” it chose involved calculating third country sales to Canada by the other two

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55. *Id.* at 1363–65.

56. 616 F.3d 1300 (Fed. Cir. 2010).

57. *Id.* at 1301.

58. *See id.* at 1302 (detailing the DOC determination that shrimp from Thailand were being dumped within the United States).

59. *See id.* (explaining that DOC constructed the value of Thai I-Mei's dumping margin by looking at profit information from other respondents' third country sales).

60. *Id.* Thai I-Mei proffered figures from other Thai companies operating in the industry to show a lower profit margin, but Commerce rejected this submission. *Id.*

61. *Id.*

62. *Id.* at 1301.

63. *Id.* at 1301–02 (citing 19 U.S.C. § 1677b(e)(2)(B)(i)–(iii) (2006) (outlining the procedure for determining the constructed value of imported articles)).

64. *Id.* at 1302.

mandatory dumping investigation respondents.<sup>65</sup> Neither party to this case objected to that decision. However, in making these calculations, the DOC excluded data for sales not made in the ordinary course of business, that is, below-cost sales and sales made among affiliated parties.<sup>66</sup> The resulting dumping margin was 9.67%.<sup>67</sup> Thai I-Mei submitted data from other Thai companies' sales to third country markets that showed a dumping margin between 0% and 0.87%.<sup>68</sup> Following the DOC's rejection of its data, Thai I-Mei challenged the DOC determination at the CIT.<sup>69</sup>

The CIT concluded that the DOC's methodology was supported by substantial evidence; however, the court found that the agency had failed to sufficiently justify why it excluded sales outside the ordinary course of trade.<sup>70</sup> The CIT remanded the decision to the DOC,<sup>71</sup> and the DOC responded, under protest, with a determination of a de minimis dumping margin after including the sales outside the ordinary course of trade.<sup>72</sup> The DOC appealed.<sup>73</sup>

On appeal, the Federal Circuit reversed the CIT's remand decision.<sup>74</sup> The court reviewed the CIT decision *de novo*, concluding that the DOC decision was "squarely within the territory of *Chevron*."<sup>75</sup> Considering that § 1677b(e)(2)(B)(iii) of the Tariff Act is a catch-all provision allowing the DOC to apply any reasonable method to determine constructed value, the role of the CIT is only to confirm that the methodology applied by DOC was reasonable.<sup>76</sup> The Federal

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *See* Thai I-Mei Frozen Foods Co. v. United States, 572 F. Supp. 2d 1353, 1372 (Ct. Int'l Trade 2008) (directing Commerce to calculate Thai I-Mei's constructed value under a method different than the one it previously used because the earlier method was not "reasonable" as statutorily required).

72. *Thai I-Mei Frozen Foods Co.*, 616 F.3d at 1304.

73. *Id.*

74. *Id.* at 1309.

75. *Id.* at 1305 (noting *Chevron's* applicability because the Tariff Act gives the DOC explicit authority to use a "reasonable method" to calculate profit amounts). *Chevron* requires courts reviewing an agency's rulemaking to undertake a two-step analysis. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). The court must first determine whether Congress has directly spoken on the question at hand. *Id.* If it has, that expression controls; however if it has not, then the court must determine whether the agency's decision "is based on a permissible construction of the statute." *Id.* at 842-43.

76. *Thai I-Mei Frozen Foods Co.*, 616 F.3d at 1307 (determining that the DOC's exclusion of sales data outside the "ordinary course of trade" in calculating constructed value was reasonable); *see* 19 U.S.C. § 1677b(e)(2)(B)(iii) (2006) ("[T]he constructed value of imported merchandise shall be an amount equal to the sum of . . . the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method . . .").

Circuit found that Commerce's decision to exclude sales outside the ordinary course of trade was reasonable.<sup>77</sup>

In *Ad Hoc Shrimp Trade Action Committee v. United States*,<sup>78</sup> the Federal Circuit criticized the CIT for failing to provide a substantive legal review of the appellant's motion for judgment upon the agency record.<sup>79</sup> In an effort to facilitate judicial efficiency, the court conducted its own substantive legal analysis and remanded the case to the CIT with instructions to enter judgment against the appellant.<sup>80</sup> The issue in the case was whether the DOC properly selected surrogate country data to make a determination about whether a Vietnamese shrimp exporter was engaged in dumping.<sup>81</sup>

This case dealt with an antidumping order on the export of certain frozen warmwater shrimp from Vietnam.<sup>82</sup> Because Vietnam is a nonmarket economy, the DOC selected Bangladesh as an appropriate surrogate market country.<sup>83</sup> The data that the agency chose came from a survey conducted by the Network of Aquaculture Centres in Asia-Pacific (NACA), which provided comprehensive pricing data from roughly 200 Bangladeshi shrimp stakeholders.<sup>84</sup> A committee of warmwater shrimp producers and processors—collectively, Ad Hoc Shrimp Trade Action Committee—claimed that reliance on NACA data, rather than data from Apex, one of Bangladesh's largest shrimp processors, was improper.<sup>85</sup>

The Federal Circuit cited numerous cases to reiterate the CIT's obligation to address the issues within its jurisdiction and expertise.<sup>86</sup>

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77. *Thai I-Mei Frozen Foods Co.*, 616 F.3d at 1307.

78. 618 F.3d 1316 (Fed. Cir. 2010).

79. *See id.* at 1320–21 (reprimanding the CIT for dismissing the action without reaching the merits and reminding the court that it, “just like any other federal court, must address the issues within its jurisdiction”). Further, the Federal Circuit stated that “the [CIT] has expertise in addressing antidumping issues and deals on a daily basis with the practical aspects of trade practice . . . [and] must therefore use its expertise to resolve the parties’ disputes regardless of any complications or time-consuming processes.” *Id.* at 1321 (internal citations omitted) (internal quotation marks omitted).

80. *Id.* at 1322–23.

81. *Id.* at 1320 (highlighting the appellant's challenge to the DOC's use of Bangladesh as a surrogate country to determine the value of appellant's imported shrimp from Vietnam).

82. *Id.*; *see* Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 70 Fed. Reg. 5152, 5153 (Dep't of Commerce Feb. 1, 2005) (describing the DOC's determination that certain imported frozen and canned warmwater shrimp were likely being sold domestically for less than fair market value).

83. *Ad Hoc Shrimp Trade Action Comm.*, 618 F.3d at 1320.

84. *Id.* at 1320, 1322.

85. *Id.* at 1320.

86. *See id.* at 1321 (“Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.” (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821))). The Federal Circuit underscored this obligation by

Because “[e]ach administrative review covers a different period of time and different product entries,” the Federal Circuit found no basis for the CIT’s decision to deny Ad Hoc Shrimp Trade Action Committee’s motion based solely upon the agency record.<sup>87</sup>

Rather than remanding to the CIT for further proceedings, the Federal Circuit chose to perform its own analysis of the issue raised in the Committee’s motion.<sup>88</sup> The court concluded that the DOC has wide discretion in the selection of surrogate data and that the DOC’s policy of relying on country-wide data, as opposed to individual exporter data, was reasonable.<sup>89</sup> The court then remanded the decision to the CIT only to enter judgment against Ad Hoc Shrimp Trade Action Committee.<sup>90</sup>

In *Target Corp. v. United States*,<sup>91</sup> the Federal Circuit addressed two key issues. First, whether the DOC could interpret the commercial availability test to include goods, which, while not resulting from technological advancements, did not appear on the market until after an antidumping order had been issued.<sup>92</sup> And second, whether the scope of an antidumping order should be interpreted literally or liberally.<sup>93</sup>

The first issue refers to the anticircumvention statute of the Tariff Act, which governs goods that are developed after the issuance of an antidumping order.<sup>94</sup> This statute allows the DOC to include goods in the antidumping order if they are “like products.”<sup>95</sup> The original

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stating “[f]ederal courts do not have the authority to decline to exercise jurisdiction conferred by the statute.” *Id.*

87. *Id.*

88. *Id.* at 1321–22.

89. *Id.* at 1322.

90. *Id.* at 1323.

91. 609 F.3d 1352 (Fed. Cir. 2010).

92. *Id.* at 1358.

93. *Id.* at 1362.

94. See 19 U.S.C. § 1677j(d) (2006) (relating whether merchandise developed after an investigation falls under the larger anticircumvention of antidumping and countervailing duty orders statute).

95. *Id.* § 1677j(d)(1). To determine whether a later-developed product satisfies this test, the statute sets forth five criteria for analysis:

(A) the later-developed merchandise has the same general physical characteristics as the merchandise with respect to which the order was originally issued . . . ,

(B) the expectations of the ultimate purchasers of the later-developed merchandise are the same as for the earlier product,

(C) the ultimate use of the earlier product and the later-developed merchandise are the same,

(D) the later-developed merchandise is sold through the same channels of trade as the earlier product, and

(E) the later-developed merchandise is advertised and displayed in a manner similar to the earlier product.

