INTERNATIONAL TRADE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DURING 1991

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INTRODUCTION

This Article reviews decisions rendered during 1991 by the United States Court of Appeals for the Federal Circuit on the subject of international trade. The Federal Circuit stands at the pinna-
icle of a specialized system for the rendering and review of trade and customs decisions. The U.S. Department of Commerce's and the U.S. International Trade Commission's determinations concerning antidumping and countervailing duties, the Department of Labor's determinations concerning adjustment assistance, and the Customs Service's decisions fall within the exclusive jurisdiction of the Court of International Trade (CIT).\(^1\) Appeal from final decisions of the CIT, in turn, comes under exclusive jurisdiction of the Federal Circuit.\(^2\) The Federal Circuit holds direct exclusive appellate jurisdiction over final determinations of the Commission made under 19 U.S.C. § 1337 and over questions of law in certain decisions of Commerce under a provision of the Harmonized Tariff Schedule.\(^3\) The Federal Circuit thus exercises substantial supervisory jurisdiction over the administration of trade laws. This Article examines the Federal Circuit's performance of that function in the decisions the court issued in 1991.

I. JURISDICTION

A. Exhaustion of Administrative Remedies

Few aspects of an appeals court's resolution of its own jurisdiction have a more direct impact on agency procedures than its decisions on the circumstances in which administrative remedies must be exhausted before an appeal may arise. The requirements for the exhaustion of administrative remedies can become confused in a statutory scheme like that governing antidumping and countervailing duties, in which responsibility is divided among several administrative agencies. Responsibility for the antidumping law is divided among three agencies—U.S. Department of Commerce (Commerce), the U.S. International Trade Commission (Commission), and the U.S. Customs Service (Customs). The fundamental framework for their joint responsibility as it currently exists was established by the Trade Agreements Act of 1979.\(^4\) Under the 1979 Act, Commerce, as the administering authority, makes a determination of whether imported goods are sold or are likely to be sold in the United States at less than foreign market value.\(^5\) If the Commis-

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3. Id. § 1295(a)(6)-(7).
5. 19 U.S.C. § 1673(1)-(2) (1988). The statute provides in pertinent part:

If:
sion determines that those goods are a cause of or threaten material injury to a domestic industry, Commerce assesses a duty in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.\(^6\) Customs admits merchandise subject to these orders with the deposit of estimated antidumping duties, but does not "liquidate" these entries, i.e., charge the final duty rate, until final antidumping duty rates are determined.\(^7\) The estimated duty becomes the final antidumping duty rate for each year's entries unless Commerce requests a review of the rate, called a "751 review" because it originated in section 751 of the Trade Act of 1930.\(^8\) The result of the 751 review then becomes the amount of the duty to be paid under the antidumping order and establishes the estimated duty deposit rate for the subsequent period.\(^9\) Both the results of Commerce's reviews and Customs' liquidation of entries are subject to appeal to the CIT, but for any matter that is subject to Commerce review, administrative review is a prerequisite for judicial review.\(^10\)

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6. See id. § 1673e.
7. See id. §§ 1673d(c), 1673e(a) (discussing implications of antidumping final determinations). Under 19 U.S.C. § 1673g, Customs may not admit imports unless an estimated duty is deposited in the amount of the antidumping margin calculated by Commerce in the original antidumping determination.
8. Id. §§ 1673e(a), 1675(a). 19 U.S.C. § 1675(a) states:

   At least once during each 12-month period beginning on the anniversary of the date of publication of . . . an antidumping order under this subtitle . . . the administering authority [Commerce], if a request for such a review has been received . . . shall (B) review, and determine . . . the amount of any antidumping duty . . . and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.

9. Id. § 1675(a).
10. See 28 U.S.C. § 1581(a) (1988) (setting forth jurisdiction of Court of International Trade). Text of the pertinent part of the statute is as follows:

   (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515 (1988)]. . . .

   (c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516(a) (1988)].

Id.; see 19 U.S.C. §§ 1516a(a)(2)(B), 1514(a) (1988) (stating that antidumping determinations are reviewable by CIT if deemed a reviewable determination). 19 U.S.C. § 1516a(a)(2)(B) provides as follows:
In *Nichimen America, Inc. v. United States*, the Federal Circuit parsed certain of these issues in order to determine what portions of appellant's cause of action might survive its failure to request a 751 review from Commerce. Nichimen imported Japanese-manufactured television receivers, allegedly for Montgomery Ward & Co. Commerce informed Nichimen that its receivers for the period preceding March 31, 1979 would be assessed specified additional antidumping duties unless Nichimen requested a 751 administrative review. Nichimen filed no request with Commerce for a 751 review but, after paying the assessed duties, filed a protest with Cus-

(i) Final affirmative determinations by the administering authority and by the Commission under section 1671d or 1673d of this title, including any negative part of such a determination (other than a part referred to in clause (ii)).

(ii) A final negative determination by the administering authority or the Commission under section 1671d or 1673d of this title, including, at the option of the appellant, any part of a final affirmative determination which specifically excludes any company or product.

(iii) A final determination, other than a determination reviewable under paragraph (1), by the administering authority or the Commission under section 1675 of this title.

(iv) A determination by the administering authority, under section 1671c or 1673c of this title, to suspend an antidumping duty or a countervailing duty investigation, including any final determination resulting from a continued investigation which changes the size of the dumping margin or net subsidy calculated, or the reasoning underlying such calculations, at the time the suspension agreement was concluded.

(v) An injurious effect determination by the Commission under section 1671c(h) or 1673c(h) of this title.

(vi) A determination by the administering authority as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order.


[D]ecisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;
(2) the classification and rate and amount of duties chargeable;
(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1397 of this title;
(5) the liquidation or reliquidation of an entry, or any modification thereof;
(6) the refusal to pay a claim for drawback; and
(7) the refusal to reliquidate an entry under section 1520(c) of this title, shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade . . .

*Id.* § 1514(a).

11. 938 F.2d 1286 (Fed. Cir. 1991).
13. *Id.* at 1287.
tooms, claiming that the applicable duties were subject to a settlement agreement between the United States government and Montgomery Ward. The CIT dismissed Nichimen's appeal of Customs' denial of its protest, holding that by failing to file a request for a 751 review before Commerce, Nichimen failed to exhaust its administrative remedies. The Federal Circuit affirmed in part and reversed in part, splitting the outcome according to what, in its view, was appropriate for Commerce to have considered in a 751 review.

As to those matters on which the statute explicitly instructs Commerce to make determinations in 751 reviews, the Federal Circuit had no difficulty in finding that Nichimen failed to exhaust its administrative remedies. For the purpose of Commerce's review, 19 U.S.C. § 1675(a)(2) states that Commerce shall determine, inter alia, the foreign market value and cost of production of the imports and whether foreign market value exceeds the United States price.

15. Nichimen, 938 F.2d at 1287-88.

Within thirty days after—

(i) the date of publication in the Federal Register of—

(1) notice of any determination described in clause (ii), (iii), (iv), or (v) of subparagraph (B), or
(II) an antidumping or countervailing duty order based upon determination described in clause (i) of subparagraph (B), or
(ii) the date of mailing of a determination described in clause (vi) of subparagraph (B), an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint... contesting any factual findings or legal conclusions upon which the determination is based.

19 U.S.C. § 1516(a)(2)(A) (1988). The standard of review for the court to apply in section 1516a(a)(2) actions is set forth in 19 U.S.C. § 1516a(b) as follows: "The court shall hold unlawful any determination, finding, or conclusion found... (B) in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." Id. § 1516a(b)(1).

17. Nichimen, 938 F.2d at 1291-92.
18. Id. Like the CIT, the Federal Circuit disposed of one claim by holding that Nichimen's complaint failed to preserve the claim. Id. Nichimen's protest and complaint stated that "[t]he determination upon which the United States relies in assessing the anti-dumping duty was arbitrary, capricious and an abuse of discretion, and not in accordance with law," but none of the specific paragraphs of the complaint or protest referenced the original final antidumping determinations. Id. at 1290. Although final determinations reached since 1979 are not challengeable by protest, the 1971 determinations covering Nichimen's merchandise would be because a transition provision of the 1979 Act, section 1002(b)(3), preserves protest jurisdiction over such actions. Id. at 1289-90. The Federal Circuit, however, agreed with the CIT that Nichimen was not seeking review of those determinations. Id.

For the purpose of paragraph (1)(B) [periodic review of the amount of any antidumping duty] the administering authority shall determine—
Thus, the court properly held that Nichimen could not challenge Customs' failure to make a determination on these subjects.\textsuperscript{20} The court also found certain of Nichimen's claims implicitly fell within Commerce's 751 jurisdiction—the claims that the determination on which the government relied in assessing the antidumping duty was arbitrary and capricious and that the dumping findings were erroneously applied because the manufacturer/exporter was another company.\textsuperscript{21} The Federal Circuit thus held that, in conducting reviews under 19 U.S.C. § 1675(a)(1)(B), Commerce's jurisdiction is not limited to the determinations required by § 1675(a)(2).\textsuperscript{22} In this respect, the \textit{Nichimen} decision is consistent with the court's prior decisions recognizing Commerce's broad authority in conducting these reviews.\textsuperscript{23}

This aspect of the court's reasoning, however, makes somewhat puzzling the court's decision that Nichimen had not failed to exhaust its administrative remedies concerning whether the Montgomery Ward settlement agreement applied to the imports. The case law from the Federal Circuit before \textit{Nichimen} was consistent in holding that a litigant must first have exhausted administrative remedies before the relevant agency if the agency was empowered to provide the remedy sought.\textsuperscript{24} The court's previous decisions on other is-

\begin{enumerate}
\item [(A)] the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and
\item [(B)] the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry.
\end{enumerate}

The administering authority, without revealing confidential information, shall publish notice of the results of the determination of antidumping duties in the Federal Register, and that determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.


21. \textit{Id}.
22. \textit{Id}.
23. \textit{See Oregon Steel Mills, Inc. v. United States}, 862 F.2d 1541, 1544 (Fed. Cir. 1988) (declaring that Secretary of Commerce is given broad discretion in administering antidumping laws and upholding International Trade Administration's revocation of antidumping duty order imposed on Korean carbon steel plate imports); \textit{Smith-Corona Group v. United States}, 713 F.2d 1568, 1571 (Fed. Cir. 1983) (stating that Secretary of Commerce has responsibility for implementing antidumping law and has broad discretionary power for execution of same).
24. \textit{Compare National Corn Growers Assoc. v. Baker}, 840 F.2d 1547, 1560 (Fed. Cir. 1988) (requiring protest and denial to Customs prior to suit challenging Customs' classification of imports); \textit{Williams v. Secretary of Navy}, 787 F.2d 552, 562 (Fed. Cir. 1986) (requiring exhaustion of military remedies prior to collateral attack on court martial conviction) \textit{with Asociacion Colombiana de Exportadores v. United States}, 916 F.2d 1571, 1577 (Fed. Cir. 1990) (finding no need to seek annual review of antidumping duties when review would not reach dispositive question of validity of dumping margins in original determination); \textit{Cooper v. Marsh}, 807 F.2d 988, 992 (Fed. Cir. 1986) (finding no need to seek review of court martial conviction in Army Board for Correction of Military Records when Board is not empowered to set aside conviction).
sues concerning the settlement agreement at issue in Nichimen would have suggested that Commerce was empowered to provide the remedy sought. The court has also held that the issue of whether a section 751 review conforms to existing settlement agreements is reviewable on appeal, and therefore has reversed CIT decisions granting injunctions against the conduct of such reviews.

