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## 2009 International Trade Law Decisions of the Federal Circuit

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## 2009 International Trade Law Decisions of the Federal Circuit

### **Keywords**

Federal Circuit decisions, U.S. Customs Law, Trade Remedies Laws

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# 2009 INTERNATIONAL TRADE LAW DECISIONS OF THE FEDERAL CIRCUIT

PATRICK A. FITCH\*

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## INTRODUCTION

In 2009, the United States Court of Appeals for the Federal Circuit frequently exercised its exclusive statutory jurisdiction under 28 U.S.C. § 1295(a)(5) to hear appeals from the U.S. Court of International Trade.<sup>1</sup> With this broad authority to hear the full panoply of cases involving the complex and organic regime of U.S. trade laws and regulations, the Federal Circuit each year must rule on complex and diverse questions of law. The Federal Circuit issued nineteen international trade-related precedential opinions in the

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1. 28 U.S.C. § 1295(a)(5) (2006).

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2009 calendar year, spanning issues as varied as tariff classification, drawback requests, antidumping duty proceedings and the constitutionality of the now-repealed Byrd Amendment.

This Article reviews the Federal Circuit's 2009 decisions dealing with international trade-related matters. While some decisions turned on extremely fact-specific issues—often relevant only to that action's litigants—others will undoubtedly alter agency practice for the foreseeable future at U.S. Customs and Border Protection (Customs), the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC). This Article separates the 2009 international trade decisions of the Federal Circuit into two main areas: (1) customs law and (2) trade remedies at Commerce and the ITC.

## I. U.S. CUSTOMS LAWS

Customs cases once again represented a significant portion of the Federal Circuit's 2009 international trade decisions. More than half of the Federal Circuit's eleven 2009 Customs decisions concerned tariff classification.<sup>2</sup> Others concerned drawback requests and requests for refunds of fees incurred by importers in the ordinary course of business.<sup>3</sup> One case concerned the ability of brokers to seek judicial review of license revocations caused by their failure to file reports concerning their brokering activities.<sup>4</sup> The Federal Circuit generally expresses deference to the decisions of Customs, but has not shown any reluctance to intervene on behalf of private litigants when circumstances warrant.

### A. *Tariff Classification*

In 2009, the Federal Circuit decided five tariff classification cases. These cases involved disagreements between importers or manufacturers and Customs about where certain products fall within the voluminous Harmonized Tariff Schedule of the United States (HTSUS), a system of ten-digit codes that purports to cover the full panoply of products imported into the United States. These ten-digit codes are significant to importers, as they determine the duty rate

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2. United States Court of Appeals for the Federal Circuit, <http://www.cafc.uscourts.gov/dailylog.html> (last visited Apr. 7, 2010); see *infra* Part I.A.

3. See *infra* Parts I.B, I.D.

4. Schick v. United States, 554 F.3d 992 (Fed. Cir. 2009).

attached to a product and whether its country of origin entitles it to preferential treatment.<sup>5</sup>

The Federal Circuit ruled on the classification of Canadian cut lumber in *Millenium Lumber Distribution Ltd. v. United States*.<sup>6</sup> Millenium appealed the Court of International Trade's grant of summary judgment in favor of the government that Customs correctly classified Millenium's lumber under HTSUS heading 4407, which covers "[w]ood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6 mm."<sup>7</sup>

Millenium argued that 215 entries of its cut lumber, including two-by-three, two-by-four and two-by-six lumber, cut to various lengths ranging from five to twenty feet and entered between October 1999 and January 2001, should be classified either under HTSUS subheading 4418.90.40 as "[b]uilders' joinery and carpentry of wood" or under HTSUS heading 4421 as "[o]ther articles of wood."<sup>8</sup> After Customs notified Millenium in December 2000 that it liquidated the merchandise under HTSUS heading 4407, Millenium filed two timely protests.<sup>9</sup>

On appeal, the Federal Circuit affirmed. The court found as a threshold matter that determining the meaning of tariff provisions is a question of law, while determining whether specific imports fall within certain tariff provisions is a question of fact.<sup>10</sup> Citing the Explanatory Note to HTSUS heading 4407, which specifies that heading 4407 covers all wood and timber thicker than 6 mm "[w]ith a few exceptions," the Federal Circuit upheld Customs' classification of Millenium's lumber under HTSUS heading 4407.<sup>11</sup> The court rejected classification under HTSUS heading 4418, because Millenium's lumber had not undergone sufficient working to

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5. See generally U.S. International Trade Commission, Tariff Information Center, By Chapter Harmonized Tariff Schedule of the United States (last visited Apr. 7, 2010), <http://www.usitc.gov/tata/hts/bychapter/index.htm> (establishing the HTSUS, listed by chapter and general notes).

6. 558 F.3d 1326 (Fed. Cir. 2009).

7. *Id.* at 1327 (quoting *Millenium Lumber Distribution Co. v. United States*, No. 02-00595, 2007 WL 1116148, at \*4 (Ct. Int'l Trade Apr. 16, 2007)).

8. *Id.* at 1328 (internal quotations and citation omitted).

9. *Id.*

10. *Id.* (citing *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997)).

11. *Id.* at 1331 (internal quotations and citation omitted) (alteration in original); see also *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1352 (Fed. Cir. 2002) (finding that Customs' classifications are presumptively correct, and that the protesting party bears the burden of proving otherwise).

constitute “joinery and carpentry.”<sup>12</sup> The court also rejected classification under the catchall provision in HTSUS heading 4421 because—under General Rule of Interpretation 3(a)’s rule of relative specificity, which provides that goods prima facie classifiable under two or more headings are properly classified in the most specific heading—it deemed HTSUS heading 4407 more descriptive.<sup>13</sup>

In *Archer Daniels Midland Co. v. United States*,<sup>14</sup> the Federal Circuit upheld an importer’s protest of Customs’ classification of deodorizer distillate (DOD), a residue from edible soybean oil production.<sup>15</sup> Customs classified DOD under HTSUS subheading 3824.90.28, a “catchall provision” for “[c]hemical products and preparations of the chemical or allied industries . . . not elsewhere specified or included: Other . . . : Other.”<sup>16</sup> Archer Daniels Midland (ADM) conceded that HTSUS heading 3824 covered the subject products but contended that other headings were more descriptive, and filed suit at the Court of International Trade seeking classification under HTSUS heading 3825, a duty-free heading that provides for “[r]esidual products of the chemical or allied industries, not elsewhere specified or included.”<sup>17</sup>

The Court of International Trade granted summary judgment for the government.<sup>18</sup> It viewed the explanatory note to HTSUS subheading 3825 as providing an exhaustive list of four substances—alkaline iron oxide, residues from antibiotics manufacture, ammoniacal gas liquors and spent oxide—that formed the complete list of items subject to classification in that subheading.<sup>19</sup> The Federal Circuit reversed, finding HTSUS subheading 3825 appropriate and more descriptive than HTSUS subheading 3824.<sup>20</sup>

First, the Federal Circuit found that “[DOD] falls within the ordinary meaning of the term ‘residual products,’” as it is left over from the distillation of soybean oil.<sup>21</sup> The court rejected the government’s argument that the list of products in the Explanatory Note to HTSUS subheading 3825 was exhaustive due to “a notable

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12. *Millenium Lumber*, 558 F.3d at 1329–30 (internal quotations and citation omitted).

13. *Id.* at 1330–31.

14. 561 F.3d 1308 (Fed. Cir. 2009).

15. *Id.* at 1310.

