American University Law Review

Volume 63 | Issue 4 Article 6

2014

2013 International Trade Law Decisions of the Federal Circuit

Kevin J. Fandl

Recommended Citation

Fandl, Kevin J. "2013 International Trade Law Decisions of the Federal Circuit." American University Law Review 63, no.4 (2014):1375-1417.

2013 International Trade Law Decisions of the Federal Circuit

Keywords
Office of the U.S. Trade Representative, Federal court decisions, Foreign trade regulation, International law, International trade -- Economic aspects, Tariff -- Law & legislation -- United States, Antidumping duties -- Law & legislation -- United States

2013 INTERNATIONAL TRADE LAW DECISIONS OF THE FEDERAL CIRCUIT

KEVIN J. FANDL, J.D., PH.D.*

TABLE OF CONTENTS

INTRODUCTION

The 2013 term at the U.S. Court of Appeals for the Federal Circuit was replete with a variety of important international trade law decisions. As in past terms, the majority of cases addressed challenges to antidumping orders and administrative review processes. However, this term also included a significant case pertaining to alleged discrimination within the Harmonized Tariff Schedule.[1] Another case involved a complaint by U.S. lumber firms challenging the authority of the U.S. Trade Representative[2] (USTR). The court also addressed a unique First Amendment challenge to an

---

* Kevin J. Fandl is an Assistant Professor of Legal Studies and an Associate Professor of Strategic Management in the *Fox School of Business* at *Temple University*. He has taught as an Adjunct Professor at *American University* since 2005. He is an attorney admitted to practice in New York, Massachusetts and Washington, D.C.; Ph.D., in Public Policy at *George Mason University*; J.D., *American University Washington College of Law*; M.A., *American University School of International Service*; B.A., *Lock Haven University*; Fulbright Scholar. I would like to thank Amorie Rivera for her outstanding research assistance with this article.

1. *See* Rack Room Shoes v. United States, 718 F.3d 1370 (Fed. Cir. 2013) (finding that the appellants did not plead facts sufficient to make a plausible claim of discriminatory intent).

2. *See* Almond Bros. Lumber Co. v. United States, 721 F.3d 1320 (Fed. Cir. 2013) (holding that the U.S. Trade Representative has discretion to decide whether compensatory trade benefits are satisfactory).

antidumping order—arguing that a negative response to an administrative questionnaire should not be used against a party in a duty determination.[3] Additionally, six classification cases provided valuable insight into the U.S. Customs and Border Protection's ("Customs") discretion in identifying a proper tariff heading.

This Article is not organized in order of case significance, but rather on the content of the opinions. The first Part focuses on antidumping decisions—discussing ten precedential decisions. The second Part addresses classification issues—providing an overview of six precedential cases. The remaining two Parts address rule of origin and procedural cases. While many unique issues were raised at the Federal Circuit this term, the scope of the court's review and its deference to regulatory agencies was consistent with prior terms.

I. PRECEDENTIAL ANTIDUMPING CASES

In *Ashley Furniture Indus., Inc. v. United* States,[4] the United States had imposed an antidumping order on laminated woven sacks from China at a countrywide rate of 91.73%.[5] Zibo Aifudi Plastic Packaging Co, Ltd. ("Aifudi"), an exporter subject to this rate, applied to the U.S. Department of Commerce (Commerce) for a separate rate—claiming that it was not subject to control by the government of the People's Republic of China ("PRC").[6] Commerce accepted Aifudi's claim and established a preliminary separate rate of 64.28%.[7] Aifudi then withdrew from the administrative proceeding and asked that their confidential information submissions be destroyed. Commerce subsequently determined that Aifudi was subject to the country-wide rate because evidence no longer existed in the record to justify a separate rate. The question in *AMS Associates, Inc. v. United States*[8] was whether unverified evidence should be used by Commerce to justify establishing a separate antidumping duty rate.[9]

In response to the request of Aifudi's and others, Commerce initiated an administrative review of the antidumping order for a specific time period—naming Aifudi a mandatory respondent in the

3. *See* Ashley Furniture Indus., Inc. v. United States, 734 F.3d 1306 (Fed. Cir. 2013) (holding that the court was bound by precedent to find that the Byrd Amendment does not discriminate on the basis of a viewpoint).
4. 734 F.3d 1306 (Fed. Cir. 2013).
5. *Id.*
6. *Id.* at 1378.
7. *Id.*
8. 719 F.3d 1376 (Fed. Cir. 2013).
9. *Id.* at 1379.

review.[10] Aifudi provided both public and confidential answers to the questionnaires along with documents it had not provided in the original separate-rate finding.[11]

After receiving the responses, but prior to their verification, Commerce made a preliminary determination that Aifudi was eligible for a separate rate of only 0.68% due to an absence of control by the Chinese government.[12] Aifudi then withdrew from the review process and asked Commerce to destroy all the confidential information collected.[13] Commerce complied and, finding Aifudi noncompliant, assigned Aifudi the countrywide rate of 91.73%.[14] Commerce used Aifudi's withdrawal as an adverse factor in assigning them the countrywide rate.[15]

Following Commerce's decision to apply the countrywide rate to Aifudi, Shapiro Packaging, an importer of laminated woven sacks exported by Aifudi, argued that the countrywide rate should not apply to Aifudi based on the material provided to Commerce.[16] In reviewing Shapiro's claims, the court applied a substantial evidence standard to sustain the Court of International Trade's (CIT) finding that Commerce had properly found Aifudi did not carry its burden of proving entitlement to a separate rate.[17] According to the court, evidence that the company at issue experiences neither de jure nor de facto government control must be offered to rebut the presumption of government control.[18] Because Aifudi requested its documentation to be destroyed, Commerce no longer possessed the evidence required to rebut the presumption of government control.[19]

The court concluded that Shapiro's argument that Commerce should have used the unverifiable information was erroneous.[20] Instead, under the relevant statute, Commerce was clearly directed that when submitted "information cannot be verified . . . [it shall] use the facts otherwise available."[21] The court held that Commerce

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 1378–79.
15. *Id.* at 1379.
16. *Id.*
17. *Id.*
18. *Id.*
19. *See id.* (noting that removal of Aifudi's confidential information "left Commerce unable to verify information that Aifudi had earlier provided in order to establish its eligibility for a separate rate").
20. *Id.* at 1380.
21. 19 U.S.C. § 1677e(a)(2)(D) (2012).

properly applied the countrywide rate when the separate rate information could not be verified.[22]

Though the First Amendment and antidumping laws rarely converge at the CIT, in the case of *Ashley Furniture Industries, Inc. v. United States*, this is precisely what happened. Here, the question presented to the court was whether a company's right to free speech was violated after it took a neutral or contrary position on an International Trade Commission (ITC) antidumping questionnaire given to domestic producers.[23]

Pursuant to a petition that the U.S. furniture manufacturers and labor unions filed, Commerce began an antidumping investigation of certain Chinese wooden bedroom furniture manufacturers.[24] At the same time, the ITC began investigating whether the domestic wooden bedroom furniture industry had been harmed by unfair import competition from China to determine if it needed to distribute questionnaires in accordance with the Byrd Amendment (now repealed).[25] To aid in its investigations, the ITC sent questionnaires to various domestic producers.[26] The questionnaires asked whether the domestic producer supported the petition.[27] Ashley Furniture indicated opposition to the petition, while Ethan Allen Furniture indicated that they took no position.[28]

The ITC nevertheless determined that there had been an injury and prepared a list of affected domestic producers ("ADPs") to receive a portion of the antidumping duties.[29] However, Ethan Allen and Ashley Furniture were precluded from the list due to their answers to the petition.[30] The ITC based its decision on a finding that neither was an "interested part[y] in support of the petition" within the meaning of the Byrd Amendment.[31] Both parties brought claims, which were dismissed by the CIT for failure to state a claim.[32] Each party then appealed to the Federal Circuit and the cases were consolidated.[33] On appeal, both parties argued

22. *AMS Assocs., Inc.*, 719 F.3d at 1380.
23. Ashley Furniture Industries, Inc. v. United States, 734 F.3d 1306, 1310 (Fed. Cir. 2013).
24. *Id.* at 1308.
25. *Id.* (referring to 19 U.S.C. § 1675c(a), (d)(1) (2000), *repealed by* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 760(a), 120 Stat. 4, 154 (2006)).
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 1308–09.
30. *Id.* at 1309.
31. *Id.*
32. *Id.*
33. *Id.*

that they had, in fact, supported the petition within the meaning of the statute, or, in the alternative, that the Byrd Amendment violated the First Amendment.[34]

The Federal Circuit affirmed the CIT on all claims. First, the court dismissed the First Amendment challenge[35]—agreeing with the CIT that the issue was previously determined in *SKF USA v. U.S. Customs and Border Protection*.[36] *SKF* held that rewarding only those producers who had supported an ITC petition did not violate the First Amendment.[37]

The court also held that both Ethan Allen and Ashley Furniture's answers had not supported the petition under the plain meaning of the Byrd Amendment.[38] The majority rejected the dissent's argument that merely completing the questionnaire was indicative of support—finding such a conclusion to be an "odd construction" of the Amendment.[39] Instead, the court found that the statutory language requiring a producer to "indicate support" was conclusive: the answer in the domestic producer's questionnaire must show support.[40]

In his dissenting opinion, Judge Clevenger argued that merely responding to the Commission's questionnaire is indicative of support. According to him, the question at issue was not meant to be dispositive as to whether the domestic producer was an affected domestic producer.[41] Instead, the question, pre-dating the Byrd Amendment, was whether the petition has been filed "on behalf of the domestic industry" in accordance with § 1673a(c)(1)(A)(ii).[42] Judge Clevenger concluded that Congress never intended the support/oppose question to be a test for whether a producer might receive Byrd Amendment distribution funds.[43]

Judge Clevenger also suggested that the majority's construction of the Byrd Amendment, which allowed for penalizing producers based on their answers, posed serious constitutional problems.[44] Thus, in

34. *Id.*
35. *Id.* at 1310.
36. 556 F.3d 1337 (Fed. Cir. 2009).
37. *See id.* at 1359–60 (explaining that the Byrd Amendment is within the constitutional power of Congress to enact, furthers the government's substantial interest in enforcing trade laws, and is not overly broad).
38. *Ashley Furniture*, 556 F.3d at 1311.
39. *Id.*
40. *Id.*
41. *Id.* at 1312 (Clevenger, J., dissenting).
42. *Id.*
43. *Id.*
44. *Id.* at 1314.