The court did not explain why Nichimen did not fit into the established doctrine that, where an administrative remedy exists, it must be pursued before the court will entertain an appeal. The court rested its decision on the fact that the settlement agreement was not only between Commerce and Montgomery Ward. On this issue, the court reasoned, "Because of the various parties and government representatives involved in the settlement, Commerce should not under the limited authority of section 751 be considered the proper agency to interpret this agreement." Why this should be the case, if the court was applying the doctrine of exhaustion of administrative remedies, is difficult to comprehend, and the court does not explain.

By statute, Commerce is allocated the responsibility to "determine . . . the amount of the antidumping duty," and in this case issued a preliminary notice stating what that duty would be in the absence of a request for a 751 review. Nichimen regarded the

25. See Montgomery Ward v. Zenith Radio Corp., 673 F.2d 1254, 1254 (C.C.P.A. 1982) (dismissing attempt to challenge validity of settlement agreement). The Federal Circuit's predecessor court, in Montgomery Ward, described the relative responsibilities of the three agencies that were parties to the agreement as follows:

The Secretary of Commerce acted on behalf of the Government with respect to [antidumping duty claims not in litigation]. The Department of Justice settled the claims upon which actions had been brought for collection of unpaid duty assessments. . . . The Secretary of Treasury was responsible for and settled the claims for civil penalties under 19 U.S.C. § 1592 with respect to false documentation of entries. Id. at 1256 n.1; see also Committee to Preserve Am. Color Television (COMPACT) v. United States, 706 F.2d 1574, 1576 (Fed. Cir. 1983) (affirming decision of CIT in refusing to set aside agreements made between Secretary of Commerce and various importers subject to antidumping duty).

26. See Matsushita Elec. Indus. Co. v. United States, 10 Ct. Int'l Trade 547, 550, 645 F. Supp. 939, 942 (1986) (granting injunction barring Commerce from making proposed reviews), rev'd, 823 F.2d 505, 506 (Fed. Cir. 1987) (reversing injunction because Matsushita could not demonstrate that it would be irreparably harmed by participating in reviews); see also Matsushita Elec. Indus. Co. v. United States, 12 Ct. Int'l Trade 455, 461-65, 688 F. Supp. 617, 621-24 (1988) (holding that CIT has jurisdiction over action by foreign manufacturers contesting delay in Commerce's review process as well as jurisdiction over Commerce's failure to issue final revocation decision and that Commerce could conduct additional administrative review for revocation of antidumping order, although statutory period for review has run), aff'd, 861 F.2d 257, 260 (Fed. Cir. 1988) (declaring that Commerce has discretion to review revocation decision prior to final determination).

27. Nichimen, 938 F.2d at 1292.
28. Id.
29. Id.
30. See id. at 1287 (discussing Commerce notification to Nichimen on August 30, 1985);
Montgomery Ward agreement as a defense to that proposed duty, but did not bring the agreement to Commerce's attention. The court did not indicate that Commerce did not have the power to entertain that defense or that any party argued that pleading the Montgomery Ward agreement to Commerce would have been futile.

Rather, the court concluded, "This is a matter properly falling within the general category of protestable matters set forth in 19 U.S.C. § 1514(a)(3)—'all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury.'" If this conclusion indicates that the Department of Treasury (Treasury) would be preferable to Commerce as an agency for interpreting the scope of a settlement agreement on antidumping duties, the decision is problematic. First, under the terms of the settlement agreement, Commerce was responsible for settlement of claims concerning antidumping duties not then in litigation; Treasury, of which Customs is a part, settled no issues concerning antidumping duties. Second, section 1675 allocates to the administering authority the responsibility to set the antidumping duty. If Treasury disregards that duty in favor of a settlement agreement it regards as binding, the potential exists for fractious and unnecessary interagency conflict, as well as uncertainty as to the duties to be paid.

In short, both under the settlement agreement and under the statute, Commerce would appear to have been the preferable agency, indeed the sole agency authorized, to make the relevant determination; in any event, the Federal Circuit did not explain why Commerce would have been without power to make the determination, as the existing law concerning exhaustion of administrative reme-

32. Id. at 1292 (claiming matter should not be decided under "limited authority" of section 751 due to participation of many diverse parties).
35. In fact, 19 U.S.C. § 1514(b) (1988) appears to acknowledge that antidumping determinations are reviewable under section 1516a procedures rather than section 1514(a) procedures. Section 1516a procedures first require section 1675 (section 751) review. See supra note 10 (reprinting statutory language of section 1516(a)). Section 1514(b) states:

With respect to determinations made under section 1303 of this title or subtitle IV of this chapter which are reviewable under section 1516a of this title, determinations of the appropriate customs officer are final and conclusive upon all persons (including the United States and any officer thereof) unless a civil action contesting a determination listed in section 1516a of this title is commenced in the United States Court of International Trade.

The alternative seems to be that the CIT would interpret the scope of the settlement agreement in the first instance, a result that Congress would seem to have precluded by its statutory insistence on exhaustion of administrative remedies. The court in Nichimen appears to have deviated from its precedents concerning exhaustion of administrative remedies, but because it did not discuss those precedents, the court probably did not intend to change the doctrine announced in those earlier decisions.

B. Tolling of Time for Appeal

Under Rule 4(a)(1) of the Federal Rules of Appellate Procedure, as made applicable to the CIT by 28 U.S.C. § 2645(c), a private party must file a notice of appeal within thirty days after the date of entry of the judgment or order appealed from. However, pursuant to Federal Rule of Appellate Procedure 4(a)(5), the lower court may, upon a showing of excusable neglect or good cause, extend the time for filing a notice upon motion filed not later than thirty days after the time prescribed in Rule 4(a). The Rules of the United States Court of International Trade provide for such a procedure in Rule 36.

36. In Timken Co. v. United States, 777 F. Supp. 20 (Ct. Int'l Trade 1991), the first case decided under Nichimen, the CIT gave a limiting interpretation to that precedent. At issue was whether Commerce, in its 751 review, had properly, under 19 U.S.C. § 1677g (1988), declined to impose an interest payment. Id. at 22. Defendant-intervenor challenged jurisdiction, citing Nichimen. Id. The court interpreted Nichimen to deny jurisdiction over claims too far removed from Commerce's 751 determination to be considered ancillary. Id. at 23. The court held that "unlike the ministerial function of duty collection" the applicability of section 1677g was the type of ancillary question within Commerce's sole discretion under a 751 review and consequently found jurisdiction under Nichimen. Id. at 24.

37. See supra notes 5-10 and accompanying text (discussing statutory requirements of administrative review).

38. The court in Nichimen also allowed the complaint to proceed on the issue of whether Customs followed its standard procedures in liquidation of entries. Nichimen Am., Inc. v. United States, 938 F.2d 1286, 1292 (Fed. Cir. 1992). This aspect of the court's decision does not appear to give rise to the same ground for criticism as the court's decision concerning jurisdiction to decide the scope of the settlement agreement, because Customs' procedures are within its own authority, not Commerce's. If, however, the allegations were in fact a collateral attack on Commerce's procedures in conducting its 751 review, then the CIT's decision to dismiss would seem to be appropriate. It is possible that the CIT's decision to dismiss was premature, if the purport of this claim was not fully developed.

The distinction between "the ministerial function of duty collection" and whether a statutory provision applies to the entry that, as noted supra note 36, the CIT made in Timken Co. v. United States, 777 F. Supp. 20, 22-24 (Ct. Int'l Trade 1991), cuts across the same divide noted here. In Nichimen, whether Customs followed its procedures would fall on the "ministerial" side of the divide, and whether a settlement agreement forbade ordinary application of section 751 would fall on the other. Nichimen, 938 F.2d at 1291-92. The CIT in Timken can be regarded as politely having criticized the Nichimen court for failing to realize that Customs' role in the collection of antidumping and countervailing duties is essentially ministerial. Timken, 777 F. Supp. at 24. In Timken, the CIT noted that, unless it found jurisdiction, plaintiff would "be left without any means to challenge [the] decision. The Court cannot envision this result to be intended by our appellate court." Id. at 23.
59(b) which states that a motion for a new trial or rehearing "shall be served and filed" within thirty days of the entry of judgment. Until January 1, 1991, Rule 5(g) of the Rules of the United States Court of International Trade provided that service of a pleading or paper by mail is completed when received, except that when service is effected by registered or certified mail, the document is deemed served as of the date of mailing.

In *Penrod Drilling Co. v. United States*, plaintiff filed a motion in the CIT for rehearing on the thirtieth day following the entry of judgment, but plaintiff’s service of that motion on the government, sent by ordinary mail on the preceding day, was not received by the thirtieth day and, indeed, was never received. Believing the time for filing its appeal had been tolled, Penrod did not file a notice of appeal of the judgment with the Federal Circuit within the required time period.

In *Penrod*, the Federal Circuit reviewed for abuse of discretion the lower court’s decision that plaintiff had failed to make a showing of excusable neglect or good cause required for an extension of time for appeal under Rule 4(a)(5). The Federal Circuit affirmed, noting that under the CIT rules, Penrod could have served the government by certified or registered mail or delivered its service copy by hand to the office of the Commercial Branch of the Civil Division of the Justice Department, which is located in the same building as the CIT, where plaintiff hand delivered its filing. Further, the Federal Circuit observed that counsel for plaintiff could have contacted defense counsel when no answer to plaintiff’s motion for rehearing was received and, finding that the motion had not been served, plaintiff would still have had time to file a notice of appeal. Like the CIT, the Federal Circuit found Penrod’s attempted distinction between the late delivery of mail and the nondelivery of mail to be

41. 925 F.2d 406 (Fed. Cir. 1991).
42. *Penrod Drilling Co. v. United States*, 925 F.2d 406, 408 (Fed. Cir. 1991) (upholding decision of CIT that determined failure to file timely notice of appeal did not result from good cause or excusable neglect); see *Fed. R. App. P.* 4(a)(5) ("The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a) [for the filing of a notice of appeal].")
43. *Penrod*, 925 F.2d at 408.
44. *Id.; see Penrod Drilling Co. v. United States*, 740 F. Supp. 858, 859 (Ct. Int’l Trade 1990) (dismissing action to recover duties assessed by Customs because party was not entitled to extension of time for appeal).
45. *Penrod*, 925 F.2d at 408.
46. *Id.* at 409.
inadequate. 47

The CIT rules have now changed so that the particular dilemma faced by the plaintiff in Penrod should not recur. The CIT has eliminated Rule 5(g) and has instead amended Rule 5(b) to state, "[s]ervice by mail is complete upon mailing." 48 Further, CIT Rule 5(e) now states that filing is complete when received, except that a paper properly sent by registered or certified mail is deemed filed as of the date of mailing. 49