*Id.*

antidumping order in this case referred only to petroleum wax candles from China.<sup>96</sup> The mixed wax candles at issue in this case, though not included in the original antidumping order, but were later added by the DOC following a second sunset review.<sup>97</sup> According to the appellant, Nantucket Distributing Co., mixed-wax candles, which existed at the time of the original antidumping order, could not be included as later-developed products.<sup>98</sup> The DOC concluded that mixed-wax candles, although they may have existed in some form, were not commercially available until at least 1999, long after the original order was issued.<sup>99</sup> The DOC also stated that “a ‘product’s actual presence in the market at the time of the [antidumping] investigation is a necessary predicate of its inclusion or exclusion from the scope of an antidumping order.’”<sup>100</sup> Applying the commercial availability test, the DOC concluded that mixed-wax candles were later-developed products for purposes of the antidumping order.<sup>101</sup>

The Federal Circuit rejected Nantucket’s challenge to the DOC’s interpretation of the statute and upheld the DOC’s application of the commercial availability test.<sup>102</sup> Because the Federal Circuit found the anticircumvention statute is ambiguous, the court deferred to what it deemed to be a reasonable interpretation of the statute.<sup>103</sup> The commercial availability test applied by DOC in this case was found to be a reasonable application of the anticircumvention statute.<sup>104</sup>

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96. *Target Corp.*, 609 F.3d at 1356; *see also* Antidumping Duty Order: Petroleum Wax Candles from the People’s Republic of China, 51 Fed. Reg. 30,686, 30,686 (Dep’t of Commerce Aug. 28, 1986) (explaining that “[t]he products covered by this investigation are certain scented or unscented petroleum wax candles made from petroleum wax”).

97. *See Target Corp.*, 609 F.3d at 135657; *see also* Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People’s Republic of China, 71 Fed. Reg. 59,075, 59,077–78 (Dep’t of Commerce Oct. 6, 2006) (final determination) (clarifying that mixed-wax candles containing any amount of petroleum wax are included within the order).

98. *Target Corp.*, 609 F.3d at 1358.

99. *Id.* at 1357–58.

100. *Id.* at 1359 (quoting *Target Corp. v. United States*, 578 F. Supp. 2d 1369, 1375 (Ct. Int’l Trade 2008)).

101. *Id.* at 1356–57.

102. *Id.* at 1359–60, 1363.

103. *Id.* at 1359–60. The Federal Circuit referenced *DuPont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005), as announcing “that where Congressional intent is not clear, [the DOC’s] interpretation must be upheld so long as it is reasonable, even if it is not the only or even preferred reasonable interpretation.” *Target Corp.*, 609 F.3d at 1360 (citation omitted) (internal quotation marks omitted).

104. *See id.* at 1359 (adopting the CIT’s finding that the DOC’s interpretation of the anticircumvention statute was reasonable, in part, because it accomplished the objective of the statute to prevent comparable products from circumventing the antidumping order).

The second issue in this case concerned the DOC's determination that mixed-wax candles are "like products" with petroleum wax candles.<sup>105</sup> During the injury investigation, the ITC considered candles consisting of over 50% petroleum wax to be domestic like products.<sup>106</sup> During a series of scope determinations, the DOC acknowledged that the ITC's definition specifically excluded candles containing less than 50% petroleum wax.<sup>107</sup> However, during the ITC's second sunset review in 2005, at the urging of the National Candle Association, the ITC redefined its domestic like product "to include all blended candles" containing any amount of petroleum wax.<sup>108</sup> No party objected to this finding.<sup>109</sup>

In this case, Nantucket objected to the DOC's determination that mixed-wax candles were like products with petroleum wax candles because the order was not ambiguous and did not specify mixed-wax candles.<sup>110</sup> The Federal Circuit rejected this argument as inconsistent with its prior precedent, which allows changes to orders based upon the minor alterations provision of the Tariff Act.<sup>111</sup> The Federal Circuit upheld the findings of the DOC because they were supported by substantial evidence and in accordance with the law.<sup>112</sup>

Another antidumping case, *KYD, Inc. v. United States*<sup>113</sup> affirmed a CIT decision that negative inferences can be made against an uncooperative exporter in a dumping investigation.<sup>114</sup> The case centered around a 2004 antidumping duty on polyethylene retail carrier bags from Thailand.<sup>115</sup> The respondent in this case was levied an antidumping duty of 122.88%.<sup>116</sup>

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105. *Id.* at 1362.

106. *Id.* at 1356 (citation omitted) (internal quotation marks omitted).

107. *Id.*

108. *Id.* (quoting Petroleum Wax Candles from China, Inv. No. 731-TA-282, USITC Pub. 3790, at 9 (July 2005) (second review)).

109. *Id.*

110. *See id.* at 1362 ("Nantucket appears to contend that Commerce may not find merchandise within the scope of an antidumping order based upon circumvention unless the scope of an antidumping order is ambiguous.").

111. *Id.*; *see* 19 U.S.C. § 1677j(c) (2006) (codifying the minor alterations provision). The minor alterations provision states that:

The class or kind of merchandise subject to—(A) an investigation under this subtitle, (B) an antidumping duty order . . . (C) a finding issued under the Antidumping Act . . . or (D) a countervailing duty order . . . shall include articles altered in form or appearance in minor respects . . . whether or not included in the same tariff classification.

*Id.* § 1677j(c)(1).

112. *Target Corp.*, 609 F.3d at 1363.

113. 607 F.3d 760 (Fed. Cir. 2010).

114. *Id.* at 761.

115. *See* Antidumping Duty Order: Polyethylene Retail Carrier Bags from Thailand, 69 Fed. Reg. 48,204 (Dep't of Commerce Aug. 9, 2004).

116. *KYD, Inc.*, 607 F.3d at 761.

The petitioners, representatives of the U.S. polyethylene carrier bag industry, submitted data on the largest Thai producer of the subject bags and suggested that the appropriate dumping margin should be between 24.84% and 122.88%.<sup>117</sup> When conducting its dumping investigations, the DOC solicits input from any interested party to the case.<sup>118</sup> In the absence of reliable information, the DOC is permitted to rely upon the data submitted by the petitioner and facts otherwise available.<sup>119</sup>

A questionnaire was sent to the interested parties in Thailand soliciting sales data.<sup>120</sup> King Pac, representing four affiliated Thai producers, responded with “incomplete, internally inconsistent, misleading, and inaccurate” information.<sup>121</sup> Accordingly, the DOC relied upon the initial petition to make a negative inference that the 122.88% rate was reasonable and should be applied to King Pac.<sup>122</sup> This determination is known as an Adverse Facts Available (AFA) margin and is permitted by statute.<sup>123</sup>

In 2008, the CIT affirmed the DOC’s use of the AFA margin in response to King Pac’s failure to provide adequate information in response to the investigation.<sup>124</sup> During the investigation for the second administrative review in 2007, King Pac failed to respond to the DOC’s questionnaire.<sup>125</sup> Accordingly, the margin of 122.88% was maintained against King Pac exports.<sup>126</sup>

KYD entered an appearance in 2007 as the importer of record for King Pac exports.<sup>127</sup> It challenged the DOC’s inclusion of King Pac as a mandatory respondent to the dumping investigation and argued

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117. *Id.* at 762.

118. *See* 19 U.S.C. § 1673a (2006) (describing that an antidumping duty investigation can be initiated by the administering authority itself or upon petition by an interested party).

119. *See id.* § 1677e(a) (outlining that an administering authority may rely on secondary information).

120. *KYD, Inc.*, 607 F.3d at 762.

121. *Id.*

122. *Id.* at 763. The Federal Circuit explained that:

Because [the DOC] determined that King Pac had significantly impeded the administrative review by not providing accurate and necessary information . . . [the DOC] found it appropriate to calculate a dumping margin for King Pac based on facts otherwise available and to use an adverse inference in selecting from among the facts otherwise available.

*Id.*

123. *See* § 1677e(b) (describing the availability of adverse inferences when an interested party fails to cooperate with the administering authority’s investigation).

124. *Universal Polybag Co. v. United States*, 577 F. Supp. 2d 1284, 1301 (Ct. Int’l Trade 2008).

125. *KYD, Inc.*, 607 F.3d at 763.

126. *Id.*

127. *Id.* at 764.

that the applied margin was punitive.<sup>128</sup> The DOC upheld the rate, reasoning that no new information had surfaced to discredit the viability of the initial rate.<sup>129</sup> On appeal, the CIT affirmed.<sup>130</sup> On appeal to the Federal Circuit, KYD argued that the DOC failed to take steps to corroborate the information submitted in the original petition, as required by statute when applying an AFA margin.<sup>131</sup>

The Federal Circuit concluded that the DOC's inquiry into the rate must be supported by independent information; however, that information need not necessarily be independent of the petition.<sup>132</sup> In other words, the fact that the petition filed with Commerce initially referenced the same source that Commerce ultimately relied on to make its independent determination did not negate the corroborating value of that source under 19 U.S.C. § 1677e(c).<sup>133</sup>

The decision of Commerce to append a rate of 122.88% to King Pac was found to be reasonable given the failure of the respondent "to provide [the DOC] with the most recent pricing data."<sup>134</sup> The Federal Circuit thus affirmed the decision of the CIT.<sup>135</sup>

In *Dorbest Ltd. v. United States*,<sup>136</sup> the Federal Circuit invalidated a regulation promulgated by Commerce to determine the normal value of dumped merchandise.<sup>137</sup> The case, which began in 2005 upon the issuance of an antidumping duty order, dealt with wooden bedroom furniture imported from China.<sup>138</sup> Dorbest objected to the methodology employed by the DOC to reach that duty rate and claimed that it violated the antidumping statute.<sup>139</sup>

Assessing normal value under this statute is usually accomplished by comparing the export price of a product to its sales price in the home market.<sup>140</sup> However, when the home market is a nonmarket economy, normal value is determined "on the basis of the value of

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128. *Id.* at 764–65.