16. *Id.* (quoting U.S. Customs & Border Prot., Headquarters Ruling No. 967288 (Mar. 10, 2005)).

17. *Id.* at 1310–11 (internal quotations and citation omitted).

18. *Id.* at 1311.

19. *Id.* (citing *Archer Daniels Midland Co. v. United States*, 559 F. Supp. 2d 1347, 1361 (Fed. Cir. 2009)).

20. *Id.* at 1317–18.

21. *Id.* at 1313–14.

absence of language in the Explanatory Note confining the list to the enumerated items or suggesting the list is exhaustive.”<sup>22</sup> Because the court found no evidence that Congress intended for HTSUS headings 3824 and 3825 to be mutually exclusive, it deemed DOD prima facie classifiable in both headings.<sup>23</sup> Pursuant to General Rule of Interpretation 3(a)’s rule of relative specificity, the Federal Circuit deemed the phrase “residual products” as used in HTSUS subheading 3825 more descriptive than general “chemical products” as used in HTSUS subheading 3824.<sup>24</sup>

In *Value Vinyls, Inc. v. United States*,<sup>25</sup> the Federal Circuit evaluated the proper tariff classification of plastic-coated fabric material, imported in sheets and used to make truck covers, dividers, upholstery, signs and other products.<sup>26</sup> The Court of International Trade classified the product in HTSUS subheading 3921.90.11 as “a product with textile components in which man-made fibers predominate by weight over any other single textile fiber” because the product is made entirely of man-made fibers.<sup>27</sup> The Federal Circuit agreed with this classification and affirmed.<sup>28</sup>

The government argued that the word “predominate” in HTSUS subheading 3921.90.11 required at least two components and could not apply to products made of only one type of fiber.<sup>29</sup> In rejecting this argument, the Federal Circuit accepted the Court of International Trade’s analysis that products made of only man-made fibers appeared in HTSUS subheading 3921.90.11, dating back to that subheading’s predecessor provision in the Tariff Schedule of the United States (TSUS), prior to harmonization.<sup>30</sup> Citing legislative history indicating that the harmonization of the tariff schedule intended to adopt internationally accepted terminology without affecting classification or duties, the Federal Circuit found that no

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22. *Id.* at 1315. The Federal Circuit rejected a similar line of argument in *Airflow Tech., Inc. v. United States*, 524 F.3d 1287, 1293 (Fed. Cir. 2008) (holding that explanatory notes cannot override the plain meaning of a tariff provision, as explanatory notes “are not legally binding” (internal citations and quotations omitted)).

23. *Archer Daniels*, 561 F.3d at 1316–17.

24. *Id.* at 1317.

25. 568 F.3d 1374 (Fed. Cir. 2009).

26. *Id.* at 1375.

27. *Id.* (internal quotations omitted). Customs originally classified the goods under subheading 3921.90.19, HTSUS; *Value Vinyls* filed a protest seeking classification in Subheading 3921.90.11, HTSUS. *Id.* at 1376.

28. *Id.* at 1375.

29. *Id.* at 1377.

30. *See id.* at 1377–79 (reasoning that, when the TSUS was harmonized into the HTSUS, no change in meaning was intended, and that wholly man-made fibers were then classified in the companion provision in the TSUS).

other HTSUS provision provided for wholly man-made fibers as did the TSUS predecessor provision to HTSUS subheading 3921.90.11.<sup>31</sup> Thus, Value Vinyls' man-made fibers were properly classified under HTSUS subheading 3921.90.11.<sup>32</sup>

*United States v. UPS Customhouse Brokerage, Inc.*<sup>33</sup> presented the question of whether certain alleged misclassifications by UPS Customhouse Brokerage, Inc. also gave rise to multiple violations of 19 U.S.C. § 1641, which obligates customs brokers to exercise reasonable supervision and control over their business.<sup>34</sup> The Federal Circuit agreed with the Court of International Trade and with Customs that UPS misclassified certain merchandise, but vacated and remanded the Court of International Trade's holding that UPS failed to exercise reasonable supervision and control over its business based on those misclassifications.<sup>35</sup>

The dispute arose from UPS's classifications under HTSUS heading 8473, which covers parts and accessories of automatic data processing (ADP) machines.<sup>36</sup> Specifically, UPS classified sixty entries under HTSUS subheading 8473.30.9000 between January and May 2000.<sup>37</sup> Customs initiated eight separate penalty actions covering these sixty entries and argued that 8473.30.9000 required ADP machine parts to themselves contain a cathode ray tube (CRT), rather than merely be part of a computer that contained a CRT.<sup>38</sup> UPS paid some of the penalties, but Customs filed suit at the Court of International Trade in December 2004 to enforce the unpaid portion of the penalties (approximately \$75,000).<sup>39</sup> UPS unsuccessfully sought a summary judgment declaration that Customs may only assess one penalty for a maximum \$30,000 under 19 U.S.C. § 1641.<sup>40</sup>

After a bench trial, the Court of International Trade found that UPS misclassified the ADP machine parts and failed to exercise

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31. See *id.* at 1378–80 (citing H.R. REP. NO. 100-576, at 548 (1988) (Conf. Rep.); *Marubeni Am. Corp. v. United States*, 35 F.3d 530, 532–33 (Fed. Cir. 1994); see also Institution of Investigation for the Conversion of the Tariff Schedules of the United States into the Nomenclature of the Harmonized System, 46 Fed. Reg. 47,897, 47,897 (Dep't of Commerce Sept. 30, 1981)) (stating that the move from the TSUS to the HTSUS did not involve a change in the definition of the fiber itself, which previously included man-made fibers).

32. *Id.* at 1380.

33. 575 F.3d 1376 (Fed. Cir. 2009).

34. *Id.* at 1377.

35. *Id.* at 1377–78.

36. *Id.* at 1378.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*



reasonable supervision and control in so doing.<sup>41</sup> UPS appealed, and the Federal Circuit affirmed Customs' and the Court of International Trade's finding of misclassification but reversed and remanded on the section 1641 reasonable supervision issue.<sup>42</sup>

Regarding its classifications, UPS argued that HTSUS subheading 8473.30 divides items based on whether the ADP machine of which they are a part or accessory contains a CRT.<sup>43</sup> The Federal Circuit: (1) ruled that "subheading 8473.30 demonstrates that there are two types of 'parts and accessories': those 'not incorporating a [CRT]' and 'other,'" and thus rejected UPS's line of argument; (2) found that HTSUS subheading 8473 actually differentiated between ADP machine parts and accessories with and without a CRT; and (3) affirmed Customs' classification in HTSUS subheading 8473.<sup>44</sup>

In reversing and remanding the Court of International Trade's decision on UPS's section 1641 liability, the Federal Circuit reasoned that Customs had not considered the ten factors that it must evaluate under 19 C.F.R. § 111.1.<sup>45</sup> Though the Federal Circuit deferred to Customs' right to interpret its own regulations, the Federal Circuit cautioned that "this discretion does not absolve Customs of its obligation under the regulation to consider *at the least* the ten listed factors."<sup>46</sup> The court thus reversed and remanded for further analysis as to whether UPS violated 19 U.S.C. § 1641 in light of the 19 C.F.R. § 111.1 factors.<sup>47</sup>

In its second wood- and lumber-related classification decision of 2009, the Federal Circuit considered the proper classification of laminated flooring panels in *Faus Group, Inc. v. United States*.<sup>48</sup> Faus Group, Inc. made the flooring panels at issue out of a fiberboard core with a density of 0.85 to 0.95 g/cm<sup>3</sup>.<sup>49</sup> The panels are nonstructural

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41. *Id.* at 1377.