II. Customs
A. Classification

The Federal Circuit reviews decisions of the CIT regarding the interpretation of tariff provisions de novo, as questions of law, and reviews findings of fact by the CIT concerning the imports at issue under the clearly erroneous standard. 50 In Clipper Belt Lacer Co., Inc. v. United States, 51 the court reviewed a CIT decision affirming Customs’ classification of certain heavy-duty fasteners used for joining together the ends or sections of conveyor belts used in transporting heavy materials. 52 The court affirmed on the basis of its “agreement” with the CIT’s analysis of the recorded evidence that the fasteners did not qualify for classification under either Tariff Schedules of the United States (TSUS) 646.20 or 646.32, a mixed decision of law and fact because those classifications require products to be “staples.” 53 In determining that the fasteners at issue were not “staples,” the court below both interpreted the meaning of the term “staples” and made findings about the nature of the product. 54

The Federal Circuit then considered an alternative claim, namely that the belt fasteners were properly classifiable under Item 664.10

47. Id.; see Penrod, 740 F. Supp. at 859.
48. CT. INT’L TRADE R. 5(b). The Court of International Trade Rule on this point now conforms to the parallel Federal Rule of Civil Procedure 5(b).
49. CT. INT’L TRADE R. 5(e).
50. See Mattel, Inc. v. United States, 926 F.2d 1116, 1117 (Fed. Cir. 1991) (reversing CIT as clearly erroneous and holding that plastic figures and doll accessories each constitute “unit” for purposes of duty exemption for toys with unit value of five cents or less); Digital Equip. Corp. v. United States, 889 F.2d 267, 268 (Fed. Cir. 1989) (holding that decision of CIT to classify power supplies for computers as parts of automated data processing machines was not clearly erroneous); Hasbro Indus., Inc. v. United States, 879 F.2d 838, 840 (Fed. Cir. 1989) (affirming decision of CIT that “GI Joe action figures” are dolls and not “toy figures of animate objects” and thus holding that CIT decision was not clearly erroneous).
51. 923 F.2d 835 (Fed. Cir. 1991).
53. Id. at 837-38 (declaring that “staples” refers to common meaning of term although CIT discussed issue at some length prior to concluding that imports in case were not staples).
54. Id.
as parts of belt conveyers.\textsuperscript{55} Headnote 1 to Part 4 of Schedule 6 of the TSUS, within which the TSUS item falls, excludes from its coverage belts and belting and parts of articles specifically provided for elsewhere in the schedules.\textsuperscript{56} The Federal Circuit held as a matter of law that, since belts and belting are excluded from the headnote, fasteners that are part of the flexible belt system are not to be classified as parts of the conveyer, a piece of mechanical machinery.\textsuperscript{57}

The court's reasoning deserves some note. Whereas the CIT was bound to reason by analogy to the Customs Court's decisions involving other exclusionary headnotes, the Federal Circuit did not discuss them on the grounds that it is not bound by Customs Court decisions.\textsuperscript{58} Rather, it simply concluded that "it seems to us to make good sense to assume, since appellant produced no evidence to the contrary," that parts of belts are excluded by a headnote excluding belts.\textsuperscript{59} As will be seen in the discussion below of other cases, the Federal Circuit, in some cases, does pay great attention to the effect of its decision on CIT precedents.\textsuperscript{60}

In \textit{Bakelite Thermosets, Ltd. v. United States}\textsuperscript{61} and \textit{P.F. Palos v. United States},\textsuperscript{62} the Federal Circuit adopted the decisions of the CIT. \textit{Bakelite} addressed the issue of whether an asphalt emulsion that was eight percent wax should be classified as "asphalt" under TSUS 521.11 or, as Customs had done, as "[m]ineral substances, and articles of mineral substances, not specially provided for: Other: Not decorated," under item 523.91.\textsuperscript{63} On appeal to the Federal Circuit, plaintiff did not challenge the CIT's factual finding that the imported emulsion results in a product in which both asphalt and wax perform important permanent functions in end use.\textsuperscript{64} In adopting the CIT's decision, the Federal Circuit, in \textit{Bakelite}, adopted the lower court's limiting interpretation of \textit{United States v. Central Westrumite Co.},\textsuperscript{65} in which the court found a product to be asphalt notwith-
standing the addition of other materials. The court distinguished Westrumite because the materials added to that product simply aided combination and application of the product, whereas in Bakelite the wax performed an important permanent function in the waterproofing of gypsum board.

In P.F. Palos v. United States, the CIT and the Federal Circuit were concerned with what constituted the uppers of footwear. The imports were molded pieces of semi-rigid clear plastic in the shape of the sole of a shoe, having a nib or protrusion of plastic that contained a hole in the front and two holes in the back through which a lace or thong was attached after importation to create a finished sandal. The CIT rejected plaintiff’s contention that the nib or protrusion was an “upper,” relying on the Court of Customs Appeals’ decision in United States v. Skolai that fabric straps and thongs on wooden clogs partially covering the foot and holding the sole in place were an “upper” within the common meaning. Because the straps attached to the Palos imports after importation serve the same function, the CIT held the imported soles not to contain uppers. On appeal, the Federal Circuit affirmed the lower court’s reasoning but also held that Skolai supports the outcome independently of the fact that thongs were added after importation—namely, that the nib fits between the toes rather than partially covering the foot and does not hold the sole in place.

The Federal Circuit again adopted the lower court’s decision on customs classification in E.T. Horn Co. v. United States, which addressed whether certain chemical residues of manufacturing processes were classifiable as “[m]ixtures of two or more organic substances” rather than as “asphaltum” as importer desired.


69. P.F. Palos v. United States, 737 F. Supp. 1191, 1195-97 (Ct. Int’l Trade 1990), aff’d, 926 F.2d 1178 (Fed. Cir. 1991). In Palos, the CIT noted that Customs classified the imports as “[o]ther footwear,” falling under TSUS item 700.60, while plaintiff claimed them to be “[o]ther footwear... [h]aving uppers of which over 90 percent of the exterior surface area is rubber or plastics,” under item 700.58. Id. at 1192, 1197. The CIT also engaged in an extended discussion of the case law concerning when footwear is “substantially complete.” Id. at 1195-96. Because the Federal Circuit held the issue to be conceded in the case, its review of the precedents appears to be dictum. See Palos, 926 F.2d at 1179 (reflecting CIT’s discussion on what constitutes “uppers” of footwear).

70. Palos, 926 F.2d at 1179.


72. Palos, 737 F. Supp. at 1194-95 (relying on United States v. Skolai, 14 Ct. Cust. 392, 397 (1927) (determining that upper holds sole in place and partially covers foot)).

73. Id. at 1195.

74. Palos, 926 F.2d at 1179.

compounds: . . . . Other,” TSUS item 430.20, or as “[w]aste and scrap not specially provided for,” TSUS item 793.00.\textsuperscript{76} The headnote governing item 430.20 states that it covers “chemicals, except those provided for elsewhere in this schedule and those specially provided for in any of the other schedules.”\textsuperscript{77} After reviewing the common definitions of “chemical” and “waste,” as well as the legislative and administrative histories of the provisions, the court held that when chemical products have identifiable useful chemical properties, are useful, are traded for those properties, and are used as is to make desired end products, they cannot be classified as waste, even when they are produced as unsought residues.\textsuperscript{78}

Rather than adopt the CIT’s decision, the court in \textit{W.R. Filbin & Co. v. United States}\textsuperscript{79} took the occasion to reiterate succinctly its standards of review. At issue was whether frozen ice pops were properly classifiable as “edible preparations not specifically provided for,” pursuant to TSUS item 183.05, when classification under that item requires the merchandise to fall within Headnote 1 of Schedule 1, Part 12, Subpart B and to be “products fit for use as beverages.”\textsuperscript{80} Following the Court of Customs and Patent Appeals’ decision in \textit{Wah Shang Co. v. United States},\textsuperscript{81} the CIT held that determining whether a product was “fit for use” as a beverage required an examination of whether the product had a “substantial actual use” as a beverage.\textsuperscript{82} The Federal Circuit reviewed the interpretation of terms de novo and held that the CIT had applied the law correctly because, in determining whether the pops’ possible use as a beverage was a “substantial actual use,” the court had explicitly stated that it did not require such a use to be the “chief use.”\textsuperscript{83} In reviewing the factual findings, quoting the Supreme Court’s decision in \textit{Anderson v. City of Bessemer City},\textsuperscript{84} the court emphasized that the clearly erroneous standard applies and that even greater deference is due when the lower court’s findings depend on observation of the credibility of witnesses.\textsuperscript{85} The Federal Circuit upheld the CIT

\textsuperscript{77} \textit{Id.} at 1542 (quoting Headnote 1, TSUS Schedule 4, Part 2 (1983)).
\textsuperscript{78} \textit{See id.} at 1545 (declaring that residue does not necessarily constitute waste entitling producer to duty free entry).
\textsuperscript{79} 945 F.2d 390 (Fed. Cir. 1991).
\textsuperscript{80} \textit{See W.R. Filbin & Co. v. United States, 744 F. Supp. 289, 292 (Ct. Int'l Trade 1990) (affirming Customs' classification of product as "edible preparation" and not as "beverage"), aff'd, 945 F.2d 390 (Fed. Cir. 1991).}
\textsuperscript{81} 44 C.C.P.A. 155, 159, C.A.D. 654 (1957).
\textsuperscript{82} \textit{W.R. Filbin, 744 F. Supp. at 291.}
\textsuperscript{83} \textit{W.R. Filbin, 945 F.2d at 392.}
\textsuperscript{84} 470 U.S. 564 (1985).
\textsuperscript{85} \textit{See W.R. Filbin, 945 F.2d at 392 (stating that court will rarely find error in trial court's
B. Drawback

Drawback is a refund or remission under qualified circumstances of a customs duty, tax, or fee that is paid on imported merchandise upon their exportation. To qualify for a drawback, a manufacturer or producer must comply with the Customs Service’s regulations governing recordkeeping. In *Aurea Jewelry Creations, Inc. v. United States*, plaintiff claimed that its wholly owned subsidiary responsible for the production process misplaced the required records when the subsidiary went out of business. Customs refused drawback, finding the substitute documents that Aurea submitted to establish the dates of manufacture and manufacturing lot numbers to be deficient. The CIT, however, found Aurea’s documentary and testimonial evidence sufficient and ordered Customs to allow drawbacks. The Federal Circuit affirmed the order, upholding the CIT’s decision that the regulations required creation of the records, but that testimonial evidence establishing existence of the required records is sufficient to overcome failure to produce them.

The Federal Circuit elaborated on the lower court’s reasoning by distinguishing two issues that testimony could properly address: (1) whether the appropriate documentation was maintained as the regulatory finding when considering documentary evidence and will give additional deference to trial court’s assessment of credibility of witnesses; see also Anderson v. City of Bessemer City, 470 U.S. 564, 565 (1985) (reversing appeals court decision as misapplication of clearly erroneous standard because trial court’s finding was plausible and therefore worthy of deference).