129. *Id.* at 764.

130. *Id.*

131. *Id.* at 765; *see also* 19 U.S.C. §1677e(c) (2006) (requiring an administering authority to corroborate secondary information it relies on with "information from independent sources that are reasonably at their disposal").

132. *KYD, Inc.*, 607 F.3d at 765.

133. *Id.* (clarifying that "the relevant inquiry focuses on the nature of the information, not on whether the source of the information was referenced in or included with the petition").

134. *Id.* at 766–67 (quoting *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002)).

135. *Id.* at 768.

136. 604 F.3d 1363 (Fed. Cir. 2010).

137. *Id.* at 1377.

138. *Id.* at 1366.

139. *Id.*; *see* 19 U.S.C. § 1673 (2006) (addressing the imposition of antidumping duties).

140. *Dorbest Ltd.*, 604 F.3d at 1367.

the factors of production utilized in producing the merchandise.”<sup>141</sup> The factor of production at issue in this case was labor, which Commerce values differently from other factors.<sup>142</sup> Commerce values labor by conducting a regression analysis—a method used to assess changes in a dependent variable caused by an independent variable when all other independent variables are held steady—of the observed relationship between wages and national income in a surrogate market economy.<sup>143</sup>

In this case, Commerce selected India as a comparable economy to China to determine the factors of production other than labor.<sup>144</sup> To determine labor wage rates, Commerce ran a regression analysis on other market economies with gross national incomes ranging from \$420 to \$39,470 per capita.<sup>145</sup> The analysis estimated a wage rate in China 300% higher than the Indian surrogate wage rate.<sup>146</sup> The Chinese manufacturers affected by this determination, collectively known as Dorbest, argued that this approach violated the statutory requirement that a comparable market economy be evaluated to assess normal value based on all factors of production, including labor wage rates.<sup>147</sup> The CIT affirmed Commerce’s application of the regression analysis, but required Commerce to conduct the analysis again after eliminating four of the previously-selected companies deemed to be too small to be comparable to Dorbest.<sup>148</sup>

On appeal to the Federal Circuit, Dorbest argued—and the court agreed—that Commerce’s use of “data from countries with widely-varying national incomes . . . does not comply with the statutory requirement to use data only from economically comparable countries to the extent possible.”<sup>149</sup> Thus, the Federal Circuit held that Commerce’s regulation violated this statutory requirement.<sup>150</sup>

The statute also requires Commerce to assess data from countries that are “significant producers of comparable merchandise.”<sup>151</sup> However, in this case Commerce included in its analysis some

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141. *Id.* (quoting § 1677b(c)(1)).

142. *Id.* at 1368.

143. *Id.*; Calculation of Normal Value of Merchandise from Nonmarket Economy Countries, 19 C.F.R. § 351.408(c) (2009), *invalidated by Dorbest Ltd.*, 604 F.3d 1363.

144. *Dorbest Ltd.*, 604 F.3d at 1367 (stating that Commerce relied on data from seven Indian companies to determine the value of several non-production factors).

145. *Id.* at 1371.

146. *Id.* at 1369.

147. *Id.*

148. *Id.* at 1370.

149. *Id.* at 1371.

150. *Id.* at 1372.

151. 19 U.S.C. § 1677b(c)(4)(B) (2006).

countries that were not significant producers of the relevant merchandise.<sup>152</sup> Accordingly, the Federal Circuit again found that Commerce's regulation violated this portion of the statute.<sup>153</sup>

The U.S. practice of zeroing was a hotly contested issue leading up to the WTO decision in 2005.<sup>154</sup> The case of *ThyssenKrupp Acciai Speciali Terni S.p.A. v. United States*<sup>155</sup> challenged the U.S. implementation of that WTO decision by the DOC under section 129 of the Uruguay Round Agreement Act when the DOC failed to correct a clerical error in the original investigation prior to the WTO decision.<sup>156</sup>

Zeroing is the practice of treating foreign exports sold at prices higher than fair market value as having no margin of difference for purposes of dumping investigations.<sup>157</sup> Thus, when a foreign exporter varies its export price throughout the year—sometimes selling below and sometimes selling above normal market value (for example, foreign market seasonal adjustments)—its average margin is only calculated based upon exports sold at higher than normal market prices, often leading to a positive determination of dumping.

In this case, ThyssenKrupp argued that when Commerce implemented the decision of the WTO by adopting a practice “not inconsistent with the findings of the panel or the Appellate Body,”<sup>158</sup> Commerce failed to account for a clerical error in the original dumping calculation.<sup>159</sup> Originally, Commerce established a duty of 11.23% on the stainless steel sheet and strip in coils exported by ThyssenKrupp.<sup>160</sup> Following the redetermination in light of the WTO decision, the new rate was 2.11%.<sup>161</sup> If the clerical error had been corrected, the rate would have been below 2%, thus making it de minimis and thereby resulting in the revocation of the antidumping duty entirely.<sup>162</sup>

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152. *Dorbest Ltd.*, 604 F.3d at 1372.

153. *Id.*

154. See generally Communication by the United States, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS294/16 (May 17, 2006) (discussing the various arguments regarding the WTO's zeroing decision); Panel Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS294/R (Oct. 31, 2005).

155. 603 F.3d 928 (Fed. Cir. 2010).

156. *Id.* at 929.

157. See Jarrod M. Goldfeder, *2008 International Trade Decisions of the Federal Circuit*, 58 AM. U. L. REV. 975, 1022 (2009) (detailing the Department of Commerce's practice of zeroing).

158. *ThyssenKrupp*, 603 F.3d at 931 (quoting 19 U.S.C. § 3538(b)(2) (2006)).

159. *Id.*

160. *Id.* at 930.

161. *Id.* at 931.

162. *Id.* at 931–32.

The DOC is bound under section 129 to reopen and revise decisions that are found to be inconsistent with a WTO decision.<sup>163</sup> However, the DOC concluded that this requirement did not obligate it to reopen original findings to revise clerical errors that have no relationship to the WTO decision.<sup>164</sup> The CIT agreed and affirmed Commerce's interpretation of section 129 as reasonable.<sup>165</sup>

On appeal, the Federal Circuit applied the *Chevron* framework to assess Commerce's decision.<sup>166</sup> The Federal Circuit found that the language in section 129 was ambiguous and that Commerce had the authority to fill in the gaps of the statute.<sup>167</sup> Once the court determined that the statute was ambiguous, the Federal Circuit looked to Commerce's decision to fill in the gaps to ensure that it was based upon a permissible construction of the statute.<sup>168</sup>

The court highlighted language from the CIT asserting that "section 129 'provides a procedural mechanism for aligning inconsistent determinations with the provisions of the WTO agreements,' and that 'allowing Commerce to expand the scope . . . to unlitigated issues' does not have clear relevance to this purpose."<sup>169</sup> The Federal Circuit agreed with the CIT that Commerce's interpretation was reasonable and affirmed the decision of the CIT.<sup>170</sup>

In *Gallant Ocean (Thailand) Co. v. United States*,<sup>171</sup> an exporter challenged a Commerce decision to apply an adverse facts available (AFA) rate to its exports of frozen warmwater shrimp.<sup>172</sup> The Federal Circuit concluded that Commerce applied a punitive and unreasonable rate to Gallant and accordingly vacated and remanded the decision.<sup>173</sup>

In 2004, Commerce initiated a dumping investigation at the request of the Ad Hoc Shrimp Trade Action Committee and subsequently established a dumping margin of 57.64% against a group of Thai shrimp exporters.<sup>174</sup> Gallant was not included in that initial investigation.<sup>175</sup> At the conclusion of the investigation,

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163. *Id.* at 932.

164. *ThyssenKrupp Acciai Speciali Terni S.p.A. v. United States*, 602 F. Supp. 2d 1362, 1366 (Ct. Int'l Trade 2009).

165. *Id.* at 1368.

166. *ThyssenKrupp*, 603 F.3d at 933–34.

167. *Id.* at 934.

168. *Id.*

169. *Id.* (quoting *ThyssenKrupp*, 602 F. Supp. 2d at 1367).

170. *Id.* at 934–35.

171. 602 F.3d 1319 (Fed. Cir. 2010).

172. *Id.* at 1321.

173. *Id.* at 1325.

174. *Id.* at 1321–22.

175. *Id.* at 1322.