Judge Clevenger's view, the Amendment should be construed so as to avoid unconstitutional results.[45]

In another case of interpretation, the court addressed Commerce's use of the "constructed value" method for determining dumping. *Chevron* deference will generally apply to Commerce's interpretation of antidumping statutes.[46] In *Atar S.R.L. v. United States*,[47] the United States argued in support of Commerce's interpretation of the "constructed value" clause of the antidumping statute.[48] Commerce had issued an antidumping order on certain pasta from Italy.[49] In the ninth administrative review of the order, Commerce assessed an antidumping duty margin of 18.18% for Atar.[50] In assessing the margin, Commerce found that it could not assess a normal value and were required to use a constructed value approach.[51] Unable to use the first two statutory options for calculating a constructed normal value, Commerce relied on the last option, which allowed "any . . . reasonable method" to construct a normal value so long as the profit used did not "exceed the amount normally realized by exporters."[52]

In order to construct a normal value, Commerce decided to assess Atar's margins by using the preferred method, which is "based on actual sales of a foreign like product made in the ordinary course of trade."[53] This information was integrated alongside a second statutory option for constructing a value that used "the weighted average of the actual costs incurred and profits realized by the other exporters under review."[54] The distinction between the two sets of data was that the information used for the "other exporters" was from six companies identified in a prior administrative review, not the review of Atar.[55] Atar challenged the Final Result in the CIT.[56]

45. *Id.* at 1315.
46. *See, e.g.*, Pesquera Mares Australes Ltda. v. United States, 266 F.3d 1372, 1381 (Fed. Cir. 2001) (holding that the antidumping proceedings conducted by Commerce are entitled to *Chevron* treatment); Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1284 (2008) (noting that *Chevron* deference is the "presumption that Congress delegates interpretive authority to administrative agencies when it commits regulatory statutes to agency administration").
47. 730 F.3d 1320 (Fed. Cir. 2013).
48. *Id.* at 1326 (referring to 19 U.S.C. § 1677 (2006)).
49. *Id.* at 1322.
50. *Id.*
51. *Id.*
52. *Id.* (noting that the provision in § 1677b(e)(2)(B)(iii) limiting the allowable profit is also described as the "profit cap").
53. *Id.* at 1323 (citing 19 U.S.C. § 1677b(e)(2)(A)).
54. *Id.* at 1322 (citing 19 U.S.C. § 1677b(e)(2)(B)(ii)).
55. *Id.* at 1323.
56. *Id.*

The CIT found Commerce's decision to exclude below-cost sales "arbitrary" and remanded for recalculation of the value.[57] Commerce then included the below-cost sales but limited the data used from the prior administrative review to only those respondents who had earned a net profit.[58] The CIT remanded again.[59] In its second response, Commerce maintained its previous position regarding the decision to use only respondents with net profits in its calculation.[60] The CIT remanded a third time, reasoning that the use of only two net-profit producers "heavily skewed Commerce's weighted-average profit cap figure" and failed to meet the statutory "profit-cap."[61] In its third response, Commerce used all six respondent's data, including below-cost sales, resulting in an antidumping duty margin of 11.76%—the Government appealed.[62]

The Federal Circuit reversed the CIT's decision and found substantial evidence to support the reasonableness of the means that Commerce used in calculating Atar's normal value.[63] Affording *Chevron* deference, the court found Commerce's decision to exclude below-cost sales reasonable in light of the fact that it had partially employed statutory option two,[64] which normally requires the exclusion of below-cost sales data.[65]

Finding that Congress had not barred exclusion of below-cost sales data, the court held that the CIT had misread a Statement of Administrative Action ("SAA") provision by taking it out of context and using it as a basis for remand.[66] Concluding that the SAA provision the CIT used was not the "unambiguously expressed intent" of Congress, the court explained that it could not be used to challenge Commerce's claim.[67] According to the court, Commerce

57. *Id.*
58. *Id.* at 1323–24.
59. *Id.* at 1324.
60. *Id.*
61. *Id.*
62. *Id.* at 1325.
63. *Id.* at 1326.
64. *Id.* at 1326–27.
65. 19 U.S.C. § 1677b(e)(2)(B)(ii) (2012). As indicated by the Statement of Administrative Action ("SAA"), accompanying the Uruguay Round Agreements Act, "with regard to option (ii), the consideration of below-cost sales of a foreign producer's competitors could allow that producer to 'benefit perversely from its own unfair pricing.'" *Atar*, 730 F.3d at 1327 (quoting H.R. Rep. No. 103-316, at 840 (1994)).
66. *Atar*, 730 F.3d at 1328 (clarifying that the SAA provision allowed Commerce to exclude below-cost sales).
67. *See id.* at 1329 (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984)).

acted reasonably in its calculation, and the CIT should have deferred to the Agency's expertise on the matter.[68]

In *Changzhou Wujin Fine Chemical Factory Co. v. United States*,[69] the court determined that, absent reasonable justification, an Adverse Facts Available ("AFA") duty rate may not be calculated as a deterrent or a punishment for cooperating respondents.[70] The case involved an antidumping investigation of 1-hydroxyethylidene, 1-diphosphonic acid ("HEDP") prompted by Compass Chemical's filing of a petition.[71] Quantity and Value ("Q&V") questionnaires were sent to ten exporters.[72] Four of the ten responded along with a fifth voluntary respondent.[73] From the five responses received, the Wujin Water and Kewei companies were chosen for individual investigation.[74] While Commerce assigned a single state-wide rate for all exporters and producers involved in proceedings stemming from non-market economy countries, including China, Wujin and Jiangsu filed for a separate rate, both proving independence from state control.[75]

Commerce initially established a preliminary rate of 24.3% for Wujin Water in the individual investigation.[76] Kewei did not respond and was assigned an AFA rate of 72.42%.[77] Commerce set Kewei's rate as the China-wide rate applicable to all Chinese exporters and producers that did not qualify for separate rates.[78] Meanwhile, it assigned Wujin Water's rate as the rate applicable to Wujin and Jiangsu in accordance with 19 U.S.C. § 1673d(c)(5)(A).[79] Commerce

68. *See id.* (recognizing that antidumping determinations have long "involve[d] complex economic and accounting decisions of a technical nature, for which agencies possess far greater expertise than courts" (quoting Fujitsu Gen. Ltd. v. United States, 88 F.3d 1034, 1039 (Fed. Cir. 1996))).

69. 701 F.3d 1367 (Fed. Cir. 2012).

70. *See id.* at 1378 (stating that deterrence does not override the greater purpose behind the AFA rate, which is to calculate the dumping margins as accurately and as fairly as possible).

71. *Id.* at 1370.

72. *Id.*

73. *Id.*

74. *Id.* Commerce had originally found that BWA was one of the largest exporters of HEDP from China based on the questionnaire responses; however, BWA was ineligible to be individually investigated due to BWA's refusal to permit public disclosure of its supplier. *Id.* As a result, Commerce selected Wujin Water and Kewei as the mandatory respondents. *Id.*

75. *Id.* at 1370–71.

76. *Id.* at 1371.

77. *Id.*

78. *Id.* at 1370.

79. *Id.* at 1371. In dealing with non-market economies like China, Commerce presumes that exporters and producers are state-controlled unless they prove otherwise, and assigns them a state-wide rate. *Id.* at 1370. Here, because Kewei failed to demonstrate its independence from state control, Commerce imputed Kewei's rate of 72.42% to the "China-wide entity" rate. *Id.* at 1371.

justified the separate rate by distinguishing Jiangsu and Wujin from the China-wide entities and by calculating their rate as a weighted-average margin based on the experience of mandatory respondents, excluding rates based on AFA.[80]

After Wujin submitted all of its supporting information, it was found to actually have a de minimis rate and not the 24.3% preliminarily assigned.[81] Given this new information, Commerce turned to § 1673d(c)(5)(B), which allowed it to "use any reasonable method to establish the estimated all-others rate" applicable to those exporters and producers who were not individually investigated.[82] However, the appellants challenged the simple averaging of the de minimis rate and Kewei's AFA rate (36.21%) as being punitive because it imposed a noncompliant AFA on a party who had acted in full compliance with the investigation.[83]

The CIT remanded the case to Commerce to recalculate the separate rate.[84] In its recalculation of the AFA rate, Commerce included Wujin's verified normal data and U.S. price data obtained from BWA Water Additives U.S. LLC (BWA), one of the five original Q&V respondents.[85] Although BWA was not part of the mandatory investigation, it held the largest share of the HEDP market.[86] BWA was not chosen initially because it had refused to provide information relating to its suppliers.[87]

Using the new data, Commerce determined that the AFA was 30.94% and, when averaged with Wujin's de minimis rate, resulted in a new separate rate of 15.47%.[88] Wujin and Jiangsu challenged Commerce's usage of new U.S. price data in its recalculated separate rate and claimed that this was beyond the scope of the remand order.[89]

---

80. *Id.* at 1371. Commerce found that Jiangsu and Wujin had provided sufficient evidence of their independence from state control and thus calculated their rate separately pursuant to 19 U.S.C. § 1573d(c)(5)(A), which provides that those rates should be calculated as "a weighted-average margin based on the experience of mandatory respondents and excluding any de minimis or zero rates or rates based on [AFA]." *Id.* (alteration in original) (quoting 1-Hydroxyethylidene-1, l-Diphosphonic Acid From the People's Republic of China, 73 Fed. Reg. 62,470, 62,473 (Oct. 21, 2008)) (internal quotation marks omitted).
81. *Id.* at 1371–72.
82. *Id.* at 1372 (quoting 19 U.S.C. § 1673d(c)(5)(b) (2006)).
83. *Id.* at 1372.
84. *Id.*
85. *Id.* at 1373.
86. *Id.* at 1370.
87. *Id.*
88. *Id.* at 1373.
89. *Id.* at 1373–74.

On appeal, the Federal Circuit found that the usage of new U.S. price data did not go beyond the scope of the remand order.[90] However, the court held that the reasoning behind the recalculation, although supported by substantial evidence, was arbitrary and capricious.[91] Regarding the facts, such as the usage of one company's data over another's, the court employed the "substantial evidence" standard.[92] Regarding the actual reasoning used, the court applied the "arbitrary and capricious" standard.[93]

The court found that it was reasonable for Commerce to abandon the data it had originally used in light of the fact that it could not be verified.[94] However, it rejected the Government's argument that imposing an AFA rate was required to serve a deterrent purpose.[95] Central to the court's reasoning was its explanation that "deterrence is not a sufficient justification when calculating a rate that solely affects cooperating respondents."[96] It reiterated that simple averaging is acceptable, but the usage of a rate created only to deter a cooperating respondent is not permissible.[97]

Lastly, the court found the Agency's reasoning arbitrary and capricious when, in accordance with law, the "overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible."[98] The court did not agree with the Government that the AFA statute requires some AFA rate for general deterrence purposes; instead, the court found that AFA rates are statutorily disfavored and only applicable when they "bear a reasonable relationship to the party's actual business practices."[99] The court regarded Commerce's behavior of "cherry-

90. *See id.* at 1375 (finding that Commerce's recalculation of the U.S. price using other sources of data was proper and within the scope of the remand).
91. *Id.* at 1379.
92. *Id.* at 1377. An appellate court uses the "substantial evidence" standard to review a lower's courts factual determinations in considering whether the holding was based on substantial evidence. *Id.*
93. *Id.* The majority asserted that the proper standard of review of the Agency's reasoning, a matter separate from review of the factual evidence, was the "arbitrary and capricious" standard. *Id.* Under this standard, a reviewing court considers whether the agency's reasoning was based on something reasonable or whether it was arbitrary. The reviewing court then applies the substantial evidence test to determine if there is substantial evidence of arbitrary or capricious action. *Id.*
94. *Id.* at 1372, 1373 n.3, 1375.
95. *Id.* at 1378.
96. *Id.* at 1376 (referring to the appellant's argument challenging the Agency's reasoning behind the recalculation).
97. *Id.* at 1378.
98. *Id.* (quoting Parkdale Int'l v. United States, 475 F.3d 1375, 1380 (Fed. Cir. 2007)).
99. *Id.* at 1379 (citing Gallant Ocean v. United States, 602 F.3d 1319, 1323 (2010)).

pick[ing]" data, for the sole purpose of creating the most adverse effect possible, as clearly arbitrary and capricious.[100]

In his dissenting opinion, Judge Reyna argued that the majority made three crucial errors in its determination. First, the judge found that it was an error for the majority to address the AFA issue because it was neither appealed nor brought before the court in a proper manner.[101] In fact, what appellants argued against was the usage of certain data—namely, the changed U.S. price—and not Commerce's methodology in recalculating the AFA rate.[102] Judge Reyna accused the majority of improperly expanding its review beyond the scope of the appeal.[103] Further, even if appellants were challenging Commerce's method for determining the AFA in this case, Judge Reyna asserted that the methods were also justified.[104] According to Judge Reyna, the AFA rate was not directly applied and served the general purpose of the statute.[105]

Second, Reyna accused the majority of misinterpreting the AFA statute—arguing that it was not meant solely for noncompliant respondents, but was also a tool to be used by the Agency to avoid absurd results. Absurd results, according to Judge Reyna, would include the application of de minimis rates to a respondent who does not deserve it based on insufficient data.[106]

Third, Judge Reyna argued that using the "arbitrary and capricious" standard to guide the decision, as opposed to the "substantial evidence" standard, was incorrect.[107] Judge Reyna maintained that if the majority had focused on the issue presented, which was an issue of fact, Commerce would have won the argument based on the evidence.[108] Judge Reyna accused the majority of stripping Commerce of the tools necessary to make the recalculated decision on remand and warned that failing to defer to Commerce's administrative authority could result in worse results for the appellants.[109]

---

100. *Id.*
101. *See id.* at 1380 (Reyes, J., dissenting) (noting that the appellant had conceded the issue in both the underlying administrative proceedings and in the CIT).
102. *Id.* at 1380–81.
103. *Id.* at 1380.
104. *Id.* at 1383, 1385.
105. *See id.* at 1385 (explaining that it was reasonable for Commerce to select an AFA rate sufficiently adverse within the bounds of the statute).
106. *Id.* at 1380.
107. *Id.*
108. *See id.* at 1380–81 (suggesting that by denying Commerce the deference it was owed under the proper standard of review, the majority's holding was contrary to court precedent).
109. *See id.* at 1381 n.2 (illustrating how the majority's opinion would leave the appellant with a higher margin than it obtained in either the initial investigation or the remand).