67. 19 U.S.C. § 1313(a) (1988). The statute provides, in relevant part:

Upon the exportation of articles manufactured or produced in the United States with the use of imported merchandise, the full amount of the duties paid upon the merchandise so used shall be refunded as drawback, less 1 per centum of such duties, except that such duties shall not be so refunded upon the exportation of flour or by-products produced from wheat imported after ninety days after June 17, 1930. Where two or more products result from the manipulation of imported merchandise, the drawback shall be distributed to the several products in accordance with their relative values at the time of separation.

*Id.*; see 19 C.F.R. § 191.2(a) (1991) (defining drawback as “a refund or remission, in whole or in part, of a customs duty, internal revenue tax, or fee lawfully assessed or collected because of a particular use made of the merchandise on which the duty, tax, or fee was assessed or collected”).

68. 19 C.F.R. § 191 (1991); see id. § 191.5 (“All records required to be kept by the manufacturer or producer under this part with respect to drawback claims . . . shall be retained for at least 3 years after payment of such claims.”).
69. 932 F.2d 943 (Fed. Cir. 1991).
71. *Id.*
72. See id. (discussing how CIT determined that Aurea Jewelry provided sufficient evidence warranting drawback); see also *Aurea Jewelry Creations v. United States*, 13 Ct. Int’l Trade 712, 715-16 (1989) (ordering Customs to refund Aurea for paid duties and interest).
73. *Aurea Jewelry*, 932 F.2d at 946.
lation required; and (2) whether the documentation adequately es-
established the right to a drawback.94

Drawback can also occur if, within three years of importation, merchandise that is fungible and in the same condition as the imported goods is exported or destroyed.95 Customs' regulations define "fungible merchandise" as "merchandise which for commercial purposes is identical and interchangeable in all situations."96 In Guess?, Inc. v. United States,97 the CIT granted summary judgment in favor of Customs' denial of drawback for jeans imported from Hong Kong in view of an admission by plaintiff's import manager that plaintiff exported only U.S.-produced jeans because its foreign customers demanded them.98

The Federal Circuit reviewed de novo the interpretation of the governing statute and regulations and whether genuine issues of material fact existed.99 As had the CIT, the court held that Customs' interpretation of "fungible," as meaning identical for commercial purposes, was reasonable and in accordance with the legislative history, and thus entitled to deference.100 The Federal

94. See id. (discussing two-pronged inquiry to satisfy requirements of drawback provisions via testimonial evidence).
   (2) If there is, with respect to imported merchandise on which was paid any duty, tax, or fee imposed under Federal law because of its importation, any other merchandise (whether imported or domestic) that-
   (A) is fungible with such imported merchandise;
   (B) is, before the close of the three-year period beginning on the date of importation of the imported merchandise, either exported or destroyed under Customs supervision;
   (C) before such exportation or destruction—
   (i) is not used within the United States, and
   (ii) is in the possession of the party claiming drawback under this paragraph;
   and
   (D) is in the same condition at the time of exportation or destruction as was the imported merchandise at the time of its importation;
   then upon the exportation or destruction of such other merchandise the amount of each such duty, tax, and fee paid regarding the imported merchandise shall be refunded as drawback, but in no case may the total drawback on the imported merchandise, whether available under this paragraph or any other provision of law or any combination thereof, exceed 99 percent of that duty, tax, or fee.

Id.
98. Guess?, Inc. v. United States, 752 F. Supp. 463, 466 (Ct. Int'l Trade 1990) (finding that fungibility was destroyed between imported and exported jeans due to customer preference for jeans with "Made in U.S.A." label and thus manufacturer was not entitled to drawback), rev'd, 944 F.2d 855 (Fed. Cir. 1991).
100. Id.
Circuit held, however, that the testimony of other Guess?, Inc. employees to the effect that U.S.-made and Hong Kong-made jeans are commercially interchangeable among foreign customers created a genuine dispute of material fact. A majority of the panel held that, even if Guess?, Inc. believed subjectively that foreign customers might prefer a “Made in the U.S.A.” label, the decisive issue was whether some foreign customers, in fact, demanded U.S.-made jeans because of the origin of the label. Judge Plager, concurring, would have included Guess?, Inc.’s subjective belief as a relevant fact.

Drawback is also authorized in certain circumstances upon exportation from a foreign trade zone. In *Chrysler Motors Corp. v. United States*, the Federal Circuit adopted a CIT decision that upheld Customs’ decision to change its interpretation of the circumstances in which such drawback would apply. In 1984 and 1985, Customs issued two rulings that permitted merchandise to be considered as exported for the purpose of drawback when it was sent to a foreign trade zone for the purpose of manufacturing. Relying on those rulings, Chrysler established an as-needed supply system, under which it purchased imported components from vendors who warehoused and tested the components in the United States for delivery to Chrysler’s manufacturing facilities in foreign trade zones. The CIT discussed the fact that Customs adopted a final rule that interpreted the Foreign Trade Zones Act as providing no authority for considering merchandise exported when it was sent to a foreign trade zone for manufacturing. Under the new rule, Customs interpreted 19 U.S.C. §§ 81c(a) and 1313(j) to allow drawback on merchandise admitted to a zone only when it was brought into the

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101. Id. at 858.
102. Id.
103. Id. at 858-59 (Plager, J., concurring) (maintaining that both customers’ demands and subjective “corporate reasoning” should be weighed in determining whether fungibility is present).
104. 945 F.2d 1187 (Fed. Cir. 1991).
zone solely for the purpose of exportation or destruction. The new rule reversed the prior rulings and Chrysler protested the denial of drawback.

The Court of International Trade held that Customs' new interpretation was in accord with the plain, unambiguous meaning of the statute and found that conclusion reinforced by the relevant legislative history. The court observed that Customs changed its interpretation after a notice and comment proceeding. Moreover, quoting Toyota Motor Sales, U.S.A., Inc. v. United States, another CIT decision adopted by the Federal Circuit, the court in Chrysler held that "[a]s long as the new interpretation is consistent with Congressional intent, an agency may make a 'course correction.'"

C. Interest

In Kalan, Inc. v. United States, plaintiff, who through earlier litigation had succeeded in overturning Customs' classification of its merchandise and obtained reliquidation of its entries, sued to obtain interest on the refunded duties. The government consented


110. The fourth proviso of section 3 of the Foreign Trade Zones Act of June 18, 1934, as amended (19 U.S.C. § 81c), on merchandise transferred to a foreign trade zone from Customs territory for the sole purpose of exportation, destruction (except destruction of distilled spirits, wines, and fermented malt liquors), or storage.

Id.

The fourth proviso of 19 U.S.C. § 81c(a) provides in relevant part that under the rules and regulations of the controlling federal agencies, articles which have been taken into a zone from customs territory for the sole purpose of exportation, destruction (except destruction of distilled spirits, wines, and fermented malt liquors), or storage shall be considered to be exported for the purpose of . . . drawback, warehousing, and bonding, or any other provisions of the Tariff Act of 1930, as amended, and the regulations thereunder . . . .

111. Id. at 394-96.}

112. Id. at 396 (stating that Customs gave notice of intention to revoke prior rulings granting drawbacks).


to pay interest running from the date on which Kalan filed its summons to the date of the refund, following the decision in the original litigation, but Kalan sought interest from the date on which it had originally paid estimated duties on the entries.\textsuperscript{117} The CIT allowed only additional interest from the date Customs liquidated the entries—i.e., earlier than the date to which the government consented, but later than the date Kalan sought.\textsuperscript{118} The Federal Circuit, reversing the CIT, applied the standard set forth in \textit{Library of Congress v. Shaw},\textsuperscript{119} which requires that, for interest to be awardable against the United States, the statute must contain an express consent to the award of interest separate from the general waiver of immunity to suit.\textsuperscript{120} An importer may recover interest on amounts “paid as increased or additional duties under section 1505(c) . . .”—i.e., those due upon liquidation or reliquidation according to 19 U.S.C. § 1520(d).\textsuperscript{121} The Federal Circuit held that the government owed Kalan no interest, concluding that, because Customs determined that the amount Kalan deposited as estimated duties at the time of entry satisfied its tariff obligations under 19 U.S.C. § 1505(a), Kalan never paid “increased or additional” duties.\textsuperscript{122} The court held that 19 U.S.C. § 1520(a) authorized a refund of duties overpaid, but

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\textsuperscript{117} Kalan, 944 F.2d at 849.
\textsuperscript{119} 478 U.S. 310 (1986).
\textsuperscript{120} See Kalan, 944 F.2d at 847 (citing Library of Congress v. Shaw, 478 U.S. 310, 314 (1986)).
\textsuperscript{121} 19 U.S.C. § 1520(d) (1988). The full text of section 1520(d) is as follows:

If a determination is made to reliquidate an entry as a result of a protest filed under section 1514 of this title or an application for relief made under subsection (c)(1) of this section, or if reliquidation is ordered by an appropriate court, interest shall be allowed on any amount paid as increased or additional duties under section 1505(c) of this title at the annual rate established pursuant to that section and determined as of the 15th day after the date of liquidation or reliquidation. The interest shall be calculated from the date of payment to the date of (1) the refund, or (2) the filing of a summons under section 2632 of Title 28, whichever occurs first.

\textsuperscript{Id.} 19 U.S.C. § 1505(c) (1988) provides as follows:

Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

\textsuperscript{Id.}

\textsuperscript{122} Kalan, 944 F.2d at 850. 19 U.S.C. § 1505(a) (1988) provides as follows:

Unless merchandise is entered for warehouse or transportation, or under bond, the importer of record shall deposit with the appropriate customs officer at the time of making entry, or at such later time as the Secretary may prescribe by regulation (but not to exceed thirty days after the date of entry), the amount of duties estimated by such customs officer to be payable thereon.

\textsuperscript{Id.}
nothing more.123

III. ANTIDUMPING AND COUNTERVAILING DUTIES

A. The Definition of Subsidies

United States law, under certain circumstances, allows the levying of duties equal to the net amounts of bounties or grants, also known as "subsidies," given to foreign industries exporting to the United States.124 How specifically a foreign subsidy must benefit a producer of exports to the United States in order to be subject to a countervailing duty is one of the most important issues in countervailing duty law. Until the CIT's 1985 decision in Cabot Corp. v.

123. See Kalan, 944 F.2d at 850 (noting that § 1520(a), sole statutory provision dealing with refund of excess deposits, is silent about addition of interests).

124. 19 U.S.C. § 1303 (1988). Section 1303(a)(1) provides the following:

Except in the case of an article or merchandise which is the product of a country under the Agreement (within the meaning of section 1671(b) of this title), whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

Id. § 1303(a)(1); see id. § 1677(5)(A) (stating that "subsidy" has same meaning as term "bounty or grant")). Section 1303 is applicable when the product is from a country that is not "under the Agreement" as defined in 19 U.S.C. § 1671(b) (1988). Id. § 1303(a)(1). In general, a country is "under the Agreement" if it is a member of and/or adheres to the General Agreement on Tariffs and Trade, Agreement on Subsidies and Countervailing Measures. See id. § 1671(b) (defining "under Agreement"). As for countries under the Agreement, the applicable statute is 19 U.S.C. § 1677(5) (1988). This statute states, in part, the following:

(A) In general

The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 1303 of this title and includes, but is not limited to, the following:

(i) Any export subsidy described in Annex A to the Agreement (relating to illustrative list of export subsidies).