Commerce applied margins against Thai exporters of shrimp of between 5.91% and 6.82%.<sup>176</sup>

During the first administrative review of the dumping order in 2006, Commerce requested information from 145 Thai companies, including Gallant.<sup>177</sup> Gallant did not respond.<sup>178</sup> As a result, Commerce applied an AFA rate of 57.64% based upon the adjusted petition rate and corroborated it by looking to specific transactions for the three mandatory respondents in the investigation, which had rates ranging from 2.58% to 10.75%.<sup>179</sup> Gallant contested the rate, claiming it had “no rational relationship to [Gallant’s] commercial practices.”<sup>180</sup> The CIT affirmed Commerce’s decision.<sup>181</sup>

Commerce maintains significant discretion in establishing antidumping margins.<sup>182</sup> This “discretion is particularly great in the case of uncooperative respondents.”<sup>183</sup> An AFA rate is meant to be a “*reasonably accurate estimate* of the respondent’s actual rate, . . . with some built-in increase intended as a deterrent to non-compliance.”<sup>184</sup> The Federal Circuit made it clear, however, that this rate cannot be unreasonably high or unrelated to the respondent’s actual dumping margin.<sup>185</sup>

In this case, Commerce had access to much more reliable information than the adjusted petition rate but failed to use that information when formulating the AFA rate against Gallant.<sup>186</sup> The Federal Circuit held the AFA rate that Commerce ultimately applied was “punitive, aberrational, or uncorroborated.”<sup>187</sup> The rate was more than ten times the average dumping margin applied to the cooperating respondents and more than five times the highest rate imposed on similar products.<sup>188</sup> As the Federal Circuit explained, “Commerce must select secondary information that has some grounding in commercial reality.”<sup>189</sup> Accordingly, the Federal Circuit

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176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 1322–23.

182. *Id.* at 1323.

183. *Id.*

184. *Id.* (quoting *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)).

185. *Id.*

186. *Id.*

187. *Id.* at 1324 (quoting *F.lli De Cecco Di Filippo Fara S. Martino*, 216 F.3d at 1032).

188. *Id.*

189. *Id.*

vacated the determination by Commerce and remanded for further analysis.<sup>190</sup>

In *Nucor Corp. v. United States*,<sup>191</sup> the appellants were importers of products from two out of an initial six countries that were subject to an antidumping order on corrosion-resistant carbon steel products.<sup>192</sup> The remaining parties had their antidumping orders rescinded during a second sunset review.<sup>193</sup> The appellants claimed that the ITC erred when it considered the likely “differing conditions of competition” and separated the parties to assess impact on the domestic industry.<sup>194</sup>

Every five years, the ITC conducts a sunset review on existing antidumping orders to determine whether the order’s revocation “would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.”<sup>195</sup> In this case, Australia, Canada, France, Germany, Japan, and Korea were subject to an antidumping order since 1993.<sup>196</sup> This order was renewed in 2000 following the first sunset review.<sup>197</sup> During the second sunset review, the ITC decided to review the impact of each country’s steel exports individually rather than cumulatively.<sup>198</sup> The ITC identified differences in competition and regrouped the countries into two groups: Australia, France, and Japan in one group and Germany and Korea in the other.<sup>199</sup> The order for Canada was revoked.<sup>200</sup>

In 2007, the ITC revoked the antidumping order on the first group—Australia, France, and Japan—after finding that it would not likely cause any material injury to the domestic industry.<sup>201</sup> However, the ITC maintained the order on the second group, which appealed to the CIT.<sup>202</sup> The CIT affirmed.<sup>203</sup>

Following the second group’s appeal, the Federal Circuit began its review by looking to the statutory provision that discusses import

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190. *Id.* at 1325.

191. 601 F.3d 1291 (Fed. Cir. 2010).

192. *Id.* at 1293.

193. *Id.* at 1295.

194. *Id.*

195. *Id.* at 1293 (quoting 19 U.S.C. § 1675a(a)(1) (2006)) (internal quotation marks omitted).

196. *Id.*

197. *Id.* at 1294.

198. *Id.*

199. *Id.* at 1294–95. The ITC examined three conditions of competition: “(1) price or volume trends; (2) the focus on home and regional markets; and (3) transnational ownership of facilities producing the subject merchandise.” *Id.* at 1294.

200. *Id.* at 1295.

201. *Id.*

202. *Id.*

203. *Id.*

accumulation.<sup>204</sup> The Federal Circuit found that the statute did not instruct the ITC on how to exercise its discretion in this practice.<sup>205</sup> Accordingly, applying *Chevron* deference, the Federal Circuit concluded that the ITC's interpretation of the statute was reasonable.<sup>206</sup> “[U]nder a reasonable interpretation of the statute, the ITC may consider the likely differing conditions of competition to predict the domestic market for the subject merchandise in event of revocation.”<sup>207</sup> The Federal Circuit then affirmed the decision of the CIT.<sup>208</sup>

In an earlier case also named *Ad Hoc Shrimp Trade Action Committee v. United States*,<sup>209</sup> the question was whether the multinational corporation (MNC) provision of the antidumping statute applied when the non-exporting country was a nonmarket economy.<sup>210</sup> Thai I-Mei foods, the company located in the non-exporting country in this case, challenged the conclusion by Commerce that the MNC provision did not apply to nonmarket economies.<sup>211</sup>

The MNC provision is meant to protect against MNCs that use affiliates in other countries to sell their products at higher prices on the export market than on their home market, making it appear as if the companies are not dumping the goods on the importing country.<sup>212</sup> The provision “generally provides that if a respondent is affiliated with a company in another country and if that respondent has no viable home market for purposes of calculating normal value, then the [DOC] uses the affiliate’s normal value as the normal value for the respondent if the affiliate’s normal value is higher than the respondent’s normal value.”<sup>213</sup> The Antidumping Act of 1921 treats this practice as price discrimination because the domestic sales in the affiliate country are subsidizing the low-cost exports in the respondent exporting country.<sup>214</sup>

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204. *Id.*; see 19 U.S.C. § 1675a(a)(7) (2006) (addressing the process for determining whether a revocation of an order or termination of an investigation is likely to cause material injury within a reasonably foreseeable time frame and stating whether volume and effect of imports may be cumulatively assessed in this determination).

205. *Nucor Corp.*, 601 F.3d at 1295.

206. *Id.* at 1296.

207. *Id.*

208. *Id.* at 1297.

209. 596 F.3d 1365 (Fed. Cir. 2010).

210. *Id.* at 1366 (considering whether the MNC provision, 19 U.S.C. 1677b(d) (2006), applies, rather than the factors-of-production methodology found in § 1677b(c)).

211. *Id.*

212. *Id.* at 1367–68.

213. *Id.* at 1367 (explaining the MNC provision found in § 1677b(d)).

214. *Id.* at 1368.

Thai I-Mei challenged Commerce's interpretation of the MNC provision, which excluded nonmarket economies from the application of the provision because Commerce did not determine prices using a factors-of-production methodology.<sup>215</sup> The MNC provision does not refer to nonmarket economies. Accordingly, applying *Chevron* deference to Commerce's interpretation, the Federal Circuit looked to whether Commerce's interpretation of the statute was reasonable.<sup>216</sup> The court found that, "if anything, the language of the MNC Provision actually suggests it does not apply when the non-exporting country is a nonmarket economy and normal value is based on a factors-of-production methodology."<sup>217</sup> Consequently, the court affirmed the decision of the CIT.<sup>218</sup>

Judge Prost dissented from the majority opinion in this case, arguing that the statute clearly set forth when the MNC Rule applies and that Commerce was not free to carve out an exception simply because the statute was silent as to that exception.<sup>219</sup> In addition, Judge Prost stated that Commerce failed to articulate "a coherent position on the meaning of the statute."<sup>220</sup> She explained that Commerce did not specify when the exception would apply but rather suggested that determinations would be made on a case-by-case basis, which the dissent found unacceptable.<sup>221</sup>

In *Deseado International, Ltd. v. United States*,<sup>222</sup> one of the issues was whether Commerce had discretion to refuse to consider a challenge to the scope of an antidumping order following a failure to cooperate in an anticircumvention inquiry.<sup>223</sup> The CIT and the Federal Circuit found that it did.<sup>224</sup>

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215. *Id.* at 1366.

216. *Id.* at 1368 ("Under step two of *Chevron*, if an agency's statutory interpretation promulgated under the authority delegated to it by Congress is 'reasonable' it is 'binding [o]n the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.'" (quoting *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1360 (Fed. Cir. 2007))).

217. *Id.* at 1370 (explaining why Commerce's interpretation was unreasonable, given the text of the MNC Provision).

218. *Id.* at 1373.

219. *Id.* (Prost, J., dissenting) (reasoning that the statute "unambiguously sets forth three conditions for determining when the MNC Rule applies and when it does not").

220. *Id.* at 1374.

221. *Id.* (noting that it is impossible to apply a *Chevron* analysis to an agency's statutory interpretation if it has not articulated an interpretation of that statute).

222. 600 F.3d 1377 (Fed. Cir. 2010).

223. *Id.* at 1378 (examining the CIT's holding that Commerce had discretion to refuse to reconsider whether candles from China were within the scope of an antidumping order).