42. *Id.* at 1377–78.

43. *Id.* at 1380. UPS argued that, under the "last antecedent rule," which provides that a limiting clause or phrase modifies only the word or phrase it immediately follows, the provision in subheading 8473.30 that reads "[n]ot incorporating a [CRT]" modifies the language in subheading 8473, HTSUS, "[p]arts and accessories . . ." *Id.* at 1381 (internal quotations omitted). This argument proved unsuccessful, as the Federal Circuit ruled it would "strain[] logic and grammar." *Id.* at 1382.

44. *Id.* at 1381.

45. *Id.* at 1382–83. Since the regulation at issue says that Customs "will" consider them, the Court added that "[w]ill" is a mandatory term, not a discretionary one." *Id.* at 1382 (citing *New England Tank Indus. of N.H., Inc. v. United States*, 861 F.2d 685, 694 (Fed Cir. 1988)).

46. *Id.* at 1382.

47. *Id.* at 1383.

48. 581 F.3d 1369 (Fed. Cir. 2009).

49. *Id.* at 1370.

finished articles to be installed by their end-users over an existing structural subfloor.<sup>50</sup> Each panel is grooved to facilitate assembly.<sup>51</sup>

Customs classified these panels under HTSUS heading 4411, which provides for “[f]iberboard of wood or other ligneous materials, whether or not bonded with resins or other organic substances.”<sup>52</sup> Faus protested and sought classification under HTSUS subheading 4418, which provides for “[b]uilders’ joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes.”<sup>53</sup> Customs denied Faus’s protest, and Faus filed suit at the Court of International Trade.<sup>54</sup>

In what the Federal Circuit described as a “fifty-three page analysis . . . that can only be described as Talmudic in its breadth and thoroughness,” the Court of International Trade deemed the floor panels *prima facie* classifiable under both HTSUS headings 4411 and 4418.<sup>55</sup> Under General Rule of Interpretation 3(a)’s rule of relative specificity, the Court of International Trade determined that HTSUS heading 4411 is the more specific of the two headings and thus more appropriate for classification.<sup>56</sup> Faus timely appealed to the Federal Circuit.<sup>57</sup>

The Federal Circuit sided with Faus and reversed the Court of International Trade.<sup>58</sup> Citing Note 4 to Chapter 44 of the Harmonized System—which excludes wood products finished to the extent that they acquired “*the character of articles of other headings*”—the Federal Circuit analyzed whether Faus’ laminate floor panels had been processed to the extent that they had the character of articles in other tariff headings.<sup>59</sup> The Federal Circuit adopted the Court of International Trade’s conclusion that Faus’ products are *prima facie* classifiable in both HTSUS headings 4411 and 4418 but appeared sympathetic to Faus’ reading of Note 4 to Chapter 44, that fiberboard processed such that it is *prima facie* classifiable in HTSUS heading 4418 is thus excluded from HTSUS heading 4411.<sup>60</sup>

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50. *Id.*

51. *Id.*

52. *Id.* (internal quotations omitted). Customs chose the eight-digit subheading 4411.19.40, HTSUS, a residual provision for “[f]iberboard of a density exceeding 0.8 g/cm<sup>3</sup>; Other: Other: Other.” *Id.* (internal quotations omitted).

53. *Id.* (internal quotations omitted).

54. *Id.*

55. *Id.* at 1371 (citing *Faus Group, Inc. v. United States*, 358 F. Supp. 2d 1244, 1249–65 (Ct. Int’l Trade 2004)).

56. *Id.*

57. *Id.*

58. *Id.* at 1374–75.

59. *Id.* at 1373.

60. *Id.* at 1373–74.

The Federal Circuit also employed a General Rule of Interpretation 3(a) analysis to avoid a final interpretation of Note 4 to Chapter 44, and instead based its holding on the determination that HTSUS heading 4418's requirement that wood products be processed makes it more specific than HTSUS heading 4411, which has no such processing requirement.<sup>61</sup> The court added that HTSUS heading 4411 is broader than HTSUS heading 4418 because it covers any fiberboard product with the character of an article under another heading "as long as it was created using one of the many enumerated processes in Note 4."<sup>62</sup>

### B. Valuation Issues

The only valuation-related decision issued by the Federal Circuit concerned penalties levied against an importer for a multi-year double-invoicing scheme that Customs alleged served to substantially undervalue imports of Mexican frozen produce and deprive the government of more than \$600,000 in duty revenue.<sup>63</sup>

The Federal Circuit reaffirmed penalties assessed against an importer found guilty of a double-invoicing scheme to suppress the entered value of its goods in *United States v. Inn Foods, Inc.*<sup>64</sup> The government alleged that Inn Foods, Inc. and its now-defunct Cayman Islands-based affiliate SeaVeg fraudulently entered frozen produce from and with the cooperation of six Mexican growers between 1987 and 1990.<sup>65</sup>

Inn Foods, SeaVeg and the Mexican growers agreed upon a double-invoicing system, in which the growers would issue a "factura" invoice to Inn Foods or SeaVeg with an invoice number, produce description and price.<sup>66</sup> The price on this factura did not represent the price actually paid to the grower or the market value of the produce, and was in fact "substantially lower" than either of those figures.<sup>67</sup> Inn Foods and SeaVeg would provide these facturas to their customs brokers, who would use it to enter the goods into the United

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61. *See id.* at 1373–75 (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441–42 (Fed. Cir. 1998)) (stating that the heading with the most specific description shall be preferred to headings with a more general description).

62. *Id.* at 1374.

63. *United States v. Inn Foods, Inc.*, 560 F.3d 1338, 1340 (Fed. Cir. 2009).

64. *Id.* This was the Federal Circuit's second review of this case. *Id.*

65. *Id.* at 1341–42. Inn Foods and SeaVeg shared a parent company, operated out of the same facility, shared employees and otherwise acted as *alter egos*. *Id.* at 1341.

66. *Id.* at 1341.

67. *Id.*

States through Customs.<sup>68</sup> After receipt of the goods, Inn Foods and SeaVeg would create a second invoice with the original invoice number and produce description, but with the higher price reflecting the produce's market value, and would then send it to the grower as an order confirmation.<sup>69</sup> Inn Foods or SeaVeg would initially pay seventy percent of the higher amount, with the balance months later after the parties could determine the final market price of the produce.<sup>70</sup>

Customs began to examine the entries made on behalf of Inn Foods and SeaVeg in 1988.<sup>71</sup> In 1989, Customs' third formal request for documentation led to the discovery of records indicating that the actual value of the entered produce vastly exceeded the values listed on the facturas used for entry purposes and presented to Customs.<sup>72</sup> After learning that Customs intended to investigate the case formally, Inn Foods added disclaimers to its entries that stated, in relevant part, "[t]he value being used on shipments . . . is strictly for customs clearance" and that "[l]iquidation . . . is to be withheld until the importer of record . . . is able to complete the audit of their files and arrive at a true transaction value."<sup>73</sup>

The government filed suit against Inn Foods in 2001 under 19 U.S.C. § 1592, alleging that this fraudulent invoicing system deprived the government of significant duties owed.<sup>74</sup> The Court of International Trade initially dismissed the suit as time-barred, but the Federal Circuit reversed.<sup>75</sup> On remand, the Court of International Trade held a bench trial and ruled that Inn Foods submitted the materially false facturas with intent to defraud Customs.<sup>76</sup> Inn Foods faced a monetary penalty of \$7.5 million under 19 U.S.C. § 1592(c)(1) and unpaid duties of \$624,602.55 under 19 U.S.C. § 1592(d).<sup>77</sup> The Court of International Trade found Inn Foods

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1341–42.