(ii) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:

(I) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.

(II) The provisions of goods or services at preferential rates.

(III) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.

(IV) The assumption of any costs or expenses of manufacture, production, or distribution.

Id. § 1677(5)(A).
United States,125 Commerce held that a subsidy did not qualify as a countervailable bounty or grant if it was generally available to companies in the foreign country.126 Judge Carman in Cabot rejected such a per se test, holding instead that Commerce needed to conduct an investigation into how a nominally generally available subsidy was in fact awarded.127 As Judge Michel recounted in his dissenting opinion in PPG Industries, Inc. v. United States,128 a string of CIT decisions followed the Cabot decision's lead.129 In 1988, Congress amended the countervailing duty law to proscribe a finding that a bounty or grant was not countervailable simply because it was "nominally generally available."130

126. See Carlisle Tire & Rubber Co. v. United States, 5 Ct. Int'l Trade 229, 231, 564 F. Supp. 834, 836-37 (1983) (providing Department of Commerce's interpretation that tax deduction generally available to Korean manufacturers for accelerated depreciation of equipment failed to be bounty or grant because it was not preferential to particular manufacturers).
127. See Cabot Corp. v. United States, 9 Ct. Int'l Trade 489, 498, 620 F. Supp. 722, 723, dismissed as inapplicable, 788 F.2d 1539 (Fed. Cir. 1986) (noting that Commerce's interpretation was unacceptable and that investigations should focus on whether implementation of benefits resulted in special bestowals and competitive advantage to specific enterprises).
128. 928 F.2d 1568 (Fed. Cir. 1991).
129. See PPG Indus., Inc. v. United States, 928 F.2d 1568, 1581 (Fed. Cir. 1991) (Michel, J., dissenting) (arguing that court's decision threatens to revive statutorily incorrect general availability test and citing cases applying correct test as derived in Cabot); see also Roses, Inc. v. United States, 743 F. Supp. 870, 879 (Ct. Int'l Trade 1990) (following Cabot and determining that International Trade Administration should have determined whether benefit in fact had been bestowed on Mexican flower industry rather than applying general availability test); Armco Inc. v. United States, 733 F. Supp. 1514, 1530 (Ct. Int'l Trade 1990) (following Cabot and rejecting International Trade Administration's finding that Malaysian tax abatements did not qualify as bounties or grants to Malaysian steel industry since abatements were generally available to all industries); Comeau Seafoods Ltd. v. United States, 13 Ct. Int'l Trade 923, 931, 724 F. Supp. 1407, 1414 (1989) (applying Cabot's requirement that actual results or effects of benefits must be examined rather than general availability of benefits in determining whether assistance programs available to Canadian fishing industry were countervailable). In PPG, Chief Judge Nies also cited cases in line with Cabot. PPG, 928 F.2d at 1577; see Alberta Pork Producers' Mktg. Bd. v. United States, 11 Ct. Int'l Trade 563, 567, 669 F. Supp. 445, 450 (1987) (determining whether various Canadian assistance programs available to pork producers were countervailable by assessing, as in Cabot, whether benefits were actually conferred upon specific industry); Can-Am Corp. v. United States, 11 Ct. Int'l Trade 424, 427-28, 664 F. Supp. 1444, 1448 (1987) (interpreting Cabot and concluding that in determining whether benefits available to Mexican lime producers were countervailable, court must assess if benefits were specifically bestowed upon lime producing industry).

The Government sought to appeal Cabot when the decision issued, but the Federal Circuit dismissed the appeal as interlocutory. See Cabot, 788 F.2d at 1543 (concluding that where trial court remands to administrative agency, remand is unappealable). The issue thus waited six years before it reached the court of appeals. Officials of the Department of Commerce have criticized the Federal Circuit's jurisdictional decision in Cabot both as a legal matter and for the effect that it has on the development of the substantive law. See generally Proceedings of the Fourth Annual Judicial Conference of the U.S. Court of International Trade, 120 F.R.D. 543, 564-66 (1987).


Nominal general availability under the terms of the law, regulation, program, or rule establishing a bounty, grant, or subsidy, of the benefits thereunder is not a basis for
PPG concerned a determination by Commerce, made prior to *Cabot*, that Mexican government programs designed to protect exporters from exchange rate risks and to control prices for the sale of natural gas were not "bounties or grants" within 19 U.S.C. § 1303(a).1 In the court below, Judge Carman, the same judge who decided *Cabot*, upheld Commerce's determination. A divided panel of the Federal Circuit affirmed. The way in which the panel divided leaves the significance of the Federal Circuit's decision in some doubt. Senior Circuit Judge Smith joined in the result, but did not join Chief Judge Nies' opinion or file one of his own. Judge Michel in dissent observed that, in these circumstances, there is no opinion of the court, and the opinion therefore does not have the force of precedent. To reinforce his point, he waxed ironic, stating, "[t]his jurisprudential truth, however, likely will be lost when the bar reads and cites that opinion." Notwithstanding Judge Michel's cautions, there appears to be more agreement than disagreement, and consequently significant precedent, in the *PPG* opinions. The disagreement may concern less what the law should be than what was at issue in the appeal. First, both Chief Judge Nies and Judge Michel rejected appellant's argument that "bounty or grant" includes any benefit that allows goods to be sold for less in the United States than would otherwise be the case. Second, both rejected the proposition that the existence of eligibility requirements suffices to make a benefit sufficiently specific to qualify as a bounty or grant. Third, both approved the line of CIT decisions that require a case-by-case inquiry into whether a nominally generally available program disproportionately benefits a specific industry or group of industries. Fourth, both determining that the bounty, grant, or subsidy is not, or has not been, in fact provided to a specific enterprise or industry, or group thereof.

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133. *PPG*, 928 F.2d at 1579.
134. See *id.* (noting merely that Judge Smith concurred in result).
135. *Id.* at 1580 (Michel, J., dissenting).
136. *Id.*
137. See *id.* at 1573 (agreeing with International Trade Administration that language of 19 U.S.C. § 1677(5)(B) restricts meaning of "bounty or grant"); *id.* at 1580 (Michel, J., dissenting) (finding effects of benefit, not merely whether benefits exist, must be focus of analysis).
138. *Id.* at 1578. The Chief Judge's discussion is explicit, while Judge Michel's judgment on this point is implicit in his conclusion that the proceeding should be remanded to Commerce for investigation of whether the program benefits are sufficiently specific. *See id.* at 1584 (Michel, J., dissenting) (finding remand is only proper course).
139. See *id.* at 1577 (finding cases to be in accord with case-by-case specific standard); *id.* at 1580, 1581 (Michel, J., dissenting) (recognizing that consistent line of cases requires inquiry
rejected, Chief Judge Nies explicitly and Judge Michel implicitly, PPG's argument that a bounty is specifically directed enough to be countervailable if its recipients are simply identifiable.\textsuperscript{140}

Chief Judge Nies and Judge Michel disagreed, however, on whether the court should remand the decision and require Commerce to investigate whether the Mexican government awarded preferential discounted natural gas rates, nominally available to all domestic industries, on a disproportionate basis to the float glass industry.\textsuperscript{141} Judge Michel found the answer clear: Commerce's statement of reasons for not finding the program countervailable rested simply on the fact that the published price for natural gas was available to all industries.\textsuperscript{142} Commerce, therefore, failed to make the investigation as required by the \textit{Cabot} line of cases—which both judges adopted in \textit{PPG}.\textsuperscript{143}

Chief Judge Nies did not reach this question. Quoting the same finding that Judge Michel cited as establishing the inadequacy of Commerce's investigation, she stated, "Before the ITA and the Court of International Trade, PPG asserted that preferential discounted natural gas rates were given to the float glass industry as compared to other industries. . . . This issue is not raised on appeal."\textsuperscript{144} Chief Judge Nies thus did not address whether the Mexican natural gas program disproportionately benefitted the float glass industry or whether Commerce adequately investigated the question. She found instead that PPG was making a different argument before the Federal Circuit—namely, that the program disproportionately benefitted a broader category of "energy intensive"
Accordingly, she held that Commerce acted properly in declining to make energy intensive industries a specific group of industries for purposes of deciding whether a bounty was de facto benefiting a group of industries. Judge Michel’s dissenting opinion did not address the energy-intensive industry question.

The disagreement between the two judges may involve no more than a difference concerning what is necessary to preserve an issue on appeal to the Federal Circuit, an issue the two opinions did not explicitly address. Judge Michel did not discuss how PPG brought, in either its briefs or its oral arguments, the issue of the adequacy of Commerce’s investigation to the court’s attention. He mentioned that PPG had no burden of proof before the agency, but because Chief Judge Nies did not preclude PPG from raising the issue before the agency or the CIT, Judge Michel’s observation does not address her objection to the Federal Circuit’s considering the question.

Judge Michel asked, “What vitality will [the Cabot line of] CIT decisions have in view of our court’s result in PPG Industries?” To this author, at least, the answer seems to be that the vitality of that line of decisions is undiminished, indeed strengthened, since the Chief Judge’s opinion did not approve, did not even consider, the administrative outcome that Judge Michel found to be so at odds with the prior case law. The two decisions do state the post-Cabot standard somewhat differently. The Chief Judge summarized it as a two part inquiry: (1) if, by its terms, a subsidy is provided to a particular enterprise or industry, or group of enterprises or industries, it is automatically countervailable; (2) if, by its terms, a benefit appears to be nominally generally available to all industries, the benefit may still be countervailable if, in its application, the program results in a subsidy only provided to a specific enterprise or industry or specific group of enterprises or industries. Judge Michel summarized the Cabot line as holding that the inquiry must go beyond general availability and must determine on a case-by-case basis the effect of the benefit, and in particular, whether the subsidy disproportionately benefits a foreign company or other industry as compared to others, thereby creating a significant competitive advantage

145. See id. (recognizing that PPG brought “energy-intensive” argument on appeal for first time in litigation).
146. Id. at 1579.
147. Id. at 1582 (Michel, J., dissenting).
148. Chief Judge Nies declined to resolve whether “energy intensive” industries are “specific” industries because it is a legislative issue. Id. at 1579.
149. Id. at 1583 (Michel, J., dissenting).
150. Id. at 1576 (emphasis in original).
over United States companies.\textsuperscript{151} It is unlikely, however, that these differences in formulation will matter greatly in future cases. In \textit{Roses, Inc. v. United States},\textsuperscript{152} the first case on the countervailability of subsidies decided by the CIT after the Federal Circuit's decision in \textit{PPG}, Judge Tsoucalas applied Judge Michel's statement of the standard, but noted that his outcome would have been the same had he applied Chief Judge Nies' statement.\textsuperscript{153}

\textbf{B. Class or Kind of Merchandise and Like Product Definitions}

To determine whether imported goods are sold at less than fair market value and whether a domestic industry has been materially injured, Commerce defines a class or kind of foreign merchandise and the Commission defines a like product and a domestic industry.\textsuperscript{154} Commerce determines the imported merchandise that is the subject of the investigation and determines whether those imports are being sold or are likely to be sold at less than fair value.\textsuperscript{155} In

\begin{itemize}
\item [151.] \textit{Id.} at 1580 (Michel, J., dissenting).
\item [154.] 19 U.S.C. § 1673 (1988). This section provides as follows:
\begin{itemize}
\item [155.] \textit{Id.} § 1677(16). This provision sets forth that for the purposes of determining the imposition of antidumping duties "such or similar merchandise" means: (A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise. (B) Merchandise—(i) produced in the same country and by the same person as the merchandise which is the subject of the investigation, (ii) like that merchandise in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to that merchandise. (C) Merchandise—(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation, (ii) like that merchandise in the purposes for which used, and (iii) which the administering authority [Commerce] determines may reasonably be compared with that merchandise. \textit{Id.; see id.} § 1673 (setting forth that administering authority [Commerce] determines whether foreign merchandise is being, or will likely be sold in United States for less than fair value).
contrast, the "Commission's role is to determine whether dumping injures or threatens to injure an American industry." Because the Tariff Act defines the domestic industry as the producers as a whole of the "like product," in each investigation the Commission must define the domestic product "like" the imported merchandise under investigation. The statute defines "like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation." 