224. *Id.*

The challenge that gave rise to this case was to a 1986 antidumping duty order on petroleum wax candles from China.<sup>225</sup> The appellant argued that it had not been considered in the original order and thus, under 19 U.S.C. § 1677j, Commerce was required to determine whether it was within the scope of the order.<sup>226</sup> However, in 2005, based upon an inquiry by the domestic candle industry, Commerce initiated an anticircumvention inquiry.<sup>227</sup> Deseado exported candles to the United States at the time of this inquiry, but it did not participate.<sup>228</sup> Deseado was considered to be on notice of the inquiry's initiation as a result of the publication in the Federal Register.<sup>229</sup>

During the eighth administrative review of the antidumping order, Deseado asked Commerce to assess the scope of the order again by determining that it did not cover candles containing less than 50% petroleum wax.<sup>230</sup> Commerce refused to consider this issue during the review.<sup>231</sup> The CIT held that "such a refusal is an agency action committed to agency discretion by law, and is therefore generally unreviewable [by the CIT]."<sup>232</sup> The Federal Circuit agreed and found that Deseado's failure to participate in the anticircumvention proceeding was a reasonable ground upon which to refuse its subsequent request for review.<sup>233</sup>

The central issue in *American Signature, Inc. v. United States*<sup>234</sup> was whether a preliminary injunction could be issued to prevent Commerce from correcting its calculation errors in an importer-specific assessment rate once the goods had been liquidated.<sup>235</sup> The CIT held that American Signature, Inc. (ASI)

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225. *Id.* (referring to the Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China, 51 Fed. Reg. 30,686 (Dep't of Commerce Aug. 28, 1986)).

226. *Id.*

227. Petroleum Wax Candles from the People's Republic of China, 70 Fed. Reg. 10,962 (Dept' of Commerce Mar. 7, 2005) (initiation).

228. *Deseado*, 600 F.3d at 1379.

229. *Id.* at 1378-79.

230. *Deseado Int'l, Ltd. v. United States*, 602 F. Supp. 2d 1360, 1361 (Ct. Int'l Trade 2009) (noting that during the Administrative Review, the plaintiff had two bases for challenging the Anticircumvention Inquiry: (1) scope of the order and (2) the date of the suspension).

231. *Id.* ("In response, Commerce declined to reconsider decisions made during the Anticircumvention Inquiry, a separate and distinct administrative proceeding.").

232. *Id.* at 1362.

233. *Deseado*, 600 F.3d at 1381 (dismissing the action requesting subsequent review).

234. 598 F.3d 816 (Fed. Cir. 2010).

235. *Am. Signature, Inc. v. United States*, 710 F. Supp. 2d 1376, 1377 (Ct. Int'l Trade 2010) (describing American Signature's position that Commerce should be prevented from altering reassessment rates for the plaintiff's unliquidated entries and that, during trial, Commerce should be compelled to maintain the current assessment rates).

would not be irreparably harmed if the injunction were not issued.<sup>236</sup> The Federal Circuit reversed.<sup>237</sup>

After issuing an antidumping order on imports of goods, Commerce calculates *ad valorem* assessment rates for each importer of the subject goods.<sup>238</sup> These confidential rates are not released in the Federal Register, where the overall dumping margin is published. Customs is instructed to liquidate using the *ad valorem* rates assessed by Commerce.<sup>239</sup>

In this case, a computer programming error led Commerce to establish a much lower *ad valorem* rate on ASI than it had intended.<sup>240</sup> On July 10, 2009, before realizing the error, Commerce instructed Customs to liquidate the goods at that rate.<sup>241</sup> On August 25, 2009, counsel to the domestic producers alerted Commerce to the calculation error.<sup>242</sup> The next day, Commerce instructed Customs to suspend liquidation pending the reissuance of instructions; however, most of the goods had already been liquidated.<sup>243</sup> On September 17, 2009, Commerce issued new instructions to Customs to liquidate at the final order rate.<sup>244</sup> ASI filed for a preliminary injunction with the CIT arguing that Commerce had no authority to correct the error.<sup>245</sup>

The CIT granted ASI's request for a preliminary injunction against Customs.<sup>246</sup> However, the following month, the CIT vacated that order upon a finding that ASI would not suffer irreparable harm were the new instructions to go forward.<sup>247</sup>

The Federal Circuit applied the Supreme Court's four-factor test for assessing the suitability of a preliminary injunction set forth in *Winter v. Natural Resources Defense Council, Inc.*<sup>248</sup> The four factors are:

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236. *Id.* at 1378.

237. *Am. Signature, Inc.*, 598 F.3d at 818.

238. See 19 U.S.C. § 1675(a)(2)(A) (2006) (requiring the administrative authority to determine the normal value, export price, and dumping margin for each entry of merchandise); 19 C.F.R. § 351.212(b) (2010) (guiding the Secretary on how to calculate an assessment rate after the antidumping order has been reviewed).

239. 19 C.F.R. § 351.212(b)(1) (2010).

240. *Am. Signature, Inc.*, 710 F. Supp. 2d at 1376–77 (explaining that the calculation error in assessment rates caused a “rather significant under-collection of antidumping duties” for ASI and other exporters).

241. *Am. Signature, Inc.*, 598 F.3d at 821.

242. *Id.*

243. *Id.*

244. *Id.* at 822.

245. *Id.*

246. *Am. Signature, Inc. v. United States*, 710 F. Supp. 2d 1376, 1378 (Ct. Int'l Trade 2010) (explaining that the Federal Circuit reversed the CIT's denial of ASI's motion for a preliminary injunction).

247. *Id.* (explaining that “a preliminary injunction is unnecessary because the merits have been resolved”).

248. 129 S. Ct. 365 (2008); see *Am. Signature, Inc.*, 598 F.3d at 823 (“In determining whether a preliminary injunction should issue, we apply the four factor test set forth by the Supreme Court [in *Winter*].”).

1) that the plaintiff is likely to be successful on the merits; 2) that the plaintiff is likely to suffer irreparable harm if an injunction is not issued; 3) that the balance of equities tips in the plaintiff's favor; and 4) that an injunction is in the public interest.<sup>249</sup>

The Federal Circuit agreed with the CIT that ASI was likely to succeed on the merits of the case since Commerce failed to correct its error within a reasonable period of time.<sup>250</sup> However, the court disagreed with the CIT over the second factor—whether ASI would suffer irreparable harm in the absence of an injunction.<sup>251</sup> The domestic producers argued, and the CIT concluded, that ASI had a reasonable opportunity to protest the liquidation decisions of Customs under 19 U.S.C. § 1514.<sup>252</sup> However, the Federal Circuit characterized the decision at issue as a decision of Commerce, not Customs.<sup>253</sup> Accordingly, the relief available to ASI in this case was uncertain.<sup>254</sup> After finding the balance of equities to favor ASI and noting that the public interest was best served by ensuring governmental bodies comply with the law, the Federal Circuit concluded that a preliminary injunction must be issued and subsequently ordered the CIT to grant the preliminary injunction.<sup>255</sup>

## II. HARMONIZED TARIFF SCHEDULE CASES

The first case of the 2010 calendar year for the Federal Circuit, *Outer Circle Products v. United States*,<sup>256</sup> involved a dispute over a tariff classification for bottle and jug wraps.<sup>257</sup> Outer Circle Products imported “soft-sided, flexible wraps constructed of a PVC closed-cell thermal-insulating foam layer.”<sup>258</sup> After being imported but before being sold, the wraps were fitted to plastic bottles that could be removed using a zipper sewn into the outer fabric.<sup>259</sup> CBP classified these items under HTSUS heading 4202.92.90, which refers to a variety of carrying cases and which has a duty rate of 19.3%.<sup>260</sup> Outer Circle contended that the items should be classified under subheading 3924.10.50, which refers to table and kitchenware and

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249. *Winter*, 129 S. Ct. at 374.

250. *Am. Signature, Inc.*, 598 F.3d at 828.

251. *Id.* at 829.

252. *Id.* at 828.

253. *Id.* at 829 (“Here . . . the alleged agency error is on the part of Commerce, not Customs. Therefore, section 1514(a) is inapplicable.”).

254. *Id.* (noting that ASI made a sufficient showing of irreparable harm because of the uncertainty regarding the availability of relief).

255. *Id.* at 830.

256. 590 F.3d 1323 (Fed. Cir. 2010).

257. *See id.* at 1326 (discussing the proper classification of bottle and jug wraps).

258. *Id.* at 1324.

259. *Id.* at 1325.

260. *Id.* at 1325–26.

which carries a duty rate of 3.4%.<sup>261</sup> The CIT affirmed CBP's decision.<sup>262</sup>

The Federal Circuit reviews classification decisions using a two-step process. First, the court determines the meaning of the tariff provisions in question, which is a question of law.<sup>263</sup> Second, the court determines under which heading the goods fall, which is a question of fact.<sup>264</sup> The court had addressed the meaning of HTSUS heading 4202 in a previous case, *SGI, Inc. v. United States*,<sup>265</sup> and concluded that it did not apply to "containers that organize, store, protect, or carry food or beverages."<sup>266</sup> Thus, the question for the court in *Outer Circle Products* was whether the items in dispute involved the storage or carriage of food or beverages.<sup>267</sup> Upon review of the nature of the items, the Federal Circuit concluded that the containers were factually indistinct from the coolers at issue in *SGI*.<sup>268</sup> Accordingly, the court held the CIT and CBP improperly classified Outer Circles' containers under heading 4202.<sup>269</sup> Thus, the Federal Circuit reversed the decision of the CIT.<sup>270</sup>

The issue in *Michael Simon Design, Inc. v. United States*<sup>271</sup> was whether changes to the HTSUS made by the President pursuant to 19 U.S.C. § 3006(a) were subject to challenge under the Administrative Procedure Act (APA).<sup>272</sup> The Federal Circuit concluded that neither commission recommendations nor the President's ultimate decision to change the tariff schedule were reviewable under the APA.<sup>273</sup>

The United States adopted the HTSUS in 1983 pursuant to the International Convention on the Harmonized Commodity Description and Coding System.<sup>274</sup> In 1988, the President was

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261. *Id.* (noting that the duty rate of carrying cases is significantly greater than the duty rate for kitchenware).