In another antidumping case focused on China, *Global Commoddity Gropu LLC v. United States*,[110] an importer of citric acid and certain citrate salts appealed a determination that its blend of citric acid falls outside the scope of the antidumping order because the Chinese-originated component consists of less than the order's minimum threshold of 40%.[111] Following an investigation, Commerce issued an antidumping order on citric acid and certain citric salts from Canada and the PRC.[112] The scope of the order included the following: (1) all grades of the unblended product; (2) blends of the product; and (3) blends with other ingredients, "such as sugar, where the unblended form(s) . . . constitute 40 percent or more, by weight, of the blend."[113]

It was determined that Global Commodity Group's ("Global") merchandise was comprised of 35% citric acid from the PRC and 65% citric acid from other countries.[114] Global claimed that the citric acid found to be from other countries was considered "other ingredients" and was subject to the scope condition requiring 40% on the unblended form.[115] After a scope inquiry, Commerce found the merchandise to be commingled and not blended, noting that the Harmonized Tariff Schedule of the United States ("HTSUS") classification is different for commingled versus blended products and that Global cannot "have it both ways" in this regard.[116] Global appealed and claimed that the interpretation "impermissibly expand[ed] the scope of the order."[117] Affording deference to Commerce's interpretation, the CIT found the interpretation to be within the scope of the order.[118] Global appealed.[119]

The Federal Circuit began its analysis by re-emphasizing the highly fact-intensive nature of a scope inquiry, reasoning that such an inquiry should be subject to the "substantial evidence" standard on review.[120] While the court sympathized with Global's interpretation of the order due to the reference of blends of one kind of citric

110. 709 F.3d 1134 (Fed. Cir. 2013).
111. *Id.* at 1335.
112. *Id.*
113. *See id.*
114. *Id.* at 1136.
115. *Id.*
116. *Id.* at 1136–37.
117. *Id.* at 1138.
118. *Id.* at 1137.
119. *Id.*
120. *Id.* at 1138.

products with another, it essentially gave great deference to Commerce's interpretation.[121]

The court reasoned that the term "such as sugar" in the order excluded citric-like products and hence the 65% citric acid found from other countries in Global's merchandise.[122] The court also found Commerce's HTSUS interpretation reasonable although not dispositive.[123] Lastly, the court held that Commerce had not expanded the scope of the order because its application of the interpretation given in the scope inquiry only included the citric acid from PRC, thereby meeting the two limitations of the order.[124] Commerce's findings were found to be reasonable and the CIT decision was affirmed.[125]

In *Itochu Building v. United States*,[126] the issue before the court was whether Commerce could use a failure to reply to a request for information regarding an administrative review of an antidumping order as a bar to challenge the results of that review.[127] Prior to *Itochu Building*, Commerce issued an antidumping order on certain steel nails from China.[128] The order and initial review was completed in August 2008, and the order applied to all imports as of January 23, 2008.[129] In its first administrative review of the order, Mid Continent (the petitioner who initially brought the challenge) sought to exclude four types of steel nails by asking Commerce to initiate a changed circumstance review.[130] The request to Commerce stated that the revocation on the specified types of nails became effective after January 23, 2008—limiting its applicability to imports not subject to final duty determinations.[131] Itochu submitted comments in support of Mid Continent's request.[132] Itochu also requested that the changed circumstance review be expedited.[133]

---

121. *See id.* at 1139 (acknowledging that Global's "interpretation of the Orders [wa]s not entirely frivolous").
122. *See id.* at 1135–36, 1139 (highlighting that "sugar" was listed as an example of "other" ingredients, which provides strong evidence that the order excluded citric-like products).
123. *Id.* at 1139–40.
124. *See id.* at 1140 (referring back to the two limitations of the order: the physical scope of the product and the country of origin).
125. *Id.*
126. 733 F.3d 1140 (Fed. Cir. 2013).
127. *Id.* at 1145.
128. *Id.* at 1142.
129. *Id.*
130. *Id.* at 1142–43.
131. *Id.*
132. *Id.* at 1143.
133. *Id.*

Commerce made a preliminary determination in support of Mid Continent and Itochu's position but declined to change the effective date of the order.[134] The preliminary determination stated that the effective date would be August 1, 2009—the date after the first completed administrative review.[135] In the preliminary determination, Commerce allowed comments on the finding for up to fourteen days.[136] Itochu did not comment.[137] Commerce issued its final determination, which maintained a later effective date than Itochu initially requested.[138] Itochu challenged the final date, but the CIT dismissed the claim and found that Itochu had waived any objection by its silence during Commerce's request for comments, thereby failing to exhaust the administrative remedies available.[139]

Reviewing under an "abuse of discretion" standard, the Federal Circuit held that the CIT's dismissal for failure to exhaust its administrative remedies was inappropriate.[140] The court described two reasons why a party might not have to exhaust their administrative remedies: (1) where the review would be "ineffectual"; and (2) when the issue presented is a "pure question of law" that requires no further findings of fact.[141]

The court concluded that Itochu's comments after the preliminary determination would have been "ineffectual," or futile, as there were no comments made available to Commerce that had not been brought forth prior to the determination.[142] In essence, no other comment from Itochu "would have been significant to Commerce's consideration."[143] The court also noted that Itochu's interest in a speedy determination would not have been served by comments, since such comments could have delayed the determination for up to 270 days.[144] Given Itochu's interests and the futility of commenting on the issue, the Federal Circuit concluded that the exhaustion

134. *Id.* at 1143–44.
135. *Id.* at 1144.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 1146.
141. *Id.* (reasoning that when an issue is a pure question of law, requiring exhaustion may not serve any agency's interest and, moreover, could result in a delay harming the agency).
142. *See id.* (noting that Commerce did not mention it rejected Itochu's request for a changed circumstance review because the company failed to make additional factual or legal arguments; rather, Commerce not only rejected Itochu's request outright, it simultaneously defended the same position against review in a different case).
143. *Id.*
144. *See id.* at 1147 (observing that it would only take forty-five days for Commerce to provide its final determination if it did not receive any comments).

doctrine could not bar Itochu's claim and that dismissal by the CIT was inappropriate.[145]

In an interesting appeal brought by Target Corporation and the United States, the court considered whether an antidumping order on a single product includes mixed goods of which the subject product comprises a portion.[146] In *Mid Continent Nail Corp. v. United States*,[147] Target Corporation ("Target") initiated a scope inquiry to determine whether a tool kit containing nails subject to an antidumping order should be excluded from that order as "mixed media."[148] Mixed media refers to an item whose components are both subject and non-subject to an antidumping order.[149] This was despite the fact that no such exception existed in the original order.[150] There was no dispute that the nails were of the type subject to the order but their inclusion in a larger collection of items made them a small portion of the total value of the tool kit.[151] Commerce interpreted the order to exclude mixed media items and Mid Continent challenged the finding at the CIT.[152] The CIT concluded that the mere fact that mixed media items were not explicitly mentioned in the order did not mean that Commerce had the authority to exclude them from the order.[153] Accordingly, the CIT remanded the case back to Commerce to interpret the scope of the order.

Commerce found for Target again on remand after conducting a mixed-media inquiry evaluating the following factors: (1) the practicability of separating/repacking the merchandise; (2) the value of the subject merchandise in comparison to the whole; (3) the use

145. *Id.*
146. *See* Mid Continent Nail Corp. v. United States, 725 F.3d 1295, 1298 (Fed. Cir. 2013).
147. 725 F.3d 1295 (Fed. Cir. 2013).
148. *Id.* at 1298.
149. Walgreen Co. of Deerfield, IL v. United States, 33 C.I.T. 1620 (2009), *aff'd*, 620 F.3d 1350 (Fed. Cir. 2010). In a mixed-media inquiry, Commerce first determines whether the item is a new product composed of subject and non-subject materials, or whether the item's components remain independent and are merely sold as a unit. Once Commerce labels the item as a mixed-media set, it then assesses whether the subject material included in the item is a minor component. *See* Mark David Davis et al., *U.S. Court of International Trade Overview: Non-Market Economy Cases in 2011*, 44 GEO. J. INT'L L. 15, 46 (2012).
150. *Mid Continent Nail Corp.*, 725 F.3d 1298.
151. *See id.* at 1299 ("In each case, Target estimated that the nails represented between 0.8% and 3.3% of the cost of the tool kit and between 0.5% and 1.8% of its retail value.").
152. *Id.*
153. *Id.* (citing the CIT's ruling in Mid Continent Nail Corp. v United States, 770 F. Supp. 2d 1372 (Ct. Int'l Trade 2011)).

of the component compared to the use of the merchandise as a whole; and (4) any other relevant factors that might arise.[154]

The CIT rejected Commerce's findings, remanding again and explaining that the final order contained no reference to a mixed-media inquiry, which meant Commerce lacked authority to conduct such an inquiry.[155] Therefore, although the nails subject to the antidumping order mixed with tools not subject to the order in the tool kit, Commerce could not exclude the nails from the scope of the order.[156] Commerce revised its ruling to comply and the CIT affirmed.[157] Target and the United States appealed to the Federal Circuit.[158]

The Federal Circuit noted that Commerce enjoyed broad powers in clarifying its antidumping orders;[159] however, Commerce could not clarify an order contrary to the order's terms or change its scope.[160] The court found that the CIT erred in finding that the order could not be interpreted to include mixed-media inquiries, stating that "Commerce's practice of conducting mixed media inquiries falls within its 'responsibility . . . to determine the scope of the final orders'."[161]

While the court disagreed with the CIT's finding, the court agreed that Commerce had not provided sufficient reasoning for why the toolbox items in Target's scope inquiry fell outside the order.[162] The court rejected the "newly announced criteria" for interpreting mixed media inquiries, especially because it was developed after the fact.[163]

Interestingly, the court outlined how Commerce should go about determining scope in inquiries such as this one. First, the court determined that Commerce should look to the literal terms of the order.[164] If there is ambiguity, Commerce may look at the regulatory history or 19 C.F.R. § 351.225(k)(1) materials,[165] such as physical

154. *Id.* at 1299–1300.
155. *Id.* at 1300.
156. *Id.*
157. *Id.* (citing the CIT's ruling in Mid Continent Nail Corp. v. United States, 34 I.T.R.D. 1839 (Ct. Int'l Trade 2012)).
158. *Id.*
159. *See id.* (citing Novosteel SA v. United States, 284 F.3d 1261, 1269 (Fed. Cir. 2002)).
160. *See id.* (citing Global Commodity Grp. LLC v. United States, 709 F.3d 1134, 1138 (Fed. Cir. 2013)).
161. *Id.* at 1301 (quoting Walgreen Co. of Deerfield, IL v. United States, 620 F.3d 1350, 1355 (Fed. Cir. 2010)). In *Walgreen*, the court upheld Commerce's conclusion that the tissue paper subject to an antidumping order, when mixed with non-subject wrapping paper, remained within the scope of the order. 620 F.3d at 1356–57.
162. *Mid Continent Nail Corp.*, 725 F.3d at 1302.
163. *Id.*
164. *Id.*
165. 19 C.F.R. § 351.225(k)(1)(2013) (noting that such materials include "the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission").