72. *Id.* at 1342.

73. *Id.* at 1344–45.

74. *Id.* at 1342.

75. *United States v. Inn Foods, Inc.*, 264 F. Supp. 2d 1333 (Ct. Int'l Trade 2003), *rev'd*, 383 F.3d 1319 (Fed. Cir. 2004).

76. *See United States v. Inn Foods, Inc.*, 515 F. Supp. 2d 1347, 1357–59 (Ct. Int'l Trade 2007), *aff'd*, 560 F.3d 1338 (Fed. Cir. 2009) (describing that Inn Foods was involved in the scheme and explaining that the values given to the facturas were far less than later invoices for the same goods, which led to Inn Foods paying less duties than it owed to Customs).

77. *Id.* at 1361–62.

liable for the entire penalty amount because it acted as either an alter ego or aider and abettor of SeaVeg.<sup>78</sup>

On appeal, Inn Foods contended that it acted merely with negligence when it filed false invoices and not with any fraudulent intent.<sup>79</sup> In rejecting this theory, the Federal Circuit held that the evidentiary record confirmed the Court of International Trade's determination that Inn Foods knew of the facturas' falsity, and knew that its brokers would use the facturas to enter the subject produce into the United States.<sup>80</sup> The court then called on precedent from the other circuit courts to confirm that "[i]nferring fraudulent intent from the knowing use of false invoices is hardly unique to the customs context."<sup>81</sup> The Federal Circuit also noted that Inn Foods and SeaVeg concealed the existence of the double-invoice system, even from their brokers.<sup>82</sup> Moreover, Inn Foods and SeaVeg knew from their brokers that the values on the facturas were material to the produce's entry and Customs' valuation process.<sup>83</sup>

Inn Foods claimed that the disclaimers added to the facturas in 1989 "belie[d] any possibility that intent to defraud existed."<sup>84</sup> The Federal Circuit disagreed for three reasons. First, the statement that the invoices existed "strictly for customs clearance" at best suggested that "the invoices contained a mere calculational error," when in actuality Inn Foods presented intentionally falsified values.<sup>85</sup> Second, the disclaimers' suggestion of a pending audit to determine the produce's value was implausible because Inn Foods possessed and kept in its records both the facturas and the true invoices, and thus

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78. *Id.* at 1356–57.

79. *See Inn Foods*, 560 F.3d at 1343 (explaining that fraudulent intent requires that a defendant "knowingly enter[] goods by means of a material false statement" (quoting *United States v. Hitachi Am., Ltd.*, 172 F.3d 1319, 1326 (Fed. Cir. 1999))); *see also* 19 U.S.C. § 1592(e)(2) (2006) (placing the burden on the United States to prove fraudulent intent by "clear and convincing evidence").

80. *See Inn Foods*, 560 F.3d at 1343 (citing *Inn Foods*, 515 F. Supp. 2d at 1354 n.12) (using as an example of Inn Foods' knowledge of the facturas' falsity a letter from a Mexican grower to SeaVeg which noted that the supplier would ship Broccoli Spears valued at \$0.50/lb. with a factura listing them at \$0.28/lb).

81. *See id.* at 1343 (citing *United States v. Marek*, 548 F.3d 147, 151–52 (1st Cir. 2008) (inferring fraudulent intent from the use of false invoices in a tax fraud case)).

82. *See id.* at 1344 (noting that on at least one occasion SeaVeg told an inquiring broker that the factura values were low because it "obtained the produce at a good price").

83. *See id.* (detailing that in one case, SeaVeg received detailed training on how Customs determined its duties, and one of Inn Foods' brokers sent Inn Foods "itemization of costs, including a copy of the undervalued factura that had been presented to Customs and the duties paid based on that factura").

84. *Id.*

85. *Id.* at 1344–45.

did not need an audit to learn the entered produce's true value.<sup>86</sup> Third, the statement that Inn Foods would correct any valuation errors rang hollow because Inn Foods never filed any actual corrections with Customs.<sup>87</sup>

Finally, Inn Foods challenged its liability for the entire sum of \$624,602.55 in unpaid duties.<sup>88</sup> Though the Federal Circuit conceded Inn Foods' argument that Congress intended that "normally only importers of record and their sureties are liable for duty,"<sup>89</sup> it also found that 19 U.S.C. § 1592(d) "suggests that the party liable for penalties under [19 U.S.C. § 1592(a)] would also be liable under [19 U.S.C. § 1592(d)] for the lost duty."<sup>90</sup> The Federal Circuit further reasoned that Congress intended for parties liable as aiders and abettors to face liability for the duties lost by the government as a direct result of aiding and abetting.<sup>91</sup> Thus, Inn Foods remained liable for the full amount of unpaid duties.

### C. Jurisdictional Issues

The only purely jurisdictional issue presented to the Federal Circuit in 2009 concerned the Court of International Trade's ability to review the revocation of a customs broker's license for that broker's failure to file a required periodic report of the broker's business activity.

In *Schick v. United States*,<sup>92</sup> the Federal Circuit decided that the Court of International Trade lacks authority to review Customs' decision to revoke a broker's license for failure to file a triennial status report.<sup>93</sup> The plaintiff, a customs broker for more than twenty years, failed to file a triennial status report on its due date and failed again to do so within the sixty-day grace period referenced in a letter sent to him by the applicable Customs Port Director.<sup>94</sup> Two months after Customs revoked the plaintiff's license, he requested a hearing and a withdrawal of the revocation under 19 U.S.C. § 1641(d)(2)(B),

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86. *Id.* at 1345.

87. *Id.*

88. *Id.* at 1346 (explaining Inn Foods' argument that, since liability rested on a violation of 19 U.S.C. § 1592(d), which applied only to importers, Inn Foods could not be found to violate that portion of the statute because it was not an importer).

89. *Id.* (citing 19 U.S.C. §§ 1484–85 (2006); *United States v. Blum*, 858 F.2d 1566, 1570 (Fed. Cir. 1988)).

90. *Id.* (pointing also to the broad language in 19 U.S.C. § 1592(d) empowering Customs to collect any duties lost "as a result of a violation of subsection (a)").

91. *See id.* at 1346–48 (concluding that "Congress intended to continue to impose liability for unpaid duty on any party guilty of fraud or aiding and abetting fraud").

92. 554 F.3d 992 (Fed. Cir. 2009).

93. *Id.* at 995.