In two separate cases captioned Torrington Co. v. United States, the court reaffirmed the discretionary authority of Commerce and the Commission to interpret antidumping duty statutes. In the administrative proceedings underlying the two Torrington cases, plaintiff petitioned for antidumping duties on imports of antifriction bearings as a whole. Rather than determining whether foreign companies were dumping antifriction bearings as a whole and injuring a single domestic industry, however, Commerce determined that the category antifriction bearings should be regarded as five classes or kinds of merchandise. The Commission determined that those classes or kinds of merchandise corresponded to six domestic like products. Torrington challenged the discretionary authority of Commerce and the Commission, respectively, to deviate from the classes or kinds of merchandise and the like product asserted by petitioner in an antidumping investigation. In the alternative, Torrington questioned whether the determinations by Commerce and the Commission were supported by substantial evidence.

In both decisions, the Federal Circuit reaffirmed the principle stipulated in Chevron U.S.A. Inc. v. Natural Resources Defense Council that where an agency is charged with administering antidumping

156. Id. § 1673.
157. The Act further provides that "industry' means the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product..." Id. § 167(4).
158. Id. § 1677(10).
159. 938 F.2d 1276 (Fed. Cir. 1991); 938 F.2d 1278 (Fed. Cir. 1991).
161. See Torrington Commerce, 938 F.2d at 1277 (naming five classes as: (1) ball bearings, (2) spherical roller bearings, (3) cylindrical roller bearings, (4) needle roller bearings, and (5) plain bearings).
162. See Torrington Commission, 938 F.2d at 1279 (naming six like products as: (1) ball bearings, (2) spherical roller bearings, (3) cylindrical roller bearings, (4) needle roller bearings, (5) plain bearings, and (6) slewing rings).
163. Torrington Commerce, 938 F.2d at 1277; Torrington Commission, 938 F.2d at 1280.
164. Torrington Commerce, 938 F.2d at 1277; Torrington Commission, 938 F.2d at 1280.
and countervailing duty laws, the court "will not disturb its interpretation unless it is unreasonable, and we conclude that it is not." The Federal Circuit adopted in both *Torrington* cases the thorough analysis of the facts conducted by the CIT "as our own." In Commerce's *Torrington* case, the plaintiff argued that once a petition satisfies the filing requirements, Commerce lacks the authority to modify the class or kind descriptions provided in the petition. The plaintiff relied on the statutory procedures for initiating an antidumping investigation to support its argument. The CIT decision adopted by the Federal Circuit noted, however, that no provision prohibits Commerce from distinguishing between two classes or kinds of merchandise when the petition does not properly do so. In reaching this conclusion, the court extended the application of the Federal Circuit's earlier decision in *Mitsubishi Electric Corp. v. United States* which involved expanding the scope of the investigation. In *Mitsubishi*, the Federal Circuit held that the administration, not the complainant, has the responsibility of determining the proper scope of the investigation and the antidumping order. The court in *Torrington* reiterated the standard stated in *Mitsubishi* that "discretion must be exercised in light of all the facts before the Administration and must reflect the agency's judgment regarding the scope and form of an order that will best effectuate the purpose of the antidumping laws and the violation found." In the Commerce *Torrington* decision, the court found this standard satisfied if the agency supports its factual findings with substantial


167. *Torrington Commerce*, 938 F.2d at 1277-78; *Torrington Commission*, 938 F.2d at 1280.


169. See id. at 720 (citing 19 U.S.C. § 1673a(c)(2) (1988)). Section 1673a(c) provides that: "the administering authority shall . . . (2) if the determination is affirmative, commence an investigation to determine whether the class or kind of merchandise described in the petition is being or is likely to be, sold in the United States at less than its fair value . . . ." 19 U.S.C. § 1673a(c)(2) (1988).


171. 898 F.2d 1577 (Fed. Cir. 1991).

172. See *Torrington Commerce*, 745 F. Supp. at 721 (discussing *Mitsubishi Elec. Corp. v. United States*, 898 F.2d 1577 (Fed. Cir. 1990) (noting scope of investigation into cellular mobile telephone dumping included subassemblies so as to prevent circumvention of antidumping order)).

173. *Mitsubishi*, 898 F.2d at 1582. The *Torrington* case involved narrowing the scope of the investigation but the trial court found the principle to be the same. *Torrington Commerce*, 745 F. Supp. at 721 n.3.

Torrington also challenged Commerce's departure from the definition of the class or kind in the petition as a departure from its past practice, although recognizing that the agency had acted similarly in two prior cases. The court responded that even though Commerce does not exercise this authority often, the frequency of its use does not limit its right to do so. Likewise, the court held that simply because the criteria used by Commerce to determine the class or kind referred to "general physical characteristics" and to the "ultimate use of the merchandise," Commerce was not obliged to adopt a broad interpretation of class or kind. Thus, in each trade case in 1991 in which appellants in the Federal Circuit sought to bind an agency to allegedly consistent past practice, the Federal Circuit either wrote or adopted an opinion that allowed deviation from the asserted practice.

In the Commission Torrington case, the plaintiff claimed that the like product determination must conform to the like product definition provided by the petition. The Federal Circuit adopted the CIT's decision. In doing so, the Federal Circuit effectively endorsed a line of CIT cases, much as it endorsed the Cabot line of cases in PPG, that authorized the Commission to find that, corresponding to the class or kind of imports, there might be several like products or a single like product encompassing domestic products not included in the scope of imports. The

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175. Id. at 723.
176. Id. at 722; see id. at n.3 (citing Cyanuric Acid and Its Chlorinated Derivatives from Japan, 49 Fed. Reg. 17,825 (Dep't Comm. 1984) and Hot-Rolled Carbon Steel Plate and Hot-Rolled Carbon Steel Sheet from Brazil, 49 Fed. Reg. 3102 (Dep't Comm. 1984) (final determination)).
177. Id. at 722.
178. Id. at 723; see id. at 728 (rejecting Torrington's argument and finding Commerce has no such interpretation policy, and even if it did, it would not yield uniform results).
179. See, e.g., Torrington Commerce, 938 F.2d at 1278 (deferring to discretion of Commerce Department); Torrington Commission, 938 F.2d at 1280 (deferring to discretion of International Trade Commission); Chrysler Motors Corp. v. United States, 945 F.2d 1187, 1187 (Fed. Cir. 1991) (adopting CIT decision which rejected contention that Customs Service lacked authority to revoke previous practices).
181. Torrington Commission, 938 F.2d at 1280.
182. See Torrington Commission, 747 F. Supp. at 748 (citing cases recognizing that Commission may deviate from contentions made in petitions in determining whether one or more industries have been injured by imports, and may deviate from International Trade Administration's class or kind findings in making its like product determinations); see also Mitsubishi Elec. Corp. v. United States, 12 Ct. Int'l Trade 1025, 1057, 700 F. Supp. 538, 563 (1988) (recognizing Commission's authority to assess injuries to domestic cellular mobile telephone subassembly industry as part of investigation of petitioner's allegations that dumping injured completed domestic cellular mobile telephone industry), aff'd, 899 F.2d 1577 (Fed. Cir. 1990); Kenda Rubber Indus. Co. v. United States, 10 Ct. Int'l Trade 120, 123, 630 F. Supp.
Federal Circuit, by adopting the CIT's decision, affirmed in Torrington that, while the Commission does not have the authority to modify Commerce's class or kind finding, it does have the right to make an independent determination as to what should be considered a like product. The CIT opinion adopted by the Federal Circuit in Torrington followed an earlier CIT opinion affirmed by the Federal Circuit in Algoma Steel Corp. v. United States. The CIT in Algoma Steel observed that the possibility that the agencies will reach inconsistent conclusions is "built into the law," and that the inconsistencies resulting from the plain language of the statute should be tolerated unless they lead to results that Congress could not have intended.

The appellant in the Commission Torrington case sought to bind the Commission, as it had sought to bind Commerce, to a "broad" interpretation of the like product. Torrington constructed its argument from the legislative history of the Trade Agreements Act of 1979, which instructs the Commission to avoid permitting "minor differences in physical characteristics and uses to lead to the conclusion that the product and article are not 'like' each other" and to avoid defining the like product "in such a fashion as to prevent con-
sideration of an industry adversely affected by the imports under consideration." The court disagreed with Torrington's interpretation of the statute's mandate and legislative history and found that the Senate Report warns against permitting minor differences to preclude a comparison of domestic products and imported products. The court noted that, on the present issue, the Commission compared domestic products to other domestic products, not domestic products to imported products.

In both Torrington cases, the court held that the true issue was whether the factual findings of the agencies were supported by substantial evidence in view of the factors that they considered. Each agency had in prior cases adopted multi-factor criteria for making their determinations. The court held that, notwithstanding some similarities with respect to products concerning some of these factors, both Commerce and the Commission acted reasonably in finding that the differences on which they relied outweighed the similarities. Perhaps the most noteworthy aspect of the court's review for substantial evidence was its holding that, even though there was little evidence to support the Commission's conclusion that bearings move through different channels of distribution, the Commission's ultimate like product determination would not be disturbed. The court found that it was not dispositive that one of the six criteria did not support the determination. It concluded

189. Id.
190. See id. (finding it impossible for court to determine minor differences between vastly different products investigated by Commission and that "[t]he issue of the Court is whether the evidence used by the ITC to make its determination rises to the level of substantial evidence and supports the conclusion"); Torrington Commerce, 745 F. Supp. at 723 ("[T]he statutes and case law require neither a 'broad' nor a 'narrow' interpretation of class or kind, only one that is supported by substantial evidence and is otherwise in accordance with law."); 19 U.S.C. § 1516a(b)(1)(B) (1988) sets forth, in part, that "[t]he court shall hold unlawful any [Commerce and Commission] determination, finding, or conclusion found . . . to be unsupported by substantial evidence.