descriptions in the order, material from its investigation, prior scope determinations, and so on.[166] If those materials are not dispositive, Commerce may look to § 351.225(k)(2), which includes such factors as (1) materials or the product's characteristics, (2) the expectations of the ultimate purchaser, (3) the channels of trade in which the product will move, and (4) the manner of advertising.[167] Any product that is substantially transformed in the merchandise will not be subject to the order.[168]

While the court did not dictate the outcome of the remand, it indicated that a strong presumption arises for including the toolbox nails as subject to the order.[169] This presumption derived from the language of the order and could only be rebutted by "published guidance issued prior to the date of the original antidumping order."[170] The requirement of published documents as a basis for the ruling complied with the ideas of notice and avoids the "inherently arbitrary nature of unpublished ad hoc determinations."[171] In that spirit, Commerce could use HTSUS subheadings or prior scope rulings that had been made publicly available.[172] The case was again remanded so that Commerce could revisit the mixed-media inquiry as it applied to Target's compliance with the court's guidelines.[173]

The court in *NSK Corp. v. U.S. International Trade Commission*[174] addressed a sunset review of ball bearing imports from several countries in which the ITC concluded that imports from Japan and the United Kingdom (UK) were materially injuring domestic producers in the United States.[175] The CIT rejected this conclusion and ultimately remanded the case four times until the ITC finally issued a finding of no material injury from the UK and Japan.[176]

In 1989, Commerce issued an antidumping order on ball bearings from France, Germany, Italy, Japan, Romania, Singapore, Sweden,

---

166. *Mid Continent Nail Corp.*, 725 F.3d at 1302.
167. *Id.* (citing 19 C.F.R. § 351.225(k)(2)).
168. *See id.* (defining "substantially transformed" to mean the merchandise's properties have been altered to the extent the merchandise can no longer be considered the same product originally subject to the antidumping order).
169. *Id.* at 1304.
170. *Id.*
171. *Id.* (quoting Morton v. Ruiz, 415 U.S. 199, 232 (1974)).
172. *Id.*
173. *Id.*
174. 716 F.3d 1352 (Fed. Cir. 2013). The extensive history of the case includes the following prior decisions by the CIT: *NSK Corp. v. United States* (*NSK I*), 577 F. Supp. 2d 1322 (Ct. Int'l Trade 2008); *NSK Corp. v. United States* (*NSK II*), 593 F. Supp. 2d 1355 (Ct. Int'l Trade 2008); and *NSK Corp. v. United States* (*NSK III*), 637 F. Supp. 2d 1311 (Ct. Int'l Trade 2009).
175. *NSK Corp.*, 716 F. 3d at 1354.
176. *Id.* at 1355.

Thailand, and the UK.[177] Its first sunset review in 1999 affirmed that it could not lift the antidumping order for France, Germany, Italy, Japan, Singapore and the UK without causing material injury to the U.S. domestic industry for ball bearings.[178] During its second sunset review, the Commission removed Singapore from the order but issued affirmative determinations for France, China, Germany, Italy, Japan and the UK.[179]

The ITC reached its initial determination after cumulating the subject imports from these countries.[180] It concluded that it could not revoke the order because it would cause material injury to the United States' ball bearings industry.[181] Further, the ITC found that the producing countries maintained an excess capacity for producing ball bearings and, therefore, the United States was in a vulnerable position because of high domestic prices coupled with large amounts of ball bearing imports.[182] Japan and the UK appealed the finding.[183]

In *NSK Corp. v. United States*[184] (*NSK I*), the CIT affirmed that the products would have competitive overlap with domestically produced products, that volume would increase upon revocation, and that these facts would likely have price effects.[185] However, the CIT remanded to allow Commerce to address whether non-subject imports also affect the market and whether this displacement in the market would allow Commerce to remove the antidumping order without the recurrence of material injury to the domestic sector.[186]

Following the outcome of *Mittal Steel v. United States*,[187] Commerce argued that whether the order would actually lead to the elimination of the good was not relevant, as the focus should be, as the *Mittal* court held, on "cause of injury in the past, not the prospect of

177. *Id.* at 1354–55.
178. *Id.* at 1355–56.
179. *Id.* at 1356 & n.1.
180. *Id.* at 1356.
181. *Id.* at 1351, 1355.
182. *Id.*
183. *Id.*
184. 577 F. Supp. 2d 1322 (Ct. Int'l Trade 2008).
185. *NSK Corp.*, 716 F. 3d at 1357. The CIT defined the concept of price effects in an earlier case, *NSK I*, 577 F. Supp. 2d at 1345. Price effects include (1) underselling caused by importing merchandise that is cheaper than the equivalent domestic product and, similarly, (2) the significant depression of domestic product prices resulting from the import of subject merchandise. *Id.* at 1345.
186. *NSK Corp.*, 716 F.3d at 1357.
187. 542 F.3d 867, 876 (Fed. Cir. 2008) (holding that imports should be a substantial factor in injury, not trivial or incidental).

effectiveness in the future."[188] The CIT rejected this argument in *NSK Corp. v. United States*[189] (*NSK II*).

In an attempt to comply with the CIT, Commerce reopened the record.[190] In Commerce's first remand determination, it reaffirmed its original findings—determining that the domestic market was susceptible to adverse impacts if the order was removed.[191] It also found that non-subject imports were not likely to capture the market share of the subject-import if the order was removed.[192] In *NSK Corp. v. United States*[193] (*NSK III*), the CIT remanded again on the same basis as *NSK I*, asking for a "more focused analysis" of non-subject imports within the market.[194]

In its second remand determination, Commerce maintained its position, relying on various evidence regarding the UK's market share and its ability to sell and produce ball bearings.[195] Commerce again found the industry "vulnerable" and reached the same conclusion regarding non-subject imports in the market.[196] The CIT remanded again.[197] In the third remand determination, Commerce disagreed with, but conceded to, the CIT's conclusion that upon the revocation of the antidumping order, subject imports from the UK would not have an adverse effect on domestic industry.[198] However, Commerce maintained its position regarding Japan.[199] The CIT affirmed Commerce's decision regarding the UK, but remanded again accusing Commerce of "ignor[ing] the influence of non-subject imports in the market."[200] In its Fourth Remand Determination, Commerce held that both subject-imports from the UK and Japan would not have a significant impact upon revocation and again noted that the CIT's remand instructions "compelled" it to reach this decision.[201] The CIT affirmed.[202] Commerce appealed the

188. *NSK Corp.*, 716 F.3d at 1357; *see also Mittal Steel*, 542 F.3d at 876 (assessing the past injury caused by steel wire rod imported from Trinidad and Tobago).

189. 593 F. Supp. 2d 1355, 1359 (Ct. Int'l Trade 2008); *see also NSK Corp.*, 716 F.3d at 1358 (noting non-subject import analysis is appropriate when triggering factors are present). The phrase "triggering factors" refers to when a commodity product is central to the complaint and "price competitive non-subject imports are a significant factor in the market." *NSK II*, 593 F. Supp. 2d at 1359.

190. *NSK Corp.*, 716 F.3d at 1358.

191. *Id.*

192. *Id.*

193. 637 F. Supp. 2d 1311 (Ct. Int'l Trade 2009).

194. *Id.* at 1324.

195. *NSK Corp.*, 716 F.3d at 1360.

196. *Id.*

197. *Id.* at 1361.

198. *Id.*

199. *Id.*

200. *Id.* at 1362.

201. *Id.* at 1362–63.

CIT's decision and cross-appellants claimed that the finding for the UK and Japan should have been applicable to the remaining countries.[203]

After this lengthy back and forth between Commerce and the CIT, the principal issue before the Federal Circuit was, which standard of review to apply.[204] In cases where the CIT directs Commerce to reach a negative conclusion, as it did here, the court reviews that decision using a "substantial evidence" standard.[205] Applying this standard of review, the court found that substantial evidence supported Commerce's claim that the UK ball bearings would have discernable adverse impacts upon revocation of the order.[206] Because of this, the court stated that Commerce could cumulate the subject-imports of the UK with the remaining countries to make its calculation.[207] The court held that the CIT had erred in considering the weight of evidence against Commerce's position.[208] As the court noted, "when adequate evidence exists on both sides of an issue, assigning evidentiary weight falls exclusively within the authority of the Commission."[209]

The court did not deny the existence of evidence that would support the remand determinations on non-subject imports.[210] Instead, the court deferred to Commerce's determination of the weight to be accorded to such evidence.[211] It concluded that substantial evidence supported an affirmative determination for both the UK and Japan, and therefore reversed and vacated the CIT proceedings and findings from Commerce.[212] The court's action thus rendered the cross-appeal moot.[213]

The court in *Union Steel v. United States*[214] added a new facet to Commerce's controversial practice of "zeroing."[215] In an antidumping investigation, zeroing is the practice of eliminating

---

202. *Id.* at 1363.
203. *Id.* (noting that the Commission issued its decision under protest and appeared dissatisfied with the CIT's ruling regarding the Commission's decision to cumulate imports from the subject countries).
204. *Id.* The standard of review could be whether the CIT abused its discretion by remanding the Commission's determination regarding Japan and the UK, or whether there was substantial evidence to support the Commission's findings. *See id.*
205. *Id.*
206. *Id.* at 1366.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 1369.
212. *Id.*
213. *Id.*
214. 713 F.3d 1101 (Fed. Cir. 2013).
215. *Id.* at 1103.

margins between foreign domestic prices and U.S. import prices when the U.S. import price is higher than the foreign domestic price.[216] In other words, goods that are not dumped on U.S. markets and are in fact sold at a higher price than they are sold on the foreign market are "zeroed" and their margins are not included as offsets to the total dumping margin.[217]

The practice of zeroing has been challenged at the World Trade Organization (WTO) resulting in several panel and appellate body decisions that have decried the practice as a violation of the Antidumping Agreement.[218] Subsequently, the United States agreed to eliminate the practice of zeroing in initial antidumping investigations.[219] However, the practice is still applied in other contexts, such as "targeted dumping" and, as *Union Steel*, administrative reviews.[220]

Prior to the Uruguay Round Agreements Act of 1995 (URAA), the Department of Commerce had engaged in average-to-transaction methods to determine the dumping margin on imported merchandise in both investigations and administrative reviews.[221] After the URAA, Commerce continued to use the calculation method in administrative reviews; however, it employed average-to-average or transaction-to-transaction methods in antidumping investigations.[222]

The continued use of zeroing in administrative reviews (but not in investigations) was challenged in 2011 under the same order at issue in *Union Steel*.[223] In that instance, Union Steel made the same argument as in the Dongbu Steel case.[224] The court vacated and

216. *Id.* at 1103–04.

217. *See, e.g.*, Dongbu Steel Co. v. United States, 635 F.3d 1363, 1366 (Fed. Cir. 2011) (describing zeroing as a "controversial" methodology "historically" used by Commerce); Timken Co. v. United States, 354 F.3d 1338 (Fed. Cir. 2004) (providing a general definition of "zeroing").

218. *See, e.g.,* Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"),* ¶¶ 3(c), 6, 263(b), WT/DS294/AB/R (Apr. 18, 2006), *available at* http://www.worldtradelaw.net/reports/wtoab/us-zeroing(ab).pdf (explaining that the European Communities have accused the United States of violating the Antidumping Agreement several times due to the United States' practice of zeroing, and that the WTO has often agreed with the European Communities); *see also Union Steel*, 713 F.3d at 1105 (noting these challenges made to the international trade organizations).

219. *See Union Steel,* 713 F.3d at 1105 (citing Antidumping Proceedings: Calculations of the Weighted-Average Dumping Margin during an Antidumping Investigation, 71 Fed. Reg. 77,722 (Dec. 27, 2006)).