94. *Id.* at 993–94.

which pertains to disciplinary proceedings against customs brokers.<sup>95</sup> Customs denied the request and reasoned that the license revocation constituted an operation of law under 19 U.S.C. § 1641(g)(1), and that the governing statute did not afford the plaintiff a right to a hearing.<sup>96</sup>

Contending that Customs should have followed the procedures for disciplinary proceedings, the plaintiff sought relief in the Court of International Trade. The Court exercised jurisdiction under 28 U.S.C. § 1581(i)(4), but rejected the plaintiff's request for relief.<sup>97</sup> Citing *Retamal v. United States Customs & Border Protection*,<sup>98</sup> the Federal Circuit rejected the Court of International Trade's basis for exercising jurisdiction in this matter.<sup>99</sup> The Federal Circuit reaffirmed its holding in *Retamal* that revocation of a customs broker license for failing to file a triennial report does not relate to the disciplinary provisions of 19 U.S.C. § 1641(g), and is not referenced anywhere in 28 U.S.C. §§ 1581(a)–(h) or (i)(1)–(3).<sup>100</sup> In remanding this proceeding to the Court of International Trade, the Federal Circuit concluded that “19 U.S.C. § 1641(g) provides the Secretary with independent authority to revoke a customs broker's license, an action that is unreviewable in the Court of International Trade,” and advised the court to consider whether the transfer statute, 28 U.S.C. § 1631, applies.<sup>101</sup>

#### D. Other Customs Issues

The Federal Circuit considered whether an importer's repeated Harbor Maintenance Tax (HMT)<sup>102</sup> payments when none were required should be treated as a remediable “inadvertence” or an irreparable mistake of law in *Esso Standard Oil Co. (PR) v. United States*.<sup>103</sup> Congress amended the HMT statute in 1988 to exempt shipments between Alaska, Hawaii or “any possession of the United

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95. *Id.* at 994; *see also* 19 U.S.C. § 1641(d)(2)(b) (2006) (setting forth the process by which a customs broker may respond to the notice of suspension and the procedure for conducting a hearing to determine if discipline is warranted).

96. *Schick*, 554 F.3d at 994.

97. *Id.* at 994–95.

98. 439 F.3d 1372 (Fed. Cir. 2006).

99. *Schick*, 554 F.3d at 995.

100. *Id.*

101. *Id.* at 995–96 (citing *Butler v. United States*, 442 F. Supp. 2d 1311 (Ct. Int'l Trade 2006)).

102. *See generally* 26 U.S.C. §§ 4461–62(a) (2006) (defining the HMT as a fee imposed on “port use” by commercial vessels, charged *ad valorem* at 0.125 percent of the value of the vessels' cargo).

103. 559 F.3d 1297, 1300 (Fed. Cir. 2009) (mentioning that the trial court defined Esso's HMT payment as a “correctable inadvertence”).

States” to the U.S. mainland, Alaska, Hawaii or a U.S. possession.<sup>104</sup> Customs, which Congress tasked with administering the HMT laws, had not updated its regulations to reflect this new exemption for shipments between U.S. possessions.<sup>105</sup>

Esso intentionally made \$339,000 in unnecessary HMT payments between 1993 and 1997 for petroleum products it shipped between the U.S. Virgin Islands and Puerto Rico.<sup>106</sup> Customs liquidated these entries between 1994 and 1997 without change and without refunding Esso’s HMT payments.<sup>107</sup> Esso realized that possession-to-possession shipments enjoyed an exemption from the HMT later in 1997 and filed three separate requests for HMT refunds, which Customs treated as requests for reliquidation under 19 U.S.C. § 1520(c).<sup>108</sup> Customs denied all three requests because it considered the HMT payments “a mistake of law . . . [not] correct[able] under 19 U.S.C. § 1520(c)(1).”<sup>109</sup>

The Court of International Trade heard Esso’s challenge to Customs’ denial, and in a summary judgment ruling found that the HMT payments constituted a correctable “inadvertence” under 19 U.S.C. § 1520(c)(1) resulting from Customs’ failure to update its regulations to accord with the 1988 HMT amendments.<sup>110</sup> On appeal, the Federal Circuit reversed the Court of International Trade’s holding that two of the three requests for reliquidation constituted correctable “inadvertences” and affirmed that the third request was time-barred.<sup>111</sup>

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104. 26 U.S.C. § 4462(b)(1) (1988).

105. *Esso*, 559 F.3d at 1298–99 (explaining that the amendment was designed to “alleviate the tax burden on domestic shipping between these ports”).

106. *Id.* at 1299 (mentioning that Esso made over eighty-seven liquidation entries during this period).

107. *Id.*

108. *Id.* at 1299–1300 (noting that Customs determined that the requests did not qualify as timely protests under 19 U.S.C. § 1514). The requests came more than ninety days after liquidation of the entries, and thus would not have qualified as timely protests in 1997. See 19 U.S.C. § 1514(c)(3) (Supp. IV 1994), amended by Pub. L. No. 108-429, § 2103(2)(B), 118 Stat. 2434, 2597–98 (2004) (extending the protest deadline to 180 days).

109. *Esso*, 559 F.3d at 1300; see 19 U.S.C. § 1520(c)(1) (allowing for corrections based on clerical errors or “inadvertence[s]”), repealed by Pub. L. 108-429, § 2105, 118 Stat. 2434, 2598 (2004).

110. See *Esso*, 559 F.3d at 1300–01 (citing *Esso Standard Oil Co. (PR) v. United States*, No. 98-09-02318, 2007 WL 4125999 at \*3 (Ct. Int’l Trade Nov. 20, 2007)). However, the Court of International Trade agreed with Customs, that one of the three requests was time-barred because it came more than one year after the last covered liquidation. See *id.* at 1300–01.

111. See *id.* at 1308 (explaining that the request was time-barred because Esso had notified Customs of its HMT payments more than one year following liquidation).



Esso advanced four theories to defend its request for HMT refunds: first, that a Customs refund procedure in place for entities that pay quarterly HMT fees—instead of importers that pay per entry, as Esso did—should apply to Esso in this case;<sup>112</sup> second, that a 1989 telex from Customs Headquarters created an alternative avenue for claiming HMT refunds;<sup>113</sup> third, that the refund requests actually qualified as “exactions” under 19 U.S.C. § 1514(a)(3);<sup>114</sup> and fourth, that the statutory time limits of the applicable Customs statutes should be equitably tolled.<sup>115</sup> The Federal Circuit rejected all four theories.<sup>116</sup>

First, the Federal Circuit held that the subject refund procedure did not apply to importers at all, and cited *Swisher International, Inc. v. United States*,<sup>117</sup> to confirm that a timely protest represented the sole avenue for importers to recover HMT payments.<sup>118</sup> Second, the court declined to create a new refund procedure based on a 1989 telex because the stated purpose of that telex was merely to summarize the 1988 HMT amendments, and not to create any procedures beyond what the 1988 amendments specified.<sup>119</sup> Third, the court rejected Esso’s “exaction” argument, which relied on *Swisher*, because *Swisher* involved a quarterly HMT payer and not an importer.<sup>120</sup> Finally, the court declined to adopt Esso’s equitable tolling argument because the statutory exemption from HMT payments took effect five years prior to Esso’s initial HMT overpayment, and “[e]quitable tolling cannot excuse this lack of diligence.”<sup>121</sup>

The Federal Circuit then held as a general matter that Customs’ lack of diligence in failing to update its regulations in accordance with the 1988 amendments did not offset importers’ lack of diligence in understanding the HMT rules.<sup>122</sup> In this regard, the court ruled that “an error is not an ‘inadvertence’ if it is the result of negligent inaction or an advertent misunderstanding of the law, regardless if

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112. *Id.* at 1301–02.

113. *Id.* at 1303.

114. *See id.* at 1303–04 (citing 19 U.S.C. § 1514(a)(3), amended by Pub. L. No. 108-429, § 2103, 118 Stat. 2434, 2598 (2004)).

115. *Id.* at 1304.

116. *Id.* at 1306–08.

117. 205 F.3d 1358, 1368 n.8 (Fed. Cir. 2000).

118. *Esso*, 559 F.3d at 1302–03.

119. *Id.* at 1303 (noting also that Esso could not identify any instance in which Customs issued a refund on those grounds).

120. *Id.* at 1304. The government claimed that Esso’s “exaction” theory would permit any importer to file a timely request for reliquidation once Customs denied a protest as untimely. *Id.*

121. *Id.* at 1305.