191. See Asociacion Columbiana de Exportadores de Flores v. United States, 12 Ct. Int'l Trade 634, 639-46, 693 F. Supp. 1165, 1169-70 & n.8 (1988) (upholding Commission's line product determination factors, which included (1) physical appearance; (2) interchangeability; (3) channels of distribution; (4) customer perceptions; (5) common manufacturing facilities and production employees; and where appropriate (6) price); Diversified Prods. Corp. v. United States, 6 Ct. Int'l Trade 155, 162, 572 F. Supp. 883, 889 (1983) (upholding Commerce's class of kind merchandise determination factors, which include (1) general physical characteristics; (2) expectation of purchasers; (3) channels of trade; (4) ultimate use; and (5) cost).
194. Id. The court noted that the six criteria are: (1) physical appearance; (2) inter-
that "[i]f the balance of the evidence constitutes substantial evidence, then the determination will be affirmed."\(^\text{195}\)

\section*{C. Antidumping and Countervailing Duty Administrative Procedures}

The Federal Circuit's decision in \textit{Matsushita Electric Industrial Co. v. United States}\(^\text{196}\) can be viewed as an intriguing case study in the intricate relationship among courts, Congress, and administrative agencies. Before 1988, the counsel for parties to antidumping and countervailing duty investigations had little access to business proprietary information in cases before the Commission, but could obtain access to the confidential records in cases before the CIT.\(^\text{197}\) The Commission also prohibited the granting of release of such documents under administrative protective orders to any in-house counsel.\(^\text{198}\)

In \textit{United States Steel Corp. v. United States},\(^\text{199}\) the Federal Circuit held that the CIT acted improperly when it followed the Commission's lead and, solely on the ground that the counsel was an employee of the party, denied in-house counsel access during court review to business proprietary portions of a Commission record under judicial protective order.\(^\text{200}\) The Federal Circuit in \textit{United States Steel} held that a per se rule against such disclosure was inappropriate.\(^\text{201}\) In dicta, the court articulated a standard for the CIT to apply. It noted that in-house counsel might be denied access where they "are involved in competitive decisionmaking."\(^\text{202}\) The court explained that competitive decisionmaking would involve "a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor."\(^\text{203}\)

\(^{195}\) Id.

\(^{196}\) 929 F.2d 1577 (Fed. Cir. 1991).


\(^{198}\) 19 C.F.R. § 207.7(b)1 (1987) (current version at 19 C.F.R. § 207.7(a)(3) (1991)).

\(^{199}\) 730 F.2d 1465 (Fed. Cir. 1984).

\(^{200}\) United States Steel Corp. v. United States, 730 F.2d 1465, 1469 (Fed. Cir. 1984).

\(^{201}\) See id. at 1468 ("Whether an unacceptable opportunity for inadvertent disclosure exists, however, must be determined . . . by the facts on a counsel-by-counsel basis, and cannot be determined solely by giving controlling weight to the classification of counsel as in-house rather than retained.")

\(^{202}\) Id.

\(^{203}\) Id. n.3.
In 1988, Congress amended 19 U.S.C. § 1677f(c)(1)(A) to provide that, during their antidumping or countervailing duty investigations, Commerce and the Commission must make their business proprietary information available under administrative protective order to representatives of interested parties. In deciding whether to grant access under administrative protective orders to in-house counsel during administrative proceedings, the Conference Report on the Omnibus Trade Act of 1988 instructed the agencies to use the standard for the CIT's judicial protective orders set forth by the Federal Circuit in United States Steel. Thus, the Federal Circuit's decision in United States Steel, which changed CIT procedures, influenced Congress to change administrative procedures.

Matsushita Electric Industrial Co. v. United States was the first appeal of agency action under this new provision. In Matsushita, an in-house counsel holding the titles of general counsel, senior vice president, and secretary for a respondent in a Commission investigation, applied to the Secretary of the Commission for access to business proprietary information under administrative protective order. Counsel for petitioners in the investigation objected to disclosure on the basis that the applicant was both an officer and general counsel of the company. In response, the applicant submitted an affidavit explaining the nature of his duties and of the meetings he attended and asserting that he was not involved in competitive decisionmaking. The Commission's Secretary granted the applicant access to the information. The CIT entered a temporary restraining order against release under the administrative protective

204. Pub. L. No. 100-418, tit. I, § 1332(2)(A), 102 Stat. 1207 (1988) (codified as amended at 19 U.S.C. § 1677f(c)(1)(A)). Congress amended the provision to state that "the Commission shall make all business proprietary information presented to, or obtained by it, during a proceeding . . . available to interested parties who are parties to the proceeding under a protective order described in subparagraph (B), regardless of when the information is submitted during a proceeding." Id.


207. Id.

208. See id. (describing applicant's asserted duties as officer and general counsel as reviewing securities filings, reviewing employee benefit and stock purchase plans, keeping minutes at Board of Directors' meetings, and attending retail store meetings).

209. Id. at 1104.
order, and the Federal Circuit reversed.²¹⁰

The Federal Circuit's reversal of the CIT's holding succinctly defined the scope of the *United States Steel* doctrine as incorporated into the statute and reaffirmed the limits of arbitrary and capricious review. It would have been sufficient for the court to state, as it did, that the applicant's submissions provided the Secretary with a reasonable basis to conclude that he was adequately insulated from competitive decisionmaking, particularly when the CIT found no reason to doubt the veracity of the representations.²¹¹ The court, however, also faulted the CIT for conducting a de novo review of the record, holding that the CIT findings concerning the nature of the meetings attended by the applicant were not only insufficiently deferential but also contradictory.²¹² On the legal issue, the Federal Circuit held that the CIT's findings that the applicant's positions put him in "regular contact" with policymaking elements of the corporation were irrelevant because the test is whether the applicant engaged in giving advice and participating in competitive decisionmaking.²¹³ The Federal Circuit suggested that the CIT's opinion effectively constituted the per se rule rejected in *United States Steel*.²¹⁴ The process begun in *United States Steel* had come full circle.

### IV. UNFAIR PRACTICES IN INTERNATIONAL TRADE

In each of the areas of trade law discussed above, the Federal Circuit reviews CIT decisions. In contrast, under 19 U.S.C. § 1337(c) and 28 U.S.C. § 1295(a)(6), the Federal Circuit exercises exclusive, direct jurisdiction over final determinations of the Commission with respect to unfair practices in international trade.²¹⁵ The court's review of Commission determinations in 1991 primarily concerned the agency's decisions on substantive issues of patent law that were predicates for affirmative or negative findings of unfair practices. Those patent law decisions are discussed in the accompanying arti-

²¹¹ *Matsushita*, 929 F.2d at 1580 (quoting CIT statement that it "has no reason to, and does not here, doubt [respondent's] veracity").
²¹² Id.
²¹³ Id.
²¹⁴ Id.
In some cases, however, the court's holdings affected the administration of 19 U.S.C. § 1337 as a trade statute. The merits of the Commission's finding of patent infringement was not at issue in Biocraft Laboratories, Inc. v. United States International Trade Commission. In this case, the Commission determined that Biocraft (the infringer) violated 19 U.S.C. § 1337 by importing an antibiotic covered by a patent of Bristol-Myers' (the patentee). The patentee and the infringer subsequently entered into a settlement agreement. Under the settlement agreement, the infringer paid the patentee $21 million in full satisfaction of the patentee's claim. The patentee agreed to join a petition to the Commission for return of bonds that the infringer had paid under a temporary exclusion order issued during the pendency of the proceeding and which had been forfeited when the Commission's determination of infringement became final. In the temporary exclusion order, the bond provision stated that it did not apply to conduct that was otherwise permitted. Because the order permitted conduct that "is licensed or authorized" by the patentee, the question was whether the settlement licensed or authorized the prior sales otherwise covered by the bond. The Federal Circuit held that the Commission abused its discretion in refusing to release the bond and found that the settlement operated retroactively to authorize the sales within the mean-

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217. 947 F.2d 483 (Fed. Cir. 1991).


219. Id. at 485.

220. Id.

221. Id.; 19 U.S.C. § 1337(e)(1) authorizes the Commission to exclude articles from entering the United States unless the importer posts a bond. This provision states:

If, during the course of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry, except that such articles shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary.


222. Biocraft, 947 F.2d at 484-85.

223. See id. at 485 (quoting Paragraph IV of Commission's order).
ing of the order. Furthermore, the court found that no other public interest was involved that would justify the continued effectiveness of the bond.

In effect, the Federal Circuit in *Biocraft* encouraged settlements prior to appeal at the cost of discouraging settlements during the agency proceeding. The order at issue provided for return of any bond posted if the Commission either reached a negative determination or no determination at all. Thus, a reading of such orders that did not provide for refund of monies in the event of a post-determination settlement would give the respondent incentive to settle before the Commission reached its determination. By holding such a reading improper, the Federal Circuit lessened the motivation for settlement during Commission proceedings.

A similar view, both of the relative importance of burdens on the agency and of the relevance of public interest factors in the Commission's framing of remedies, appears to explain the court's procedural disposition in *Intel Corp. v. United States International Trade Commission*. In *Intel*, the Commission affirmatively determined that the respondent's imports infringed two patents owned by Intel. The Commission issued an order excluding respondents' imports that infringed Intel's patents from entry into the United States. The court affirmed the finding of infringement as to one patent and, without making any holding concerning infringement of the other, vacated that portion of the Commission's order forbidding importations that infringed only the second patent.

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224. *Id.* at 486.
225. *Id.* at 486-87.
226. *See id.* (noting that returning of bond is consistent with intent of parties and encourages settlement).
227. *See id.* at 485 & n.2 (reprinting Paragraph XI of order stating conditions for forfeiture or release of bond).
228. 946 F.2d 821 (Fed. Cir. 1991).

The provision authorizing the issuance of exclusion orders is 19 U.S.C. § 1337(d). This section provides:

> If the Commission determines, as a result of an investigation under this section, that there is violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

230. *Intel*, 946 F.2d at 825.
231. *Id.* at 843-44.
The disposition of Intel is the culmination of a five-year development in the court's use of vacatur to limit its review of Commission determinations.\textsuperscript{232} The development began with Corning Glass Works v. United States International Trade Commission,\textsuperscript{233} in which the court, having affirmed the Commission's negative determination that the petitioner's actions did not injure the domestic industry, vacated those portions of the Commission's determination also reaching negative conclusions on the substantive patent case.\textsuperscript{234} In Texas Instruments, Inc. v. United States International Trade Commission,\textsuperscript{235} the Federal Circuit extended this practice to support the vacatur of portions of orders issued after affirmative determinations. In that case, the Commission's order barred the importation of specific components produced by a foreign manufacturer that infringed three patents.\textsuperscript{236} Finding two of the patents infringed, the Federal Circuit vacated the portion of the order concerning the third because it was coterminous with one of the others, noting that the patentee did not claim that any of respondent's devices infringed the third patent and not the others.\textsuperscript{237} The court in Intel applied this principle to vacate portions of a limited exclusion order that was based on the infringement of a second patent.\textsuperscript{238} The court, however, noted the apparent inconsistency between this approach and earlier dictum to the effect that each ground for an exclusion should be regarded as a separate order.\textsuperscript{239}

\textsuperscript{232} "Vacatur" is defined as, "[i]n practice, a rule or order by which a proceeding is vacated; a vacating." BLACK'S LAW DICTIONARY 712 (6th ed. 1990).