220. *Id.* at 1104. Note that South Korea lodged a complaint about this practice with the WTO in 2013. *See, e.g.,* Scott Flaherty, *Zeroing Faces Novel Test in WTO Row over Washer Duties*, LAW360 (Sept. 10, 2013), http://www.law360.com/articles/471407.

221. *Union Steel*, 713 F.3d at 1104.

222. *Id.*

223. Dongbu Steel Co. v. United States, 635 F.3d 1363, 1364, 1366 (Fed. Cir. 2011).

224. *Id.* at 1368.

remanded so that Commerce could explain "why the statutory language supports [an] inconsistent interpretation."[225] According to the standard of *Timken Co. v. United States*,[226] the court had previously held that the statutory provision at issue, 19 U.S.C. § 1677(35)(A), was ambiguous and noted that deference would be given to the Department's reasonable interpretation.[227] Commerce failed to provide a justification in the next case before the court,[228] and a voluntary remand was ordered in *Union Steel*, so that Commerce might again provide a reasonable interpretation.[229] On remand, Commerce, arguing before the CIT, provided that differing interpretations are an exception to the rule, but that the rule is generally interpreted to permit the use of zeroing.[230] The exception granted after the WTO settlement was not arbitrary but instead was a specific response to the "international obligation[s] [of] the Executive Branch."[231] The CIT found that Commerce had not abused its discretion by changing the method used in investigations but not in administrative reviews.[232]

The court reviewed the CIT's decision de novo, considering whether Commerce had provided substantial evidence to support its decision to apply zeroing to administrative reviews.[233] The court held that "Commerce's differing interpretation [was] reasonable because the comparison methodologies compute dumping margins in different ways and are used for different reasons."[234] The court agreed with the Government's argument that less specificity was required in investigations because more data is compiled and used—producing a risk of error that is easily fixed by offsetting.[235] The court stated that this logic did not apply to administrative reviews, which perform comparisons on an individual transaction basis and are meant to target the "masked dumping" that average calculations

225. *Id.* at 1372–73.
226. 354 F.3d 1334 (Fed. Cir. 2004).
227. *Id.* at 1342.
228. *See* JTEKT Corp. v. United States, 642 F.3d 1378, 1384–85 (Fed. Cir. 2011) (holding that although Commerce's actions were reasonable, the failure to provide a justification for these action required the Federal Circuit to vacate the law court's decision).
229. Union Steel v. United States, 713 F.3d 1101, 1105 (Fed. Cir. 2013).
230. Union Steel v. United States, 823 F. Supp. 2d 1346, 1356–57 (Ct. Int'l Trade 2012), *aff'd*, 713 F.3d 1101.
231. *Union Steel*, 713 F.3d at 1106.
232. *Id.*
233. *Id.*
234. *Id.* at 1109.
235. *Id.*

might hide.[236] Applying *Chevron* deference, the court deferred to Commerce's reasonable interpretation of the statute.[237]

The court emphasized that the outcome of the WTO decisions had limited effect and that it was Commerce's decision whether to expand the findings determined in the settlement outside average-to-average transactions (i.e., investigations).[238] Commerce's justification was found to be sufficient and the differing interpretation reasonable in light of the justifications provided.[239]

Yangzhou Bestpak Gifts & Crafts Co. v. United States[240] represented the often-difficult balance that Commerce must strike between establishing a fair and equitable rate, or dumping-margin, and punishing non-cooperative respondents in an antidumping investigation.[241] Bestpak was a Chinese exporter of narrow woven ribbons that was subject to an antidumping investigation set from January 1 to June 30, 2009.[242] To select the mandatory respondents subject to review, Commerce sent out a quantity and value questionnaire to all known exporters.[243] Commerce determined that only the largest producers—both exporters—would be chosen for the individual investigation.[244] It concluded that Yama, the complying exporter, had a de minimis dumping margin.[245] The remaining exporter, Jintian, refused to comply and was assigned an adverse facts available (AFA) rate of 247.65% for the China-wide market.[246] Commerce did not choose a replacement respondent to fill Jintian's absence and there were no volunteers.[247]

Bestpak applied for a separate nonmarket rate by showing that it was not subject to government control.[248] Nonetheless, Commerce determined a median rate of 123.83% by averaging the two individual investigations.[249] Commerce argued that the means used were reasonable given the lack of available data and the statutory time constraints of the investigation.[250]

236. *Id.*
237. *Id.* at 1110.
238. *Id.*
239. *Id.* at 1109.
240. 716 F.3d 1370 (Fed. Cir. 2013).
241. *Id.* at 1375.
242. *Id.* at 1374.
243. *Id.*
244. *Id.*
245. *Id.* at 1375.
246. *Id.*
247. *Id.*
248. *Id.* at 1379.
249. *Id.* at 1375.
250. *Id.*

Disagreeing with Commerce's finding, Bestpak maintained that the rate assigned did not correlate to its actual dumping margin and that an invoice, which the CIT refused to include in its review, proved this argument.[251] Bestpak raised this error to the Federal Circuit on appeal.[252]

The court found that the methods employed to find Bestpak's separate rate were reasonable; however, in light of the fact that there was only one participant's data used in the calculation, the court held that in this instance, it was inappropriate to apply this method of simple averaging.[253] The court stated that the findings of the investigation were insufficient to support the separate rate that Commerce had established.[254] The Government also failed to provide any other economic proof in support of the 123.83% rate, which it described as "more than doubl[ing] the import's sale price."[255] The court held that the imposed rate appeared to be punitive and not in accordance with the antidumping statute.[256] It then reiterated that the margins imposed must be calculated on a "fair and equitable basis."[257]

In concluding, the court agreed with the CIT's decision not to include the Bestpak invoice in its analysis.[258] The court reasoned that failure to exhaust administrative remedies and present the invoice evidence before Commerce precluded its usage on appeal.[259] Applying an abuse of discretion standard of review,[260] the court found that the CIT did not abuse its discretion in denying admission of that evidence.[261] The case was vacated and

---

251. *Id.* at 1376.
252. *Id.* at 1377.
253. *Id.* at 1378.
254. *Id.* at 1378–79.
255. *Id.* at 1379.
256. *Id.*
257. *Id.* at 1380 (quoting SNR Roulements v. United States, 402 F.3d 1358, 1363 (Fed. Cir. 2005)).
258. *Id.* at 1380–81.
259. *Id.*
260. *Id.* at 1381. The abuse of discretion standard is used by appellate courts in reviewing decisions of lower courts. An appellate court will rule that a lower court's decision an abuse of discretion "when its decision is based on clearly erroneous findings of fact, is based on erroneous interpretations of the law, or is clearly unreasonably, arbitrary, or fanciful." Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1460 (Fed. Cir. 1998) (en banc).
261. *Yangzhou Bestpak Gifts*, 716 F.3d at 1381 (reasoning that Bestpak did not raise the invoice issue until its second appeal to the CIT although it knew the importance of the document to Commerce's analysis and had opportunities to raise the issue earlier).

remanded so that the rate/dumping margin might be reassessed consistent with the opinion.[262]

II. PRECEDENTIAL HARMONIZED TARIFF SCHEDULE CASES

The Harmonized Tariff Schedule of the United States (HTSUS) largely models the International Harmonized Commodity Coding and Classification System set out by the World Customs Organization. The HTSUS includes a ten-digit code for over 17,000 goods, from agriculture to technology.[263] Descriptions found within the HTSUS are often the subject of litigation given that the classification of a good within the HTSUS determines the tariff that it will be assessed upon entry into the United States.

This Part addresses several important classification cases from the 2013 term. Among these are a case involving the meaning of "slip-on footwear" with respect to popular boots; a case debating the calculation of import costs in determining the value of imported tuna; another case examining the classification of engineered flooring that closely resembles plywood; and finally, a case debating the difference between clocks and meteorological devices. It was an active term for classification issues last year.

The court in *Deckers Outdoor Corp. v. United States*[264] addressed the classification of boots and assessed whether they were included in an HTSUS subheading for slip-on footwear.[265] Deckers imported UGG boots and attempted to enter them under HTSUS subheading 6404.19.90.[266] Customs instead assigned the item under subheading 6404.19.35 as "footwear of the slip-on type."[267] The 19.35 Customs classification is assigned a duty rate of 37.5%, as opposed to the 9% duty imposed by 19.90 classification.[268]

Deckers claimed that the subheading Customs chose to apply was explicitly for shoes and, therefore, could not apply to boots.[269] Deckers also claimed that its product must be "pulled on" and could

262. *Id.*
263. *See generally* U.S. INT'L TRADE COMM'N, USITC PUB. 4299, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (2014 ed.) [hereinafter HTSUS], *available at* http://hts.usitc.gov.
264. 714 F.3d 1363 (Fed. Cir. 2013).
265. *Id.* at 1365.
266. This provision covers footwear with outer soles of rubber/plastic and uppers of textile valued over $12 per pair. *Id.*
267. This provision covers footwear with outer soles of rubber/plastic and uppers of textile with open toes/heels or slip-on type, 10% or more by weight of rubber/plastic. *Id.*
268. *Id.*
269. *Id.*

therefore not qualify as "slip-on footwear."[270] It claimed that its reasoning was one based on industry standards.[271] The claim was dismissed on a motion for summary judgment in the CIT.[272]

On appeal, the Federal Circuit applied a plain-language review of the statute, examined congressional intent, and interpreted a U.S. Department of Treasury decision to conclude that the CIT's decision was correct as to the proper classification of the boots at issue.[273] The court began with the statutory language—finding the clear language of the subheading to include both shoes and boots.[274] This, the court maintained, was indicated by the use of the term "footwear" as opposed to "shoes" or "boots."[275] The court concluded that "footwear" encompassed both items and explained that "[t]he cardinal principle of statutory construction is to save and not to destroy" the statute in its interpretation, giving effect "to every clause and word of the statute."[276]

To address the argument that the boots must be "pulled on," the court relied on Treasury Decision 93-88, which specifically indicated that a "slip-on" included "a boot which must be pulled on."[277] While the court warned that the decision should not be construed as a Customs ruling, it conceded that Customs and importers use it to better understand classification requirements.[278] The court flatly rejected Deckers' argument that the meaning "slip-on" is contrary to industry standards for the UGG boot.[279] In reaching this conclusion, the court cited several examples from various commercial websites that indicated that the UGG boot at issue was commonly referred to as a "slip-on" in advertisements.[280]

The court rejected the argument that contrary to the definition in the subheading, the UGG boot at issue must be "pulled on."[281] Instead, the court returned to the plain-language reading of the statute to affirm the CIT's definition of "slip-on footwear" as "footwear that does not contain 'laces or buckles or other fasteners'."[282] In preserving the CIT's definition, the court

270. *Id.* at 1367.
271. *Id.* at 1368.
272. *Id.* at 1366.
273. *Id.* at 1367–68.
274. *Id.* at 1367.
275. *Id.*
276. *Id.* at 1367–68 (quoting United States v. Menasche, 348 U.S. 528, 538–39 (1955)).
277. *Id.* at 1368.
278. *Id.*
279. *Id.*
280. *Id.* at 1369.
281. *Id.*
282. *Id.* at 1370.

upheld other sections of the statute that would be rendered superfluous under Deckers' interpretation—giving effect "to all [the HTSUS] provisions, so that no part . . . [is made] inoperative or superfluous."[283]

Lastly, the court turned to the standard of review for summary judgment,[284] agreeing with the CIT that there remained no issues of material fact "regarding the salient physical characteristics of the Classic Crochet boots."[285] Accordingly, the court affirmed the CIT's dismissal.[286]

Judge Dyk dissented from the majority.[287] He found the words "of the slip-on type" to be limiting and that they excluded boots.[288] He also disagreed with the plain-language analysis of the majority—finding that the subheading included three defining characteristics of products to which it applied: (1) shoes (2) that are easy to slip on (3) with few or no fasteners.[289] Judge Dyk stated that the boots at issue are neither shoes nor are they easy to slip on—defeating the purposes indicated by a "slip-on shoe" in accordance with a plain English interpretation.[290] Judge Dyk criticized the majority's reliance on the government's collection of "Footwear Definitions" and found the entirety of the argument unpersuasive.[291]