122. *See id.* at 1304–05 (noting that the error could have been avoided if Esso had made any effort to review the statute).

the inaction or misunderstanding was originally the fault of Customs or the importer.”<sup>123</sup>

In *Aectra Refining & Marketing, Inc. v. United States*,<sup>124</sup> the Federal Circuit considered a claim for a refund of HMT and Merchandise Processing Fee (MPF) payments on certain petroleum products subsequently used to produce export goods, commonly known as drawback.<sup>125</sup> Aectra Refining and Marketing, Inc. imported petroleum products, paid customs duties, MPFs and HMTs, and subsequently exported finished petroleum products between 1987 and 1997.<sup>126</sup> The issue before the Federal Circuit was not whether Aectra’s imports and exports qualified for drawback, but rather whether Aectra made a timely drawback claim—normally within three years.<sup>127</sup>

Aectra timely filed ten requests for drawback between 1997 and 1998, but listed only the duties paid and omitted the MPF and HMT payments.<sup>128</sup> At the time, Customs’ regulations did not allow for drawback on MPF or HMT payments, but Aectra conceded that it knew Customs’ policy in this regard was subject to ongoing judicial review.<sup>129</sup> After Aectra filed its drawback claim—but while those claims could be timely amended or re-filed—the Federal Circuit determined that MPF payments were recoverable under drawback but that HMT payments were not.<sup>130</sup> Congress later amended the drawback statute in 2004 to permit the recovery of HMT payments.<sup>131</sup>

Though Aectra never amended its drawback claims during the three-year statutory period, it filed a protest prior to Congress’ 2004 amendments, requesting MPF and HMT on the same entries for which it sought drawback in 1997 and 1998.<sup>132</sup> Customs denied this

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123. *Id.* at 1306–07.

124. 565 F.3d 1364 (Fed. Cir. 2009).

125. *Id.* at 1366 (requiring Customs to refund 99% of “any duty, tax, or fee imposed under Federal law upon entry or importation” of merchandise that is later “exported, or . . . destroyed under customs supervision; and . . . is not used within the United States before such exportation or destruction”) (quoting 19 U.S.C. § 1313(j), (p) (2006)).

126. *Aectra*, 565 F.3d at 1366.

127. *Id.* The statutory period for a drawback claim is three years. *See* 19 U.S.C. § 1313(r)(1) (“A drawback entry and all documents necessary to complete a drawback claim . . . shall be filed or applied for, as applicable, within 3 years after the date of exportation or destruction . . .”).

128. *Aectra*, 565 F.3d at 1367. HMT and MPF payments are not eligible for drawback. *See* 19 C.F.R. § 191.3(b) (2009).

129. *Aectra*, 565 F.3d at 1367 (citing *Textport Oil Co. v. United States*, 1 F. Supp. 2d 1393 (Ct. Int’l Trade 1998), *rev’d*, 185 F.3d 1291 (Fed. Cir. 1999)).

130. *Textport*, 185 F.3d at 1296, *cited in Aectra*, 565 F.3d at 1367.

131. Miscellaneous Trade & Technical Corrections Act of 2004, Pub. L. No. 108-420, § 1557, 118 Stat. 2434, 2579 (2004).

132. *Aectra*, 565 F.3d at 1368.

protest, and Aectra appealed to the Court of International Trade.<sup>133</sup> Aectra argued that the 2004 drawback amendments suspended the three-year limit on HMT drawback claims, that its original drawback claims were sufficiently complete so as to entitle it to HMT and MPF payment refunds and that the futility of such claims based on Customs' policy at the time the drawback claims were filed rendered them unnecessary.<sup>134</sup> The Court of International Trade rejected these arguments and affirmed Customs' denial of the claims.<sup>135</sup>

In affirming the Court of International Trade, the Federal Circuit clarified that Congress' 2004 drawback amendments, instead of creating a new right to HMT refunds, merely clarified that such refunds were always available under the statute.<sup>136</sup> Citing Supreme Court precedent, the Federal Circuit found nothing in the 2004 amendments that suggested intent to waive or otherwise modify the longstanding three-year statute of limitations on drawback claims.<sup>137</sup> The Federal Circuit also rejected Aectra's argument that it did not have to include HMT and MPF payment amounts in its drawback request to complete a claim because 19 C.F.R. § 191.51(b) defines a "complete" claim as including a full calculation of the amount of drawback due.<sup>138</sup> Finally, the Federal Circuit rejected Aectra's argument that requesting HMT and MPF payment refunds at the time it filed drawback requests was futile and thus not required.<sup>139</sup> Applying Supreme Court precedent in the area of tax law, the Federal Circuit reasoned that "futility does not excuse the failure to file a proper claim for limitations purposes."<sup>140</sup>

In *Heartland By-Products, Inc. v. United States (Heartland VII)*,<sup>141</sup> the Federal Circuit ruled that the Court of International Trade must treat the Circuit's customs classification decisions as retroactively

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133. *Id.*

134. *Id.*

135. *Id.* (citing *Aectra Refining & Marketing, Inc. v. United States*, 533 F. Supp. 2d 1318, 1327 (Ct. Int'l Trade 2007), *aff'd*, 565 F.3d 1364 (Fed. Cir. 2009)).

136. *Id.* at 1369–70.

137. *Id.* at 1370. The court cited *Cannon v. University of Chicago*, 441 U.S. 677, 696–98 (1979), for the proposition that newly enacted laws by Congress are presumptively harmonious with existing law and judicial concepts, thus rendering a lack of express modification of the three-year period in the 2004 amendments dispositive. See *Aectra*, 565 F.3d at 1370.

138. *Id.* at 1371–72 (citing 19 C.F.R. § 191.51(b) (1998)).

139. *Id.* at 1373–74.

140. *Id.* at 1373. In so concluding, the court referenced *United States v. Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511, 1515–16 (2008), where the Supreme Court held that a party must have submitted a tax claim in order to preserve the right later to sue on the subject-matter of the claim, even though the party had little reason to believe that the IRS would accept it. See *Aectra*, 565 F.3d at 1373.

141. 568 F.3d 1360 (Fed. Cir. 2009) (*Heartland VII*).

applicable.<sup>142</sup> Heartland By-Products' dispute with Customs began in 1995, when Customs issued a ruling letter classifying Heartland's prospective sugar syrup imports as exempt from the Tariff Rate Quota (TRQ) duties on sugar.<sup>143</sup> In 1999, after Heartland had established its sugar refining business and had commenced importing significant quantities of sugar syrup into the United States, Customs revoked its ruling letter and reclassified Heartland's sugar syrup as subject to the substantially higher TRQ duties.<sup>144</sup> Heartland filed suit at the Court of International Trade before Customs' revocation and reclassification took effect.<sup>145</sup> In *Heartland I*, the Court of International Trade determined that Customs' revocation was unlawful and exempted Heartland's imports from TRQ duties.<sup>146</sup> In *Heartland II*, the Federal Circuit reversed *Heartland I* and upheld Customs' reclassification.<sup>147</sup> After the *Heartland II* decision, Heartland stopped importing the sugar syrup at issue.<sup>148</sup>

Although Customs did not liquidate or reliquidate most of Heartland's entries at the TRQ rate after the *Heartland II* mandate issued, some entries were liquidated or reliquidated at the TRQ rate prior to its issuance.<sup>149</sup> Heartland protested these liquidations and reliquidations, while Customs sought more than \$65 million in unpaid TRQ duties.<sup>150</sup> Heartland also sought a judgment at the Court of International Trade that any liquidations or reliquidations made prior to the *Heartland II* mandate should not be subject to the TRQ rate, which was dismissed for lack of jurisdiction under 28 U.S.C. § 1581(h).<sup>151</sup> After Heartland appealed another suit dismissed by the Court of International Trade,<sup>152</sup> the Federal Circuit reversed and concluded that the Court of International Trade had ancillary

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142. *Id.* at 1366.