\textsuperscript{233} 799 F.2d 1559 (Fed. Cir. 1986).

\textsuperscript{234} The court subsequently followed this precedent in Fischer & Porter Co. v. United States Int'l Trade Comm'n, 831 F.2d 1574, 1582 (Fed. Cir. 1991) (sustaining Commission's determinations of no injury yet vacating, without discussion, negative findings by Commission on substantive patent issues).


\textsuperscript{235} 871 F.2d 1054 (Fed. Cir. 1989).

\textsuperscript{236} Texas Instruments, Inc. v. United States Int'l Trade Comm'n, 871 F.2d 1054, 1057 (Fed. Cir. 1989).

\textsuperscript{237} Id. at 1063-64. Likewise, the court in Texas Instruments vacated, without substantive review, a noninfringement determination regarding a fourth patent that the patentee challenged. Id. at 1067. The court found the relief that the patentee received from the other patent infringement determinations adequately covered all the goods and, therefore, made it unnecessary to address the remaining patent issue. Id.

\textsuperscript{238} Intel Corp. v. United States Int'l Trade Comm'n, 946 F.2d 821, 844 (Fed. Cir. 1991).

\textsuperscript{239} See Texas Instruments, 871 F.2d at 1067 & n.7 (citing SSIH Equip. S.A. v. United States Int'l Trade Comm'n, 718 F.2d 365, 370 n.8 (Fed. Cir. 1983)).
Like the Biocraft decision, the Intel and Texas Instruments dispositions treated Commission orders simply as resolving issues between parties in a case before it. Nevertheless, decisions by the court to vacate portions of a Commission order can have significant impacts on the administration of trade laws. The Commission's exclusion orders constitute directions to Customs to stop goods that infringe named patents from entering the United States. Upon the entry of an exclusion order, it is not uncommon for foreign producers to attempt to engineer around the patent named in the order. A foreign producer might successfully engineer around the patent that the Federal Circuit has retained in an exclusion order, but not around a second patent that the court has eliminated from the order. If the second patent remained in the order, the goods would be excluded from entry, subject to an appeal of Customs' determination and a trial de novo in the CIT. If the second patent is eliminated, the goods enter the United States. The patentee must again petition the Commission for an investigation. That investigation cannot provide remedies for already entered goods, and the Commission's determination is subject to substantial evidence re-

240. The court was careful to note in Intel that, as in Texas Instruments, the "court was considering a limited exclusion order, directed solely at the parties before it." Intel, 946 F.2d at 844. In doing so, the court recognized that it has upheld the agency's discretion to enter general exclusion orders directed to the world and not simply to the parties before it. See, e.g., Allied Corp. v. United States Int'l Trade Comm'n, 850 F.2d 1573, 1580 (Fed. Cir. 1988), cert. denied, 488 U.S. 1008 (1989) (upholding Commission's modification to general exclusion order prohibiting all foreign manufacturers from importing particularly produced amorphous metal articles); SIIH Equip. S.A. v. United States Int'l Trade Comm'n, 718 F.2d 365, 370 (Fed. Cir. 1983) (arguing that Commission may modify order that is operative against goods and that order is equally effective against those who participate in proceeding and those who do not); Sealed Air Corp. v. United States Int'l Trade Comm'n, 645 F.2d 976, 985, 989 (C.C.P.A. 1981) (upholding exclusion order directed generally against multicellular plastic material manufacturers).


242. See Yarway Corp. v. Eur-Control U.S.A., Inc., 775 F.2d 268, 277 (Fed. Cir. 1985) (acknowledging that foreign company, through United States subsidiary, designed around patent); Rebecca S. Elsenberg, Patents and the Progress of Science: Exclusive Rights and Experimental Use, 56 U. CHi. L. REV. 1017, 1028 n.44 (1989) (discussing benefits and problems of designing around patents and providing sources supporting each position).


244. Since the court vacated the prior determination, a new investigation would be necessary. Although the Commission may commence an investigation on its own initiative, to ensure that the investigation takes place, the patentee must petition for an investigation. See 19 U.S.C. § 1337(b)(1) (1988) (providing Commission's authority and duty to investigate alleged violations of unfair practices in import trades).

245. The remedies afforded to the Commission under 19 U.S.C. § 1337 are prophylactic in nature and do not include remedies for goods that have already entered. See 19 U.S.C. § 1337(d)-(g) (1988) (providing exclusion of articles for entry, exclusion of articles from entry under bond, and cease and desist orders as applicable remedies available to Commission upon determining that import activity is unlawful).
view in the Federal Circuit. During the pendency of the investigation, goods are not excluded, but at most may be subject to the bonding provisions described in the Biocraft decision. In short, the Federal Circuit's decision to vacate portions of Commission orders can affect what goods enter the country (and thus the effectiveness of the Commission's orders as quasi-legislative actions imposing embargoes), what agency decides infringement issues, what court hears subsequent appeals in the first instance, including whether a court trial takes place in those appeals, and whether the Commission must conduct further investigations. The court did not explain in either Intel or Texas Instruments why such consequences are required if its decisions to vacate are discretionary, advisable, or consistent with the statutory scheme.

In contrast to the outcomes in Biocraft and Intel, the decision in Farrel Corp. v. United States International Trade Commission stressed that the Commission does not simply act as an adjudicator of private rights. In Farrel, the parties entered into an arbitration agreement that provided: "All disputes arising in connection with the present Agreement shall be finally settled by arbitration." On Farrel's petition, the Commission instituted a section 337 proceeding in the Commission just prior to a decision in a parallel district court case involving the same challenged actions. The district court dismissed the suit, holding that the arbitration agreement bound the


247. See 19 U.S.C. § 1337(e)(1) (1988) (providing that, if during course of investigation, Commission has reason to believe there is violation of statute, Commission may exclude entry of articles unless under bond); supra note 221 (setting forth text of section 1337(e)(1)); see also Biocraft Labs., Inc. v. United States Int'l Trade Comm'n, 947 F.2d 483, 487 (Fed. Cir. 1991) (discussing mechanics and purpose of bond).

248. A review of the Federal Circuit's practice on vacatur is beyond the scope of this Article. It may be noted that in one of the last patent cases of the year, Malta v. Schulmerich Carillons, Inc., 952 F.2d 1320 (Fed. Cir. 1991), the court, having upheld the district court's finding of noninfringement, found it unnecessary to reach issues of equitable ownership and shop rights raised in a cross-appeal, but did not vacate those findings. Id. at 1328.

249. 949 F.2d 1147 (Fed. Cir. 1991), petition for cert. filed, 60 U.S.L.W. 3689 (U.S. Mar. 16, 1992) (No. 91-1501). The petition for writ of certiorari was filed by intervenor-appellee in the case and is opposed by the Commission.

250. Farrel Corp. v. United States Int'l Trade Comm'n, 949 F.2d 1147, 1152 (Fed. Cir. 1991) (observing that in reaching final determination on alleged violation, Commission must consider factors that may or may not interest parties), petition for cert. filed, 60 U.S.L.W. 3689 (U.S. Mar. 16, 1992) (No. 91-1501).

251. Id. at 1149.
parties to bring it to arbitration. Finding that the district court decision collaterally estopped any question as to whether the scope of the agreement reached the claims before it, the Commission terminated its investigation before it made a finding on the merits of Farrel’s claim of trade secret misappropriation. The Commission relied on the strong federal policy in favor of arbitration, especially in international disputes, as enunciated by the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* The Commission also declined to exercise its discretion to self-initiate an investigation.

The Federal Circuit reversed, holding that 19 U.S.C. § 1337 requires the Commission to determine whether there is a violation once it has begun an investigation. The court found that the policy articulated in *Mitsubishi* was inapplicable, largely in view of the Supreme Court’s decision in *Gilmer v. Interstate/Johnson Lane Corp.* In *Gilmer*, the Court held that subjecting a claim to binding arbitra-


253. *See id.* at 1151 (discussing findings of Commission). In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985), the Supreme Court held that a party having made the bargain to arbitrate should be held to it unless Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. The Court further stated that there is an “emphatic federal policy in favor of arbitral dispute resolution” which “applies with special force in the field of international commerce.” *Id.* at 631, quoted in *Farrel*, 949 F.2d at 1155.

254. *Farrel*, 949 F.2d at 1150 (noting that Commission instituted investigation based on Farrel’s complaint rather than self-initiating investigation as Farrel proposed).


The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section, except that the Commission may, by issuing a consent order or on the basis of a settlement agreement, terminate any such investigation, in whole or in part, without making such a determination.

*Id.* § 1337(c). The court regarded the mandatory language of this provision as requiring a narrow reading of any exceptions to the need to make a conclusive determination on the merits. *Farrel*, 949 F.2d at 1153. It also noted that other provisions of the statute, contemplating that Commission investigations would proceed parallel to proceedings in other fora, suggested that in terminating an investigation in view of an arbitration, the Commission exercised discretion that it could not exercise in the event of parallel district court litigation. *See id.* at 19-20 (citing 19 U.S.C. § 1337(a), (b)(1) (1988)). 19 U.S.C. § 1337(a)(1) provides that violations “when found by the Commission to exist shall be dealt with, in addition to any other provision of law . . . .” 19 U.S.C. § 1337(a)(1) (1988). 19 U.S.C. § 1337(b)(1) provides that for the purpose of tolling the statutory time limits applicable to the Commission, “there shall be excluded any period of time during which such investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.” *Id.* § 1337(b)(1) (1988).

tion under the Age Discrimination Employment Act only barred the petitioner's access to a judicial, not an administrative, forum.\textsuperscript{257} The petitioner, according to the Court, was still free to pursue administrative relief for age discrimination through the Equal Employment Opportunity Commission (EEOC).\textsuperscript{258} The Federal Circuit held that this reasoning in \textit{Gilmer} should also apply to the Commission because the Commission, like the EEOC, is available by statute to a specific class of complainants, has independent authority to investigate alleged or apparent wrongs, and possesses a statutory mandate to promote the public interest.\textsuperscript{259} The court concluded that if the unique protections of the EEOC could not be privately contracted away, then neither should the protections of the Commission.\textsuperscript{260} In determining whether issuance of an order is in the public interest, the court indicated that the Commission could take arbitration proceedings into account after its determination of whether there was a violation of the statute.\textsuperscript{261}

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\textsuperscript{258} \textit{Id.}
\textsuperscript{259} Farrel, 949 F.2d at 1156.
\textsuperscript{260} \textit{Id.}
\textsuperscript{261} \textit{Id.} at 1154.
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