In *Del Monte Corp. v. United States*,[292] the court addressed whether post-importation payment adjustments could be used to calculate actual transaction costs.[293] In addition, it analyzed the meaning of "in oil" with reference to the packing of tuna.[294] Del Monte imported cooked tuna packaged in a sauce consisting of a small portion of sunflower oil (.62% total weight).[295] Customs determined that the items should be classified as tuna "in oil" under HTSUS subheading 1604.14.10[296] at a duty rate of 35%.[297] Del Monte argued that the

283. *Id.* at 1371 (quoting Corley v. United States, 556 U.S. 303, 314 (2009)).
284. *Id.* ("[T]he grant of summary judgment is appropriate where there is no genuine dispute as to the nature of the merchandise and the classification determination turns on the proper meaning and scope of the relevant tariff provisions.").
285. *Id.*
286. *Id.* at 1372.
287. *Id.* at 1373 (Dyk, J., dissenting).
288. *Id.*
289. *Id.*
290. *Id.* at 1374.
291. *Id.*
292. 730 F.3d 1352 (Fed. Cir. 2013).
293. *Id.* at 1356.
294. *Id.* at 1355.
295. *Id.* at 1353.
296. *Id.*; HTSUS, *supra* note 264, subheading 1604.14.22.
297. HTSUS, *supra* note 264, subheading 1604.14.22.

item should be classified under subheading 1604.14.22 as tuna "not in oil"[298] at a duty rate of 6%.[299]

Additionally, there was a dispute over the price of the goods between Del Monte and the supplier in Thailand that Del Monte claimed should have been taken into account during Customs' appraisal of the items.[300] Del Monte agreed to an estimated price of $1.67 per case, but the invoiced cost at importation was around $3.00 per case.[301] Later negotiations between the supplier and Del Monte resulted in a "credit note" to Del Monte for approximately $1.5 million.[302] When appraising the value of the goods, Customs used the invoiced amount at importation and did not take into account the later credit that Del Monte received.[303] The CIT granted the government's motion for summary judgment and Del Monte appealed.[304]

The Federal Circuit affirmed the CIT's findings that Customs properly classified the imported items at issue as tuna "in oil" and properly rejected the later adjustment to the importation price.[305] The court affirmed that the "goods are considered 'in oil' even if the liquid substance does not consist entirely of oil."[306] The court distinguished the case Del Monte used to support its argument because, in that case, the tuna was *cooked* in oil and could not be classified as tuna packaged in oil.[307] As the court explained, here the items were not cooked in oil, but were packaged in oil—a key factor in classifying the item as either "in oil" or not.[308]

Next, the court affirmed Customs' decision on the valuation of the imported tuna based upon the clear language of § 1401a(a)(1).[309] The court reasoned that the "transaction value" should be defined as "the price actually paid or payable for the merchandise when sold for exportation to the United States."[310] Additionally, the court noted the direct statutory command that "[a]ny rebate . . . after the date of

298. *Del Monte Corp.*, 730 F.3d at 1353–54; HTSUS, *supra* note 264, subheading 1604.14.22.
299. HTSUS, *supra* note 264, subheading 1604.14.22.
300. *Del Monte Corp.*, 730 F.3d at 1354.
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.* at 1357.
306. *Id.* at 1355.
307. *Id.*
308. *Id.* at 1355–56.
309. *Id.* at 1356 (referring to 19 U.S.C. § 1401a(a)(1) (2012)).
310. *Id.*

the importation . . . shall be disregarded in determining the transaction value."[311]

The court rejected Del Monte's argument that the value was based on a "formula" agreed to between Del Monte and the supplier as described by 19 C.F.R. § 152.103(a)(1), and that as a "formula" it should have been adjusted after the credit.[312] The court found that the usage of a "formula" must be clear and definite in order to rebut the "otherwise-strong statutory prohibition on using payments post-dating importation."[313] Unable to find enough evidence to rebut the statutory mandate in § 1401a, the court affirmed the ITC's decision allowing Customs to disregard the credit in its final appraisal.[314]

The court addressed a classification issue in *Kahrs International, Inc. v. United States*,[315] examining the assignment of a "plywood" classification to engineered wood flooring imports.[316] Kahrs International imported engineered wood flooring, which it wanted classified under HTSUS subheading 4418 as "[b]uilders' joinery and carpentry of wood."[317] This assignment would have made the product duty-free.[318] Customs instead classified the item as "plywood" under subheading 4412 with an 8% duty rate.[319]

Kahrs claimed that its product was more like "parquet panels" covered by subheading 4418 due to its laminated faux wood finish.[320] Kars additionally claimed that the more specific description in subheading 4418 should apply in accordance with HTSUS General Rule of Interpretation ("GRI") 3, though the flooring may be classified under both subsections prima facie.[321]

Applying a plain-language analysis of the GRI 3 and the accompanying Explanatory Notes, and analyzing a 2001 Customs ruling, the Federal Circuit determined that the original Customs classification of Kahrs' flooring was correct.[322] The court began by analogizing the *Kahrs* issue to *Boen Hardwood Flooring, Inc. v. United States*,[323] in which "plywood" under HTSUS subheading 4412 was

311. *Id.*
312. *Id.* (citing 19 C.F.R. § § 152.103(a)(1) (2013)).
313. *Id.*
314. *Id.*
315. 713 F.3d 640 (Fed. Cir. 2013).
316. *Id.* at 644.
317. *Id.* at 643.
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.* at 647.
322. *Id.* at 647–48.
323. 357 F.3d 1262 (Fed. Cir. 2004).

defined according to three requirements.[324] The Kahrs' flooring at issue met all three requirements and was similar to the product at issue in *Boen*.[325] Additionally, according to the court, Kahrs indicated no feature that would have made its flooring more unique than the flooring in *Boen*.[326] Next, the court turned to the HTSUS Explanatory Notes to subheading 4412, which explained that the subheading "also cover[ed] plywood panels or veneered panels . . . sometimes referred to as 'parquet flooring'."[327]

Finally, the court rejected Kahrs' argument that subheading 4418 was more specific than subheading 4412 and should be preferred under GRI 3.[328] The court found the exact opposite—that the more specific provision was subheading 4412 as "builders' joinery" could mean many items, while "plywood" was specifically defined.[329] The court bolstered its argument by using a 2001 Customs ruling on the issue where it concluded "that flooring panels consisting of one or more strips of veneer on the surface are classifiable in heading 4412, HTSUS."[330] The court affirmed the CIT decision, which had affirmed the Customs classification decision.[331]

In *La Crosse Technology v. United States*,[332] the Federal Circuit addressed the classification of electronic devices that measure weather conditions.[333] Previously, Customs had classified these imports as "other clocks" under the HTSUS.[334] La Crosse argued that the items were "meteorological appliances."[335] In La Crosse's adjudication before the CIT, the CIT determined that while certain items should be classified as "weather stations," others should be classified as "professional models" with primarily meteorological functions, and the remaining items should be classified as "clocks" due to their primary time-telling functions.[336]

324. *Kahrs Int'l, Inc.*, 713 F.3d at 645 ("[W]e concluded that '[t]here are three common characteristics of 'plywood' found in the definitions provided above: (1) there must be at least three layers; (2) each layer must be arranged at a right angle to its adjacent layer; and (3) the layers must be bonded together.'" (second alteration in original) (quoting *Boen*, 357 F.3d at 1265)).
325. *Id.*
326. *Id.* at 646.
327. *Id.*
328. *Id.* at 648.
329. *Id.* at 647–48.
330. *Id.* at 648.
331. *Id.*
332. 723 F.3d 1353 (Fed. Cir. 2013).
333. *Id.* at 1356.
334. *Id.*
335. *Id.*
336. *Id.* at 1357.

The CIT applied both the functionality and the marketing of the items to make its findings.[337]

The CIT rejected La Crosse's contention that all the contested items were meteorological devices when applying GRI 1, which allows for all items to be classified under a single heading if they are prima facie related to that heading, or applicable as a whole under that heading.[338] La Crosse appealed the decision of the CIT regarding those imports found to be "weather stations" and "clock" models.[339]

On appeal, the Federal Circuit emphasized that HTSUS terms would be accorded their plain-language meaning, absent contrary legislative intent.[340] The court sustained the CIT's rejection of La Crosse's argument on GRI 1 and went on to hold that the items at issue could not be defined under a single heading.[341] Instead, the court agreed with the government's contention that GRI 3(b) applied.[342] GRI 3(b) explains that classification of goods will be determined by the "material or component which gives them their essential character."[343]

However, applying that reasoning, the court reversed the findings regarding both the "clock" and "weather station" models.[344] Instead, they found that those models contained a significant number of meteorological functions as compared to timekeeping functions.[345] The court accepted La Crosse's argument that the forecasting features of the device would remove it from the HTSUS classification covering "clocks" and place it in the broader classification for similar meteorological devices.[346]

In deciding between the broader and more specific subheadings for the devices, the court found that the broader classification should apply.[347] Therefore, the court reasoned that it was the forecasting instrumentality that gave the import its "essential character," but that character alone could not lead to definition under the subheading that explicitly listed certain meteorological devices.[348] The court thus reversed the CIT and directed all items to be classified as

---

337. *Id.*
338. *Id.* at 1356–57.
339. *Id.* at 1357.
340. *Id.* at 1358.
341. *Id.* at 1359–60.
342. *Id.* at 1359.
343. *Id.*
344. *Id.* at 1360.
345. *Id.*
346. *Id.*
347. *Id.* at 1361–62.
348. *Id.* at 1361.

"professional items" with the primary character being their meteorological functions.[349]

Rack Room Shoes, Inc. v. United States[350] was the second in a series of challenges to the alleged discriminatory nature of the HTSUS.[351] This case was one of 126 cases (later updated to 173) claiming that HTSUS discriminatorily applied rates based on gender and age—violating the Fifth Amendment's Equal Protection clause.[352] The case was preceded by *Totes-Isotoner Corp. v. United States*,[353] where Totes brought a similar, if not identical, claim. In *Totes*, the Federal Circuit determined that the challenged provisions in the HTSUS were not facially discriminatory.[354] The court determined that Totes was required to plead facts sufficient to prove a governmental purpose to discriminate—in addition to disparate impact—to win a Federal Rule of Civil Procedure 12(b)(6) motion for failure to state a claim.[355] Because Totes failed to carry this burden, the court affirmed the CIT's dismissal.[356]

After deciding *Totes*, the Federal Circuit allowed importers awaiting the outcome of the case to amend their claims.[357] Rack Room amended its claim to allege that the rates on footwear for women were higher than those for men and higher for adults, generally, than for youths.[358] Rack Room asserted that Congress "could have used other non-gender[ed] factors" to classify products under HTSUS, and the fact that it did not evidenced an intent to discriminate.[359] Similarly, Forever 21 claimed that for approximately half of the goods it imported, the rates on menswear were higher, and in the remaining half, rates on womenswear were higher.[360] It claimed that this imposed a burden on the wearer of the goods based upon her gender.[361] It also submitted explanatory notes from a 1960 Tariff

349. *Id.* at 1357.
350. 718 F.3d 1370 (Fed. Cir. 2013).
351. *Id.* at 1372.
352. *Id.*
353. 594 F.3d 1346 (Fed. Cir. 2010).
354. *Id.* at 1356–57 (rejecting disparate impact as prima facie evidence of discrimination in the tariff context because rates typically result from complex international trade negotiations and concessions that aim to further United States policy goals, not from concern over the characteristics of the final purchasers).
355. *Id.* at 1358.
356. *Id.*
357. *See, e.g.*, *Rack Room Shoes*, 718 F.3d at 1373 (supplementing gender- and age-based discrimination charges with additional allegations in an effort to show government intent to discriminate).
358. *Id.*
359. *Id.*
360. *Id.* at 1373–74.
361. *Id.* at 1374.