143. *Id.* at 1362 (citing U.S. Customs & Border Prot., New York Ruling No. 810328 (May 15, 1995), available at <http://rulings.cbp.gov> (search "NY 810328")).

144. *Id.* Customs' authority to revoke rulings and reclassify products comes from 19 U.S.C. § 1625(c) (2006). In this case, the reclassification increased Heartland's duties "by approximately two orders of magnitude." *Heartland VII*, 568 F.3d at 1362.

145. *Id.*

146. *Heartland By-Products, Inc. v. United States (Heartland I)*, 74 F. Supp. 2d 1324, 1345 (Ct. Int'l Trade 1999), *rev'd*, 269 F.3d 1126 (Fed. Cir. 2001).

147. *Heartland By-Products, Inc. v. United States (Heartland II)*, 264 F.3d 1126, 1137 (Fed. Cir. 2001).

148. *Heartland VII*, 568 F.3d at 1362 (Fed. Cir. 2009).

149. *Id.* at 1363.

150. *Id.*

151. *Id.*

152. In this suit, Heartland sought a declaratory judgment that Customs could not liquidate or reliquidate Heartland's entries at TRQ rates. See *Heartland By-Products, Inc. v. United States (Heartland IV)*, 341 F. Supp. 2d 1284, 1286-87 (Ct. Int'l Trade 2004), *rev'd* 424 F.3d 1244 (Fed. Cir. 2005). The court dismissed the suit for lack of jurisdiction. *Id.* at 1290.

jurisdiction to decide the scope of the Federal Circuit's *Heartland I* decision.<sup>153</sup>

On remand, the Court of International Trade granted Heartland's motion for summary judgment and ruled that Customs must liquidate any entries made by Heartland before the *Heartland II* mandate issued at the non-TRQ rate.<sup>154</sup> The court reasoned that retroactive liquidation at the TRQ rate would "undermine the purpose of pre-importation review."<sup>155</sup> On appeal, the Federal Circuit reversed.<sup>156</sup>

The Federal Circuit affirmed the Supreme Court's general rule that judicial decisions have retroactive effect.<sup>157</sup> The court rejected Heartland's argument that the pre-importation review afforded by 28 U.S.C. § 1581(h) represented an exception to this general rule, finding in the legislative history for that provision evidence that it was intended as "a very narrow and limited exception to th[e] rule" that the Court of International Trade "does not possess jurisdiction to review a ruling . . . unless it relates to a subject matter presently within the jurisdiction of the United States Customs Court."<sup>158</sup>

The Federal Circuit also determined that, contrary to Heartland's contention that 28 U.S.C. § 1581(h) would be rendered meaningless if importers could not rely on section 1581(h) decisions while they remained subject to appeal, the pre-importation process merely existed to allow importers the chance to challenge Customs rulings and exhaust all appeals before importing the goods at issue.<sup>159</sup> Thus, the Federal Circuit found that its *Heartland II* decision applied retroactively to entries liquidated or reliquidated before the *Heartland II* mandate issued.<sup>160</sup>

In its final Customs-related decision of 2009, *Agro Dutch Industries, Ltd. v. United States*,<sup>161</sup> the Federal Circuit considered whether Customs' liquidation of entries after the Court of International Trade

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153. See *Heartland By-Prods., Inc. v. United States (Heartland V)*, 424 F.3d 1244, 1245 (Fed. Cir. 2005).

154. See *Heartland By-Prods., Inc. v. United States (Heartland VI)*, 521 F. Supp. 2d 1386, 1392-93 (Ct. Int'l Trade 2007), *rev'd* 568 F.3d 1360 (Fed. Cir. 2009).

155. *Id.* at 1392.

156. *Heartland III*, 568 F.3d at 1362.

157. *Id.* at 1365 (citing *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993)).

158. *Id.* (quoting H.R. REP. NO. 96-1235, at 46 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3758).

159. *Id.* at 1365-66.

160. *Id.* at 1369. Heartland also argued in its appeal that Customs should not be allowed to seek unpaid TRQ duties on merchandise liquidated at the non-TRQ rate, but the Federal Circuit found the issue moot because "Customs will not seek to collect the TRQ duties it assessed in its liquidations and reliquidations before the *Heartland II* mandate issued." *Id.* at 1368.

161. 589 F.3d 1187 (Fed. Cir. 2009).

issued an injunction barring their liquidation but before that injunction took effect, mooted pending claims for reliquidation at a newer, lower duty rate.<sup>162</sup> The Federal Circuit decided that it did not, and in that regard affirmed the holding of the Court of International Trade.<sup>163</sup>

After the Department of Commerce published the final results of its second administrative review in the Court of International Trade of an antidumping duty order on preserved mushrooms from India, Agro Dutch Industries, Ltd. sought review of its 27.80% antidumping duty margin.<sup>164</sup> Agro Dutch moved for a preliminary injunction to prevent liquidation of its covered entries during the pendency of its action.<sup>165</sup> The government consented to this request, even though Agro Dutch filed it outside of the thirty-day deadline normally required by the Court of International Trade rules of practice.<sup>166</sup>

The Court of International Trade granted Agro Dutch's request for an injunction, which took effect five days after service on certain Commerce and Customs personnel.<sup>167</sup> The government requested this five-day grace period to avoid "an inadvertent violation" of the injunction due to lack of notice by the applicable government agents or delay in dispensing the required instructions.<sup>168</sup>

Commerce had previously issued liquidation instructions to Customs after its final administrative review results published.<sup>169</sup> On the same day that Agro Dutch served the injunction on the appropriate Customs and Commerce personnel, "Customs acted on those [prior] instructions and liquidated nearly all of Agro Dutch's entries."<sup>170</sup>

After "extensive" additional proceedings, Commerce recalculated Agro Dutch's antidumping duty rate from 27.80% to 1.54%.<sup>171</sup> The Court of International Trade sustained this significantly lower duty rate on review, and ordered that the entries be reliquidated at the lower duty rate.<sup>172</sup>

Since Customs personnel had already liquidated nearly all of Agro Dutch's entries at the higher duty rate on the same day that Agro

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162. *Id.* at 1189.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 1189-90.

Dutch served the initial injunction, the government argued that the reliquidation request was moot.<sup>173</sup> The Court of International Trade rejected this line of argument, noted that the injunction issued before the liquidations took place, and attributed the liquidations to “what might best be charitably described as ‘inadvertence.’”<sup>174</sup> The Court of International Trade backdated the injunction and held that not granting relief would cause “manifest injustice” to the non-party importer of record, “which was likely to be rendered insolvent unless the entries were reliquidated at the proper, lower duty rate.”<sup>175</sup>

On appeal, the Federal Circuit acknowledged that, under *Zenith Radio Corp. v. United States*,<sup>176</sup> court actions in which liquidation has already occurred are ordinarily moot.<sup>177</sup> However, the Federal Circuit noted that it has previously acknowledged the existence of exceptions to that rule.<sup>178</sup> When liquidation occurs in spite of an injunction to the contrary, for example, the Federal Circuit held that “not only does the trial court retain jurisdiction, but a broad array of remedies . . . [are] available to the court to rectify the unlawful liquidation.”<sup>179</sup>

Since the injunction was issued solely to prevent liquidation pending a decision on Agro Dutch’s challenge, the Federal Circuit was skeptical that Customs’ mass liquidation on the day that the injunction was served amounted to merely a mistake.<sup>180</sup> Indeed, the Federal Circuit emphasized that the five-day grace period “was not intended to allow the government to ‘rush in’ to liquidate the relevant entries and thereby avoid the effect of the injunction.”<sup>181</sup> Thus, the Federal Circuit affirmed that Customs’ arguably suspicious liquidation of the enjoined entries did not moot Agro Dutch’s

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173. *Id.* at 1190.