262. *Id.* at 1325 (noting that the CIT agreed that the wraps should fall under classification 4202 as "bottle cases").

263. *Id.*

264. *Id.*

265. 122 F.3d 1468 (Fed. Cir. 1997).

266. *Id.* at 1472 (comparing the classification under subheading 3924, household containers, to the classification under subheading 4202, containment of any food or beverage).

267. 590 F.3d at 1326.

268. *Id.* ("The containers in *SGI*, like the articles here, were not designed to hold uncontained food or beverage.").

269. *Id.*

270. *Id.*

271. 609 F.3d 1335 (Fed. Cir. 2010).

272. *Id.* at 1337–38.

273. *Id.* at 1338 (affirming dismissal of the appellants' actions because the Commission's actions were neither final nor agency actions for purposes of the APA, and due to the non-reviewable discretionary nature of the President's authority under § 3006(a)).

274. *Id.* at 1336 (describing the Convention, "which created a single international system of nomenclature to classify goods for customs purposes").

authorized to make proclamations for changes to the HTSUS, based upon recommendations of the International Trade Commission.<sup>275</sup> Following a proposal of the World Customs Organization in 2004, the Commission recommended a change to the HTSUS with respect to the classification of “festive articles.”<sup>276</sup>

The appellants contended that they were adversely affected by the decision to change the HTSUS.<sup>277</sup> They sought judicial review under the general-review provisions of the APA.<sup>278</sup> However, the CIT concluded that the Commission’s decision was only a recommendation and, accordingly, was not a reviewable final decision.<sup>279</sup> The CIT also held that the President, who makes a proclamation based upon the recommendation of the Commission, is not an agency within the meaning of the APA.<sup>280</sup> Thus, his decision was not reviewable under the APA.<sup>281</sup>

The Federal Circuit agreed with the CIT.<sup>282</sup> The court based its analysis on the findings of *Dalton v. Specter*,<sup>283</sup> which involved a challenge to the closing of the Philadelphia Naval Shipyard.<sup>284</sup> In that case, the Supreme Court concluded that because the recommendations to the President were not “final and binding,” but merely suggestions for the President to consider, the contested actions were not reviewable under the APA.<sup>285</sup>

In the case at hand, the Federal Circuit concluded that the recommendations of the Commission “do not directly affect tariffs or bind importers.”<sup>286</sup> Additionally, nothing in the statute required the

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275. *Id.*

276. *Id.* at 1337 (explaining that, following a period for public comment, the Commission issued its final report regarding the classification of festive articles to the President, who adopted the recommended modifications in their entirety).

277. *Id.*

278. *Id.*

279. *Id.* at 1338 (noting that the Commission fulfills only an advisory role, its recommendations are not final agency actions, and thus are not subject to APA review).

280. *Id.*

281. *Id.* (explaining that actions by a governmental body not considered an “agency” within the meaning of the APA cannot be deemed “agency actions”).

282. *Id.*

283. 511 U.S. 462 (1994).

284. *Id.* at 464 (determining whether the President’s decision to close the Philadelphia Naval Shipyard, pursuant to the Defense Base Closure and Realignment Act of 1990, was reviewable). The Federal Circuit addressed the facts and the Supreme Court’s analysis from *Dalton* to demonstrate that, for APA purposes, non-final reports are not judicially reviewable. *Michael Simon Design, Inc.*, 609 F.3d at 1339.

285. *Dalton*, 511 U.S. at 469 (reaffirming that a Commission’s recommendation is not reviewable because it does not carry with it finality of “direct consequences”).

286. *Michael Simon Design, Inc.*, 609 F.3d at 1339 (reasoning that since the recommendations are non-final, and therefore do not have a direct effect on the tariffs, they cannot be judicially reviewed under the APA).

President to act in accordance with the Commission's recommendations.<sup>287</sup> Accordingly, the Federal Circuit determined that the Commission's recommendation was not a final decision and thus not subject to judicial review under the APA.<sup>288</sup>

*Honda of America Manufacturing, Inc. v. United States*<sup>289</sup> addressed a classification of imported "oil bolts" by CBP.<sup>290</sup> CBP classified these bolts under subheading 7318.15.80 of the HTSUS, which refers to "[s]crews, bolts, nuts, . . . and similar articles . . . ."<sup>291</sup> Honda claimed that the oil bolts should have been classified under chapter 87, which refers to "[v]ehicles . . . and [p]arts and [a]ccessories [t]hereof."<sup>292</sup> The CIT supported CBP's decision, and the Federal Circuit affirmed.<sup>293</sup>

CBP follows a two-step approach to classification.<sup>294</sup> First, CBP must look to the meaning of the tariff provisions.<sup>295</sup> Second, CBP must determine under which heading the goods in dispute should fall.<sup>296</sup> Within the initial determination, CBP must apply the General Rules of Interpretation.<sup>297</sup> The first rule of interpretation is to classify "according to the terms of the headings and any relative section or chapter notes."<sup>298</sup>

In this case, the Federal Circuit reasoned that the oil bolts could arguably fall under the common meaning associated with either of the two disputed sections of the HTSUS.<sup>299</sup> Therefore, CBP needed to look to the notes associated with those tariff headings.<sup>300</sup> The notes

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287. *Id.*

288. *Id.* at 1340.

289. 607 F.3d 771 (Fed. Cir. 2010).

290. *Id.* at 772.

291. *Id.* (citation omitted).

292. *Id.* (citation omitted).

293. *Id.* at 776 (affirming the CIT decision that "Customs properly classified Honda's oil bolts under Schedule subheading 7318.15.80").

294. *Id.* at 773.

295. *Id.* (classifying the issue of defining the tariff provisions as a question law).

296. *Id.* (explaining that determining which heading should be applied to the disputed items is a question of fact).

297. See *Millenium Lumber Distribution Ltd. v. United States*, 558 F.3d 1326, 1328 (Fed. Cir. 2009) (explaining that "the General Rules of Interpretation . . . govern classification of merchandise under the HTSUS").

298. *Id.* at 1328–29 (citation omitted).

299. *Honda of Am. Mfg., Inc.*, 607 F.3d at 773. As explained by the Federal Circuit:

Here, the plain language of the competing relevant subheadings is not dispositive. The oil bolts facially meet subheading 7318.15.80 because they are undisputedly 'threaded articles' of iron or steel with a diameter of 6mm or more. However, they also facially meet Honda's proposed subheading because they are 'parts and accessories' of vehicle power trains (subheading 807.99.6790), of vehicle 'brakes and servo-brakes' (subheading 8708.39.5050), and of motorcycles (subheading 871.4.19.0060).

*Id.*

300. See *Millenium Lumber Distribution Ltd.*, 558 F.3d at 1329 (explaining that while "the Explanatory Notes are not legally binding or dispositive, they may be consulted

pursuant to the section proposed by Honda for classification assert that parts of general use shall not be included in this section of the HTSUS.<sup>301</sup> Honda argued that its oil bolts were not for general use, but rather were specifically designed for a particular use within its vehicles.<sup>302</sup> However, the Federal Circuit concluded that note two to section XVII of the HTSUS clearly excludes parts for use solely or principally with articles in that chapter as parts of general use.<sup>303</sup>

In affirming the CIT decision, the Federal Circuit concluded that “an article’s specialization for vehicles does not preclude its classification as a part of general use.”<sup>304</sup> The oil bolts undisputedly had the characteristics of other screws and bolts and thus were classifiable under heading 7318.15 as parts of general use.<sup>305</sup>

In the only sex-based discrimination case in 2010, *Totes-Isotoner Corp. v. United States*,<sup>306</sup> Totes-Isotoner alleged that the HTSUS discriminated between men’s and other person’s gloves in violation of the Equal Protection Clause of the U.S. Constitution.<sup>307</sup> Subheading 4203.29.30 of the HTSUS taxes imported men’s gloves at 14% *ad valorem* while subheadings 4203.29.40 and 4203.29.50 tax gloves for other persons at 12.6% *ad valorem*.<sup>308</sup> Totes-Isotoner contended that this unlawfully discriminated on the basis of sex.<sup>309</sup> The CIT and the Federal Circuit disagreed.<sup>310</sup>

The government argued before the Federal Circuit that the CIT lacked jurisdiction, that Totes-Isotoner lacked standing to bring this case, and that the claim was non-justiciable because it was a political question.<sup>311</sup> The jurisdiction claim was based on the fact that Totes-Isotoner had failed to initially file a protest with CBP under 28

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for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions”).