Classification Study, which described the age/gender based classification system as "questionable."[362] Finally, Skiz Imports, which had been specially created in order to bring an equal protection claim, argued that it should have standing despite the purpose of its existence.[363]

The Federal Circuit agreed with the Government's argument that Skiz lacked standing.[364] As the court explained, the "requirements for third-party standing" described in *Totes* require either (1) a "close relationship" to a first party or (2) a "hindrance to the first party filing its own claim."[365] The court determined that Skiz met neither requirement, having no relationship "with a . . . consumer whose rights it can . . . assert."[366] The court rejected Skiz's alternative claim that it had first-party standing, asserting that Skiz failed to prove an injury that was "(a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical."[367] The court reasoned that Skiz was simply a test case entity created solely to bring a claim.[368]

The court then proceeded to discuss Rack Room's and Forever 21's claims, eventually affirming the CIT's dismissal for failure by either to state a claim.[369] The court rejected Rack Room's argument that discriminatory intent may be inferred from Congress's failure to use "legitimate, available alternatives."[370] The court explained that the inference that Rack Room asserted had its roots in Commerce Clause jurisprudence and was not applicable to Equal Protection Clause challenges.[371] It explained that the equal protection standard includes a heightened requirement of disparate impact with a "discriminatory purpose."[372] Further, the court explained that failure to use alternative options did not prove discriminatory purpose.[373] In response to Rack Room's arguments, the court

---

362. *Id.*
363. *See id.* at 1374–75 (arguing that its intention not to sell its products to third party consumers did not deprive it of third-party standing and also claiming that it had first party standing to bring an equal protection claim because paying allegedly discriminatory customs duties itself constituted an injury in fact).
364. *Id.* at 1374–76.
365. *Id.* at 1375 (quoting Totes-Isotoner v. United States, 594 F.3d 1346, 1352 (Fed. Cir. 2010)).
366. *See id.* (relying on Skiz's admission that it did not intend to sell its imported goods to consumers).
367. *Id.* (omission in original) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).
368. *See id.* (noting that "Skiz does not have a legally protected interest in not paying tariffs" and thus has no concrete or particularized injury).
369. *Id.* at 1376–79.
370. *Id.* at 1376–77.
371. *Id.*
372. *Id.* at 1377 (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979)).
373. *Id.*

reaffirmed the *Totes* decision, which held that HTSUS was not facially discriminatory in either its content or classification headings.[374] The court reasoned that HTSUS classifications "based on the intended gender of [the] product's user"[375] most likely showed that the products were made differently.[376]

Lastly, with regard to the studies that Forever 21 presented, the court remained unpersuaded that the studies could allow an inference of a discriminatory intent.[377] The studies pertained to a particular product—McKay-sewn leather footwear—and Forever 21 presented no additional evidence to support the proposition that the statement would apply to other products classified in the HTSUS.[378] The court felt that the same was true of portions of an 1892 treatise concerning 'slavery-related tariffs on wool clothing,' which Forever 21 presented as evidence/to support its argument.[379] Overall, the court affirmed the CIT's dismissal in part and, regarding Skiz, dismissed in part due to lack of standing.[380]

The Federal Circuit in *Wilton Industries v. United States*[381] addressed the classification of paper punches and considered the issue under which general heading certain types of paper punches should fall.[382] Wilton imported paper punches from Taiwan, which Customs classified under HTSUS subheading 8203.40.60 as "perforating punches and similar hand tools."[383] Wilton argued that the items should be classified under HTSUS subheading 8441.10.00 as "cutting machines of all kinds."[384] In a stipulation agreement, Customs agreed to reclassify the larger models as "cutting machines of all kinds" because their size made it virtually impossible to use them as hand tools; however, it classified the remaining models under the general

374. *Id.* at 1377–78.
375. *Id.* (noting the complexity of tariff negotiation processes and various other possible non-discriminatory reasons for differing rates (citing Totes-Isotoner Corp. v. United States, 594 F.3d 1346, 1355–59 (Fed. Cir. 2010))); *see also Totes*, 594 F.3d at 1359–60 (Prost, J., concurring) (observing that like tuxedos and evening gowns, men's and women's gloves are different products but simply lack a distinguishing name).
376. *Rack Room*, 718 F.3d at 1378 (citing *Totes*, 594 F.3d at 1357).
377. *Id.*
378. *Id.*
379. *Id.* at 1378–79.
380. *Id.* at 1379.
381. 741 F.3d 1263 (Fed. Cir. 2013).
382. *Id.* at 1265.
383. *Id.* (internal quotation marks omitted).
384. *Id.* (internal quotation marks omitted).

heading for "[t]ools, implements, [and] cutlery."[385] The CIT ruled in favor of the Government and Wilton appealed.[386]

Applying the same GRI Rules that the CIT applied, the Federal Circuit affirmed the CIT's conclusion that the smaller Wilton models should be classified under the HTSUS classification for "perforating punches and similar hand tools."[387] The court rejected Wilton's argument that the items should be classified prima facie as "cutting machines."[388]

Applying GRI 1, the court afforded the section headings and subheadings their plain meaning and determined that the appropriate subheading for the machines was 8203.40.60, which falls under the chapter on "[t]ools, implements, [and] cutlery," rather than 8441.10.00, which applies to "[n]uclear reactors, boilers, [and] machinery."[389] The court rejected Wilton's argument that subheading 8203.40.60 was meant to exclude items that perforate paper and should be limited to hand tools only.[390] Relying on the Explanatory Notes accompanying GRI 1, the court explained that the classification included items used for perforating paper and "covers tools which can be used independently in the hand."[391]

Lastly, the court found that even if the items were not "prima facie classifiable" under subheading 8203.40.60, GRI 3 would mandate their classification under the more specific of the two subheadings—in this case, subheading 8203.40.60.[392] Furthermore, if no appropriate classification existed under GRI 1-3, GRI 4 would require the items' classification under heading 8203.40.60 because it is "the heading appropriate to the goods to which they are most akin."[393] Based on the above analysis, the court affirmed the CIT.[394]

III. RULES OF ORIGIN CASES

In *Ford Motor Co. v. United States*,[395] the Federal Circuit considered the application requirements for preferential treatment under the North American Free Trade Agreement (NAFTA), which allows

---

385. *Id.* at 1265–66 (internal quotation marks omitted).
386. *Id.* at 1265.
387. *Id.* at 1268 (internal quotation marks omitted).
388. *Id.* (internal quotation marks omitted).
389. *Id.* at 1267–68.
390. *Id.*
391. *Id.*
392. *Id.* at 1268.
393. *Id.*
394. *Id.*
395. Ford Motor Co. v. United States, 715 F.3d 906 (Fed. Cir. 2013).

"qualifying goods to enter into the United States duty free."[396] Those seeking the preference may do so before importing or seek a refund after the fact.[397] Congress codified the procedures for seeking the preference post-importation in 19 U.S.C. § 1520(d).[398] The requirements under § 1520(d) include written declarations, other documentation, and a valid certificate of origin for the goods, which must be filed within one year of importing.[399] Late filing may result in denial of preferential treatment, according to 19 C.F.R. § 181.23.[400] Additionally, in certain circumstances, Customs may waive the certificate of origin requirement as provided by § 181.22.[401]

Alongside NAFTA and the process for filing for preferential treatment is the reconciliation program.[402] The program involves an online process meant to streamline importation where certain documents may not exist at the time of importation.[403] Customs modified/amended the program on September 30, 1997, to eliminate its certificate of origin requirement.[404] This alteration took effect on October 1, 1998.[405]

Ford Motor Company negotiated with many ports to develop the electronic submission procedure for preferential treatment claims.[406] It succeeded at most ports, except Detroit.[407] Despite this failure to reach an agreement with the port of Detroit, Ford timely submitted over six hundred electronic claims during a period when it mistakenly believed the electronic submissions had been authorized.[408] However, Customs denied Ford's submissions to its

---

396. *Id.* at 908.
397. *Id.*
398. *Id.* at 908–09 (citing 19 U.S.C. § 1520(d) (2012)).
399. 19 U.S.C. § 1520(d).
400. *See Ford Motor Co.*, 715 F.3d at 909 (citing 19 C.F.R. § 181.23 (2013)).
401. *See id.* at 909–10 (citing 19 C.F.R. § 181.22(d)(1)).
402. *See id.* at 910–11 (outlining the reconciliation process and highlighting sources on the program); Announcement of National Customs Automation Program Test Regarding Reconciliation, 62 Fed. Reg. 5673 (Feb. 6, 1997) (initiating the development of the reconciliation program, which, according to *Ford Motor Co.*, 715 F.3d at 910, continued over the course of multiple notices published in the Federal Register); *see also* U.S. CUSTOMS & BORDER PATROL, *AUTOMATED COMMERCIAL SYSTEM (ACS) RECONCILIATION PROTOTYPE: A GUIDE TO COMPLIANCE, VERSION 4.0* (2004), *available at* http://www.cbp.gov/linkhandler/cgov/trade/trade_programs/reconciliation/reference_desk/acs_recon_guide.ctt/acs_recon_guide.pdf (explaining the reconciliation process and including an appendix of applicable Federal Register notices).
403. *Ford Motor Co.*, 715 F.3d at 910.
404. Modification of National Customs Automation Program Test Regarding Reconciliation, 62 Fed. Reg. 51181, 51182 (Sept. 30, 1997).
405. *Id.* at 51181.
406. *Ford Motor Co.*, 715 F.3d at 911.
407. *Id.*
408. *Id.* at 911–12.

Detroit office.[409] At first, the CIT refused to hear Ford's appeal regarding the denial, claiming that the court lacked the jurisdiction to challenge Customs' decision regarding the certificates of origin.[410] The Federal Circuit overturned the CIT dismissal, holding that the review could not be denied due to "formalities."[411] On remand, the CIT ruled in favor of Customs, and Ford appealed that decision.[412]

In its second appeal, Ford argued that "[19 U.S.C.] § 1520(d) [did] not expressly require [certificates of origin] to be filed within one year" and that Customs must accept the late certificates under 19 C.F.R. § 10.112.[413] Section 10.112 predates NAFTA and allows documents to be filed any time before liquidation if the untimeliness was not "due to willful negligence or fraudulent intent."[414] Ford also argued that Customs had waived the documentation requirement as part of the reconciliation program but not as part of the paper process, resulting in contradictory applications of the same statutory provision.[415]

The court rejected Ford's argument that the time limitation did not apply to the certificates.[416] The court found Ford's argument unpersuasive because the language of the statute was clear.[417] Indeed, the statute states that the necessary documentation must be filed "within 1 year after the date of importation."[418] Thus, the court held that a request for refund may be denied if the required documentation is not provided within the statutory timeframe.[419] Based on the plain language of the statute, the court was also unwilling to accept Ford's position regarding § 10.112, finding that the language of § 10.112 clearly indicated Congress's intent to require a one-year submission deadline.[420] The court explained that § 10.112 cannot be used to "circumvent the clear mandate" of both NAFTA and the statute.[421]

However, the court agreed with Ford's argument regarding the contrary interpretations of the waiver within the statute.[422] In

409. *Id.* at 912.
410. *Id.*
411. *Id.* (including failure to file a certificate of origin).
412. *Id.*
413. *Id.*
414. *Id.* at 914 (citing 19 C.F.R. § 10.112 (2013)).
415. *Id.* at 912, 915.
416. *Id.* at 914–15.
417. *Id.*
418. 19 U.S.C. § 1520(d) (2012).
419. *Ford Motor Co.*, 715 F.3d at 913.
420. *Id.* at 913–14.
421. *Id.* at 914.
422. *Id.* at 917.

accordance with *Dongbu Steel v. United States*,[423] Customs cannot interpret the same statute in two different ways "[a]bsent a reasonable explanation."[424] The court remanded the case so that Customs could provide an explanation as to why a waiver was provided in the reconciliation program while other waiver procedures remained in the paper process.[425]

Judge Newman dissented, finding that § 10.112 should apply.[426] Judge Newman asserted that § 10.112 came first, and absent clear intent to remove the provision, there was no reason to interpret 19 U.S.C. § 1520(d) as being an exception to the general rules that 19 C.F.R. § 10.112 provided.[427] Because there was no willful negligence or fraudulent intent, the documents should have been accepted despite their untimeliness.[428] Judge Newman went on to cite the audit reports of Ford's post-entry claims as "noteworthy accomplishment[s]," and noted the lack of consistency amongst the ports themselves in providing statutory waivers.[429]

IV. PROCEDURAL CASES

Procedural cases address the practice elements of the cases presented to the Federal Circuit. During the 2013 term, two procedural cases stood out as important to the practice. One examined the scope of power the USTR has to negotiate trade agreements, and the other distinguished between shareholders and corporations as importers of record for gross negligence actions.

The key aspect of *Almond Bros. Lumber Co. v. United States*[430] was the court's confirmation of the USTR's broad power to negotiate trade agreements that he finds satisfactory despite objections by industry.[431] The origin of the issue presented in this case can be traced back over two decades to ongoing allegations that Canada had unfairly subsidized production of softwood lumber at the expense of domestic

---

423. 635 F.3d 1363 (Fed. Cir. 2011).
424. *Ford Motor Co.*, 715 F.3d at 915–16.
425. *Id.* at 917 (finding the record inadequate to explain why Customs applied different interpretations of the statute when exercising its waiver authority).
426. *Id.* (Newman, J., dissenting).
427. *Id.* at 920.
428. *See id.* at 917–18 (highlighting that § 10.112 allows for the late filing of a supporting document on the condition that the delay in filing the document was not due to willful negligence or fraudulent intent).
429. *Id.* at 920–21.
430. 721 F.3d 1320 (Fed. Cir. 2013).
431. *See id.* at 1326–27 (finding that the negotiation of trade agreements was committed to agency discretion and thus the USTR's action was immune from judicial review).

U.S. producers.[432] Beginning in 1986, the Coalition for Fair Lumber Exports ("the Coalition") filed a petition relating to Canada's subsidizing practices.[433] This petition resulted in a memorandum of understanding (1986 MOU) between Canada and the United States;[434] however, Canada terminated that MOU in 1991.[435] After the results of a countervailing duty investigation, a new settlement agreement was reached with Canada (1996 Softwood Lumber Agreement (SLA)).[436] In the 1996 SLA, Canada agreed to impose an export tax on softwood lumber, and the United States agreed to stop the related duty investigation and dismiss prior petitions.[437]

The SLA expired in 2001 and Commerce and the Coalition sought to again impose antidumping and countervailing duty orders.[438] This resulted in a renewed SLA with Canada (2006 SLA).[439] The 2006 SLA stipulated that the United States would revoke any outstanding antidumping and countervailing duty orders and refund duties Canada paid after March 22, 2002, in exchange for Canada's imposition of an export tax for seven years and distribution of $1 billion to various groups in the United States.[440] Under the distribution terms of the agreement, the Coalition was set to receive half of the billion-dollar distribution.[441]

The appellants in this case were domestic softwood lumber producers who were not members of the Coalition.[442] The appellants brought four counts against the United States and the USTR.[443] The CIT dismissed counts 2, 3, and 4 for failure to state a claim.[444] Count 1 was dismissed separately.[445] The appellants appealed the dismissal of counts 2, 3 and 4.[446]

---

432. *Id.* at 1323.
433. *Id.*
434. *Id.*
435. *Id.*
436. *Id.*
437. *Id.*
438. *Id.*
439. *Id.*
440. *Id.* at 1323–24.
441. *Id.*
442. *Id.* at 1324.
443. *Id.* at 1324.
444. *Id.* at 1324–25. In count 2, the appellants alleged that the USTR exceeded its statutory authority by agreeing to a distribution term that excluded some members of the domestic softwood lumber industry. *Id.* In count 3, the appellants alleged that the distribution term failed to provide equal protection for all members of the industry. *Id.* In count 4, the appellants alleged that the USTR wrongfully allowed the Coalition, a non-governmental entity, to determine how much each domestic producer should receive. *Id.*
445. *Id.* at 1322.
446. *Id.* at 1325.

The Federal Circuit sustained the dismissal of count 2, which stated that the USTR exceeded his authority when he negotiated the 2006 SLA with Canada.[447] Section 2411 provides the authority for the USTR to enter into negotiations.[448] Section 2411(c)(1)(D)(iii) in particular provides the USTR with authority to set the distribution terms or provide the United States with "compensatory trade benefits."[449] The only statutory limitations placed on the USTR are that the requirements of § 2411(c)(4) be met and that any negotiated benefits be "satisfactory to the Trade Representative."[450] Given the overly broad nature of the limitations, the court found that the actions of the USTR were not reviewable in accordance with *Heckler v. Chaney*,[451] in which the U.S. Supreme Court held that there can be no review of agency action where there is no law to apply.[452] The USTR's actions were also unreviewable under *Citizens to Preserve Overton Park v. Volpe*,[453] in which the Court held that there can be no law to apply where the statute's terms are overly broad.[454] Given that the USTR's decision was immune from review and that expertise lay with him on the subject, the appellants could not then allege abuse of discretion due to the USTR's decision to exclude them from the distribution.[455] Further, the USTR was not required to include every member of the domestic lumber industry in the distribution terms, and final discretion lay with the USTR on how best to distribute any fund received from Canada in the negotiated agreement.[456]

The court then sustained the dismissal of count 3, which alleged that the distribution terms violated equal protection principles by excluding the appellants.[457] The court applied rational basis scrutiny to find that there was a "rationally related . . . legitimate government purpose [aimed at] ending the undesirable trade practices of the Canadian softwood lumber industry, and . . . settl[ing] the ongoing litigation concerning the U.S.—Canadian softwood lumber trade."[458] Further, it was the Coalition who bore the bulk of the time and expense in the lengthy litigation process that began in 1986.[459] The

447. *Id.*
448. *Id.* at 1326–27.
449. *Id.*
450. 19 U.S.C. § 2411(c)(1)(D)(iii))(2012).
451. 470 U.S. 821 (1985).
452. *Almond Bros. Lumber Co.*, 721 F.3d at 1326–27 (citing *Heckler*, 470 U.S. at 830).
453. 401 U.S. 402 (1971).
454. *Almond Bros. Lumber Co.*, 721 F.3d at 1326 (citing *Overton Park*, 401 U.S. at 410).
455. *Id.* at 1326–27.
456. *Id.* at 1327.
457. *Id.* at 1327–29.
458. *Id.* at 1328.
459. *Id.* at 1328–29.

court stated that there was a rational basis for compensating the party who had borne the most expense in reaching an agreement between the U.S. and Canada.[460]

Finally, the dismissal of count 4 was also sustained.[461] Count 4 alleged sub-delegation of authority to a private entity on the matter of the distribution terms.[462] Importantly, the court noted that the terms and agreement were made by the USTR, not the Coalition.[463] Further, the court held that the parties had no standing to object to how the private party (Coalition) distributed the funds.[464]

In a case that was later vacated by the Federal Circuit, the court in *United States v. Trek Leather*[465] distinguished between shareholders and corporations as importers of record for purposes of assessing damages for gross negligence actions.[466] Shadadpuri was the president and sole shareholder of Trek Leather and a 40% shareholder of Mercantile Electronics.[467] Customs determined that both Trek and Mercantile purchased "assists"[468] and provided them to manufacturers outside the United States.[469] These "assists" were used to make men's suits, which were then imported back into the United States by Trek and Mercantile.[470] Trek and Mercantile failed to advise Customs of the "assists"—therein lowering the duties owed on the imports.[471]

After an initial investigation in 2002, Mercantile admitted fault and paid $46,156 in unpaid duties.[472] After being confronted again about these assists, Shadadpuri admitted that Trek should have included the value of the assists in its duties as well.[473] Customs brought criminal actions against Trek and against Shadapuri in his personal capacity, seeking damages of $2,392,307 for "fraudulently, knowingly, and intentionally understating the dutiable value" of the items.[474]

460. *Id.* (finding that it was rational to favor the Coalition because it was largely responsible for the agreement).
461. *Id.* at 1329.
462. *Id.*
463. *Id.*
464. *Id.*
465. 724 F.3d 1330 (Fed. Cir. 2013), *petition for rehearing en banc granted and vacated by* 2014 WL 843527 (Fed. Cir. Mar. 5, 2014) (per curiam).
466. *Id.* at 1339–40.
467. *Id.* at 1331.
468. *Id.* at 1331–32 (defining "assists" as "materials, components, parts, and similar items incorporated in the imported merchandise" (quoting 19 U.S.C. § 1401a(h)(1)(A)(i) (2012))).
469. *Id.*
470. *Id.*
471. *Id.* at 1332.
472. *Id.*
473. *Id.*
474. *Id.*

Customs also sued Trek and Shadadpuri civilly for gross negligence and negligence.[475]

In the CIT, Trek conceded to gross negligence.[476] Shadadpuri, meanwhile, denied all claims, arguing that he was merely an officer, not the "importer of record," and could not be held liable unless the government pierced Trek's corporate veil or found him guilty of fraud or of aiding and abetting fraud.[477] The CIT found in favor of the Government on the gross negligence claims, holding both Trek and Shadadpuri joint and severally liable for $534,420.[478] The CIT determined that the plain language of the statute for assessing penalties did not make an exception for "negligent corporate officers."[479] Shadadpuri appealed, again arguing that corporate officers cannot be held liable for penalties assessed solely due to negligence.[480]

The Federal Circuit agreed with the CIT that the term "person" should be read broadly, but disagreed that the plain language of the statute indicated that corporate officers could be held liable in negligence.[481] The court found that the CIT's interpretation was unreasonable "given [the] long-standing principles of limited liability for shareholders and corporate officers when acting on behalf of a corporation."[482]

Reiterating *United States v. Hitachi*,[483] the court explained that an officer cannot be held liable for negligence because he cannot "aid and abet" another's negligence.[484] The court reasoned that because the "importer of record" is the only actor with an imposed duty under the statute, only the "importer of record" can be held liable for negligence, which is in accordance with the common law understanding of negligence.[485] The court also refused to undermine common law principles of corporate law and rejected the government's contention that Shadadpuri should be held liable because he was "actively involved with the funding and control of the entry of merchandise."[486]

475. *Id.*
476. *Id.* at 1333.
477. *Id.*
478. *Id.* at 1334.
479. *Id.*
480. *Id.*
481. *Id.* at 1338–39.
482. *Id.* at 1337.
483. 172 F.3d 1319 (Fed. Cir. 1999).
484. *Trek Leather*, 724 F.3d at 1338.
485. *Id.*
486. *Id.* at 1339–40.

By failing to prove Shadadpuri guilty of fraud or to pierce Trek's corporate veil, the Government's claim against Shadadpuri had devolved into a private claim against a corporate shareholder where the Government had no standing.[487] Thus, the court reversed the CIT decision.[488]

In his dissenting opinion, Judge Dyk agreed with the CIT's finding that "person," read broadly within the statute, included private shareholders.[489] Judge Dyk stated that this interpretation also accorded with the legislative history predating the current statute where officers were held liable.[490] Citing legislative material, Judge Dyk emphasized that the scope of the current language was not meant to change those liable under the statute and that "[t]he persons covered . . . [we]re intended to remain the same as they [we]re under [the previous] law."[491] In agreement with the CIT, Judge Dyk asserted that Shadadpuri could clearly be held liable for negligence as a "person" under the statute.[492]

487. *Id.*
488. *Id.* at 1340.
489. *Id.* (Dyk, J., dissenting).
490. *Id.*
491. *Id.* at 1341–42.
492. *Id.* (noting that if the legislative history and plain language require the courts to define "person" broadly within the statute, then Shadadpuri is not immune from liability simply because he was not the "importer of record").