301. U.S. International Trade Commission, Harmonized Tariff Schedule of the United States (2010) (Rev. 2), ch. 86 § XVII n.2(b) (2010), *available at* <http://www.usitc.gov/publications/docs/tata/hts/bychapter/1002c86.pdf> (noting that “parts” and “parts and accessories” do not apply to parts of general use).

302. *Honda of Am. Mfg., Inc.*, 607 F.3d at 775.

303. *Id.* at 774.

304. *Id.*

305. *Id.* at 775. Despite Honda’s contention that the oil bolts were not for general use because they had a more specific function than mere fastening, the Federal Circuit relied on the Explanatory Notes to Chapter 73 of the HTSUS, which clarified that “‘bolts and screws for metal’ include ‘all types of fastening bolts and metal screws regardless of shape and use.’” *Id.*

306. 594 F.3d 1346 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 92 (2010).

307. *Id.* at 1349.

308. *Id.*

309. *Id.* at 1350.

310. *Id.* at 1350, 1358.

311. *Id.* at 1350.

U.S.C. § 1581(i).<sup>312</sup> The standing claim was based on the argument that Totes-Isotoner failed to allege an injury-in-fact that was caused by the government's conduct and was redressable by the court.<sup>313</sup> The political question argument was based on the assertion that the subject matter of the complaint—the use of sex in tariff classifications—was reserved for the political branches of the government.<sup>314</sup>

The Federal Circuit dismissed all of the government's arguments. The court asserted that the CIT had jurisdiction under 28 U.S.C. § 1581(i) because challenges to the constitutionality of a statute cannot be resolved by CBP; therefore, there was no requirement that a protest be filed before bringing a claim to the CIT under that statute.<sup>315</sup> As to the standing claim, the court found that Totes-Isotoner properly claimed that it would suffer injury-in-fact based upon the alleged discrimination even though the vendor was not the target of the discrimination.<sup>316</sup> Finally, the court dismissed the political question argument by concluding that federal statutes are not immune from the protections of the Constitution and review of the provisions of the HTSUS are “within the realm of the judiciary.”<sup>317</sup>

The central question in this case, however, was whether Totes had sufficiently stated a claim of unlawful discrimination.<sup>318</sup> The Federal Circuit explained that

[t]o properly state a claim for unequal treatment, as with any other claim, a plaintiff must provide “‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’”<sup>319</sup>

In this case, Totes-Isotoner alleged disparate impact based on the distinct classifications of men's and women's gloves.<sup>320</sup> However, the court stated that a showing of disparate impact was not enough to

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312. *See id.* (stating that jurisdiction is available under § 1581(i) only if it is not available under another subsection of § 1581). The government reasoned that jurisdiction was not available since Totes could have had jurisdiction under § 1581(a) but did not because it had failed to file a protest with CBP. *Id.*

313. *Id.* at 1351.

314. *Id.* at 1352 (arguing that a judicial ruling in this instance would infringe on the foreign affairs powers of the political branches).

315. *Id.* at 1350–51.

316. *Id.* at 1352 (finding that Totes suffered an injury-in-fact, despite not being the target of the discrimination, because it was required to pay the tariff and thus was directly injured by the discrimination).

317. *Id.* at 1353.

318. *Id.*

319. *Id.* at 1354 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

320. *Id.* at 1355.

prove sex discrimination in the case of tariff classifications.<sup>321</sup> In addition, the Federal Circuit recalled that the Supreme Court has held that “the power to tax is the power to discriminate in taxation.”<sup>322</sup> The Federal Circuit held this axiom to also be true with regard to the power to establish customs duties.<sup>323</sup> Accordingly, the Federal Circuit found that “something more than disparate impact is required to establish a purpose to discriminate for the purposes of pleading an equal protection violation.”<sup>324</sup> The Federal Circuit agreed with the CIT that Totes-Isotoner failed to allege sufficient facts to support a claim of discrimination.<sup>325</sup>

### III. OTHER TRADE CASES

In *Hacker v. United States*,<sup>326</sup> the issue was whether a disaster relief payment to a farmer could be counted as part of the farmer’s net farm income for purposes of calculating trade adjustment assistance.<sup>327</sup> The case involved grape farmers in Michigan who lost a significant portion of their crops during the 2001 growing season due to drought.<sup>328</sup> In 2003, the Hackers applied to the U.S. Department of Agriculture (USDA) for a disaster relief payment to cover their losses from this event.<sup>329</sup> They were provided with \$80,000 in relief from the USDA in early 2004.<sup>330</sup>

Later that year, low-priced imported grapes from Argentina led the USDA to certify Michigan grape growers for trade adjustment assistance.<sup>331</sup> The Hackers timely filed for this relief but were denied by the USDA on the ground that they had not suffered a loss of income in the 2004 growing year.<sup>332</sup> The Hackers contended that the disaster relief payment should not be counted toward their total income, but the USDA disagreed.<sup>333</sup> On appeal, the CIT affirmed the USDA’s decision.<sup>334</sup>

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321. *Id.* at 1356. The Federal Circuit stated that the tariff rates were the result of international trade negotiations and that the differing rates for gloves could be the result of a concession. *Id.* at 1357.

322. *Id.* (quoting *Leathers v. Medlock*, 499 U.S. 439, 451 (1991)) (internal quotation marks omitted).

323. *Id.*

324. *Id.*

325. *Id.* at 1358.

326. 613 F.3d 1380 (Fed. Cir. 2010).

327. *Id.* at 1382.

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

Trade adjustment assistance previously required farmers to demonstrate that they suffered a loss of “net farm income” in the year for which benefits were sought.<sup>335</sup> The Hackers asserted that net farm income for 2004 should not include disaster relief payments.<sup>336</sup> The Federal Circuit disagreed.<sup>337</sup> After initially noting its broad deference to the decision of the agency,<sup>338</sup> the Federal Circuit concluded that disaster relief payments were made based upon the loss of crops in an effort to compensate for what the farm would have earned but for the drought.<sup>339</sup> Therefore, according to the court, the payments constituted net farm income.<sup>340</sup> Additionally, for purposes of calculating trade adjustment assistance, the statute requires the USDA to consider the “overall financial well-being” suffered by the farmer as a result of import competition.<sup>341</sup> A disaster relief payment to a farm could ultimately offset any overall loss in income.<sup>342</sup> Thus, the CAFC ruled that disaster relief payments do constitute net farm income for purposes of trade adjustment assistance.<sup>343</sup>

The central issue in *Trustees in Bankruptcy of North American Rubber Thread Co. v. United States*<sup>344</sup> was whether a party can be judicially estopped from reversing its position in a later hearing based upon changed business conditions.<sup>345</sup> Following the Supreme Court’s analysis in *New Hampshire v. Maine*,<sup>346</sup> the CIT found—and the Federal Circuit agreed—that it cannot.<sup>347</sup>

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335. *Id.* (citing 19 U.S.C. § 2401e(C) (2006)). In 2009, the statute was amended to remove the requirement that farmers demonstrate a decline in net farm income. See 19 U.S.C. § 2401e (Supp. III 2009).

336. *Hacker*, 613 F.3d at 1383 (arguing that because the agency used an accrual basis for calculating taxes, the disaster relief payment should have been considered received in an earlier tax year).

337. *Id.*

338. *Id.* (stating that Congress expressly directed the Secretary of Agriculture to define net farm income for purposes of trade adjustment assistance and that the regulations are controlling because they are not arbitrary or capricious).

339. *Id.* at 1384.

340. *Id.* at 1384–85 (stating that “[a]gricultural entitlement payments which result from the actual disposition of a planted crop are proceeds of that crop” (quoting *In re Schneider*, 864 F.2d 683, 685 (10th Cir. 1988))).

341. *Id.* at 1385 (quoting *Steen v. United States*, 468 F.3d 1357, 1362 (Fed. Cir. 2006)).

342. See *id.* (explaining that although the Hackers’ income from grape production was lower in 2004 than in the preceding year, their overall income was higher due to the disaster relief payment).

343. See *id.* at 1386 (holding that the USDA did not err in denying the Hackers trade adjustment assistance).

344. 593 F.3d 1346 (Fed. Cir. 2010).

345. *Id.* at 1349.

346. 532 U.S. 742 (2001).

347. *N. Am. Rubber Thread Co.*, 593 F.3d at 1349; see also *New Hampshire*, 532 U.S. at 749–51 (describing the doctrine of judicial estoppel and enumerating factors with which a court can determine whether the doctrine should be applied in a particular case).

The case involved a challenge to a 1992 antidumping duty order on extruded rubber thread from Malaysia.<sup>348</sup> In 2004, the foreign industry—Heveafil—requested a changed circumstances review under 19 U.S.C. § 1675(b)(1), arguing that the U.S. domestic industry, North American Rubber Thread Co. (NART), had gone bankrupt and there was no longer a need for the order.<sup>349</sup> The trustees for NART agreed that the order should be revoked, but the parties initially disagreed about the retroactive date of revocation.<sup>350</sup> NART argued that the proper date for revocation should be October 1, 2003, while Heveafil recommended October 1, 1995.<sup>351</sup> Commerce supported NART's position and revoked the order effective as of October 1, 2003.<sup>352</sup>

In 2005, following settlement negotiations between Heveafil and NART, both parties challenged Commerce's revocation date and proposed a new revocation date of October 1, 1995.<sup>353</sup> Commerce refused to open a second set of proceedings.<sup>354</sup> The parties appealed to the CIT, which concluded that it had jurisdiction and found that Commerce failed to explain why the agency had departed from its normal practice of opening a changed circumstances investigation in this instance.<sup>355</sup> Commerce again refused to open an investigation, and the CIT again remanded with an order to open an investigation.<sup>356</sup> The parties appealed to the Federal Circuit.<sup>357</sup>

On appeal, the United States argued that the CIT lacked jurisdiction to hear the claims of NART and Heveafil because the jurisdictional statute that the parties relied upon, 28 U.S.C. § 1581(i), bars jurisdiction when another section of § 1581 provides an adequate remedy.<sup>358</sup> The Federal Circuit found that Heveafil was barred by this statute because it could have sought the remedy it desired through a changed conditions provision under § 1581(c).<sup>359</sup> However, because NART did not argue that conditions changed for them between the original and subsequent proceeding, the CIT did have jurisdiction over NART's claim for relief.<sup>360</sup> The Federal Circuit

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348. *N. Am. Rubber Thread Co.*, 593 F.3d at 1350.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.* at 1350–51.

356. *Id.* at 1351.

357. *Id.*

358. *Id.*

359. *Id.* at 1352.

360. *Id.*

concluded that the CIT had jurisdiction under § 1581(i)(4) to hear NART's claim.<sup>361</sup>

To determine the issue of judicial estoppel, the Federal Circuit relied upon the factors enumerated by the Supreme Court in *New Hampshire*:

(1) whether the party's later position [is] clearly inconsistent with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.<sup>362</sup>

The Federal Circuit found that NART's positions were clearly inconsistent, satisfying the first factor.<sup>363</sup> The court also determined that the key element of the second factor is "whether the party was successful in getting a court to adopt its earlier position, not whether the party misled the courts."<sup>364</sup> As that was the case in NART's successful claim before Commerce here, this factor was also satisfied.<sup>365</sup> With respect to the third factor, NART argued that its interests were now aligned with its previous adversary, Heveafil, so there was no detriment to the opposing party.<sup>366</sup> However, the court found that in this case the United States was an opposing party and would be affected by this ruling, thereby satisfying the third factor.<sup>367</sup> In addition, the Federal Circuit concluded that NART failed to provide an adequate justification for its change in position and that, therefore, it was judicially estopped from making such a claim.<sup>368</sup>

In a dissenting opinion, Judge Gajarsa argued that the purpose of the judicial estoppel doctrine was to prevent inconsistent court decisions and that "courts should resist muzzling a party with judicial estoppel."<sup>369</sup> The dissent went on to argue that the pending appeal by Heveafil in front of the CIT, which the CIT stayed awaiting resolution of this case, could ultimately reverse Commerce's earlier decision and

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361. *Id.* at 1353.

362. *Id.* at 1354 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001)) (internal quotation marks omitted).

363. *Id.* at 1354–55.

364. *Id.* at 1355.

365. *Id.*

366. *Id.* at 1356.

367. *Id.*

368. *Id.* at 1357.

369. *Id.* at 1358–59 (Gajarsa, J., dissenting).

dissolve the court's basis for a finding of inconsistency under the *New Hampshire* factors.<sup>370</sup>

In *Chrysler Corp. v. United States*,<sup>371</sup> Chrysler Corporation brought a challenge to a decision by CBP to deny a refund of Harbor Maintenance Taxes (HMT) paid on exports prior to July 1, 1990.<sup>372</sup> CBP concluded that Chrysler was ineligible for the refund because it failed to provide the required supporting documentation in its request.<sup>373</sup> The CIT and Federal Circuit affirmed.<sup>374</sup>

The HMT was established by Congress in 1986 and mandates that "exporters, importers, and domestic shippers [] pay an *ad valorem* tax on commercial cargo shipped through [U.S.] ports."<sup>375</sup> This tax was used to maintain and develop the ports.<sup>376</sup> Congress granted CBP broad authority to implement regulations governing "the manner and method of payment and collection of the tax and the settlement or compromise of claims."<sup>377</sup> CBP implemented a system where the bank designated as the depository for HMT payments entered the data from the original payment documents into an electronic system for CBP and then later forwarded the original documents to CBP.<sup>378</sup> CBP also established a system for operators to obtain refunds of the HMT by filing a form along with supporting documentation.<sup>379</sup> In 1998, the Supreme Court held that the HMT was unconstitutional when applied to exporters.<sup>380</sup> Accordingly, CBP began to reconcile its paper and electronic records to begin issuing refunds to exporters.<sup>381</sup>

During its reconciliation process, CBP discovered "widespread inaccuracies" in its electronic database and had to make many corrections.<sup>382</sup> CBP was able to reconcile records captured after July 1, 1990 and accordingly implemented regulations waiving the supporting documentation requirement for refund requests by exporters.<sup>383</sup> However, because CBP destroyed written documents for

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370. *Id.* at 1360.

371. 592 F.3d 1330 (Fed. Cir. 2010).

372. *Id.* at 1331.

373. *Id.* at 1333–34.

374. *Id.* at 1332.

375. *Id.*

376. *Id.*

377. *Id.* (quoting 26 U.S.C. § 4462(i) (2006)) (internal quotation marks omitted).

378. *Id.*

379. *Id.* at 1332.

380. *Id.*; see *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 363 (1998) (concluding that the HMT violated the Export Clause of the U.S. Constitution).

381. *Chrysler Corp.*, 592 F.3d at 1332.

382. *Id.*

383. *Id.* at 1333.

entries prior to this date, the supporting documentation requirement was maintained for earlier entries.<sup>384</sup>

Chrysler applied for a refund on its export HMT payments made between September 1987 and February 1998.<sup>385</sup> CBP determined that Chrysler should receive an undisputed refund of \$13,549,018.22 for export payments after July 1, 1990.<sup>386</sup> However, even though CBP electronic records reflected a refund of an additional \$782,407.45 in pre-July 1, 1990 payments due, Chrysler did not submit supporting documentation for that request, and thus CBP denied the additional monies.<sup>387</sup> Chrysler filed a protest in 2003, which CBP denied in 2007 on the same basis.<sup>388</sup> The CIT upheld CBP's decision.<sup>389</sup>

On appeal, Chrysler claimed that the CBP regulation requiring documentation for entries pre-July 1, 1990 was invalidated by the decision in *United States v. United States Shoe Corp.*<sup>390</sup> and that the regulation continued to violate the Export Clause of the U.S. Constitution.<sup>391</sup> The Federal Circuit explained that the *U.S. Shoe* decision only invalidated the portion of the regulation requiring exporters to pay the HMT and that it had no effect on the documentation requirements for requesting refunds.<sup>392</sup> The court also found "that Customs retains the authority under the HMT statute to amend and enforce its refund regulation as applied to export HMT."<sup>393</sup> Accordingly, the Federal Circuit affirmed the decision of the CIT.<sup>394</sup>

The dissent contended that the logic of CBP with respect to documentation requirements was flawed.<sup>395</sup> In this case, CBP had an electronic record that showed a refund due to Chrysler for pre-July 1, 1990 export payments, yet because neither Chrysler nor CBP had paper records to confirm the accuracy of this electronic record, CBP chose to withhold the refund.<sup>396</sup> The dissent argued that "[t]he presumption of correctness of official records applies to the

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384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* at 1333–34.

389. *Id.* at 1334.

390. 523 U.S. 360 (1998).

391. *Chrysler Corp.*, 592 F.3d at 1334 (arguing that it was a continued violation to put the burden of submitting documentation on Chrysler).

392. *See id.* at 1335 ("And we [have] expressly recognized Customs' continued authority to prescribe the regulations in administering refunds . . .").

393. *Id.*

394. *Id.* at 1338.

395. *Id.* at 1339 (Newman, J., dissenting).

396. *Id.* at 1338–39.

government as well as the governed<sup>397</sup> and that CBP should not, without good cause, “invoke its own record-keeping error as the ground for refusing Chrysler’s refund.”<sup>398</sup>

#### CONCLUSION

The 2010 term of the Federal Circuit with respect to appeals from the Court of International Trade was very active, with nineteen precedential decisions. And while most of the cases addressed issues surrounding U.S. and international antidumping law, including an important decision on the U.S. Department of Commerce policy of zeroing, the court heard a variety of trade-related matters ranging from agricultural disaster payments to due process. The growing importance of international trade in sustaining the U.S. economy, and the expanding scope of trade activities in collateral subject areas makes for fertile ground for an exciting docket in 2011.

Also of note, in 2010, the Federal Circuit began a new transnational training and communication “international series” that strives to identify best practices across appellate courts around the world. This series focuses mainly on patent-related issues; however, the lessons learned from this approach are very likely to spill over into the international trade docket and may shape the opinions of the judges for years to come.

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397. *Id.* at 1339 (citing *VWP of Am., Inc. v. United States*, 175 F.3d 1327, 1342 (Fed. Cir. 1999)).

398. *Id.* at 1340.