174. *Id.*

175. *Id.*

176. 710 F.2d 806 (Fed. Cir. 1983).

177. 589 F.3d at 1190 (citing *Zenith Radio Corp.*, 710 F.2d at 810, for the proposition that, in certain circumstances, liquidation would constitute irreparable injury).

178. *Id.* at 1191.

179. *Id.* at 1192. For examples of remedies, the court referenced *Allegheny Bradford Corp. v. United States*, 342 F. Supp. 2d 1162, 1171 (Ct. Int’l Trade 2004), in which the court refunded monies exacted pursuant to enjoined liquidation, and *AK Steel Corp. v. United States*, 281 F. Supp. 2d 1318, 1323 (Ct. Int’l Trade 2003), in which the court ordered the matter returned to status quo prior to liquidation following illegal acts by Customs.

180. *See Agro Dutch*, 589 F.3d at 1193 (suggesting that inadvertence was a dubious excuse because “the five-day window was apparently added [specifically] only to ensure against subjecting Customs officials to contempt sanctions for an inadvertent liquidation”).

181. *Id.*

request for reliquidation at the corrected, substantially lower duty rate.<sup>182</sup>

## II. TRADE REMEDIES LAWS

Commerce and the ITC share the responsibility for conducting antidumping and countervailing duty investigations.<sup>183</sup> Antidumping investigations attempt to combat “dumping” of products at less than fair value in the United States from other countries.<sup>184</sup> Commerce has the responsibility of determining whether products are entering the United States and being sold at less than fair value, while the ITC determines whether this activity injures or threatens to injure a domestic industry in the subject goods.<sup>185</sup> Countervailing duty investigations seek to determine whether a foreign government or public entity is subsidizing the manufacture of the subject goods.<sup>186</sup>

### A. *Department of Commerce*

In 2009, the Federal Circuit decided seven cases involving antidumping and countervailing duty investigations. Interestingly, all of these decisions stemmed from Commerce’s, and not the International Trade Commission’s, role in these investigations.

In *Belgium v. United States*,<sup>187</sup> the Federal Circuit reviewed Commerce’s liquidation instructions treating certain imports of stainless steel plate in coils (SSPC) as steel of Belgian—not German—origin, and thus subject to antidumping and countervailing duties on Belgian SSPC.<sup>188</sup> Plaintiffs-appellants Arcelor Stainless USA, LLC and Arcelor Trading USA, LLC imported SSPC and made cash deposits in compliance with the antidumping and countervailing duty orders, but alleged that it had mistakenly designated some of the SSPC as of Belgian origin when it was actually of German origin.<sup>189</sup> Because

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182. *Id.* at 1194.

183. United States International Trade Commission, *Antidumping and Countervailing Duty Investigations*, [http://www.usitc.gov/trade\\_remedy/index.htm](http://www.usitc.gov/trade_remedy/index.htm) (last visited Apr. 7, 2010).

184. *Id.*

185. *Id.*

186. *Id.*

187. 551 F.3d 1339 (Fed Cir. 2009).

188. *Id.* at 1341; *see also* Antidumping Duty Orders; Certain Stainless Steel Plate in Coils from Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan, 64 Fed. Reg. 27,657, 27,756 (May 21, 1999); Notice of Amended Final Determinations: Stainless Steel Plate in Coils from Belgium, Italy and South Africa; and Notice of Countervailing Duty Orders: Stainless Steel Plate in Coils from Belgium, Italy and South Africa, 64 Fed. Reg. 25,189, 25,288 (May 11, 1999).

189. *Belgium*, 551 F.3d at 1344 (citing *Ugine & Alz Belgium, N.V. v. United States*, 391 F. Supp. 2d 1284, 1287 (Ct. Int’l Trade 2005) (*Arcelor I*), *rev’d*, 452 F.3d 1289 (Fed. Cir. 2006)).



Arcelor appealed the results of Commerce's first administrative review, albeit on other grounds, the subject entries were not liquidated.<sup>190</sup>

Prior to the fourth administrative review, Arcelor discovered that it should have entered as of German origin some of the SSPC entered under the antidumping and countervailing duty orders during the first administrative review period.<sup>191</sup> Arcelor believed, under the "substantial transformation" doctrine, that the SSPC at issue was of German origin because the steel was hot rolled in Germany and not further cold rolled in Belgium.<sup>192</sup> Arcelor filed timely protests with Customs under 19 U.S.C. § 1514 and sent letters to Customs seeking to correct the origin designations and collect a refund of the deposits.<sup>193</sup> Based on this logic, Arcelor did not include the SSPC that it considered of German origin in its questionnaire responses during the fourth administrative review.<sup>194</sup>

Commerce accepted Arcelor's argument and issued liquidation instructions alongside the fourth administrative review that "imports of SSPC hot rolled in Germany and not further cold rolled in Belgium are not subject to the antidumping duty order on SSPC from Belgium. Entries of this merchandise made on or after 05/01/02 should be liquidated without regard to antidumping duties."<sup>195</sup>

In contrast, Commerce issued liquidation instructions that the entries covered by the first administrative review remain subject to antidumping and countervailing duties.<sup>196</sup> Arcelor filed suit in the Court of International Trade to challenge the liquidation instructions specific to the first administrative review.<sup>197</sup>

After the Federal Circuit initially remanded the Court of International Trade's denial of the plaintiffs' joint motion for a preliminary injunction,<sup>198</sup> the Court of International Trade held that

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190. *Id.* (citing *Ugine & Alz Belgium, N.V. v. United States*, 517 F. Supp. 2d 1333, 1336 (Ct. Int'l Trade 2007) (*Arcelor IV*)).

191. *Id.* at 1344.

192. *Id.* at 1345 (quoting *Arcelor IV*, 517 F. Supp. 2d at 1337, n.5).

193. *Id.* (citing *Arcelor I*, 391 F. Supp. 2d at 1287 and *Arcelor IV*, 517 F. Supp. 2d at 1338).

194. *Id.*

195. *Id.* at 1345 (quoting Dep't of Commerce, Message No. 5182203, Liquidation Instructions for Stainless Steel Plate in Coils from Belgium Produced by Ugine & ALZ, N.V. Belgium (July 1, 2005)).

196. *Id.* at 1345-46 (citing Dep't of Commerce, Message No. 5189204, Liquidation Instructions for Stainless Steel Plate Coils from Belgium (July 8, 2005), and Dep't of Commerce, Message No. 5199201 Liquidation Instructions for Stainless Steel Plate Coils from Belgium (July 18, 2005)).

197. *Id.* at 1346.

198. *Id.* at 1346.

Commerce's liquidation instructions were contrary to law.<sup>199</sup> The lower court reasoned that "[p]laintiffs can not [sic] be expected to raise a challenge on an issue before it ripens or is revealed," and "that Commerce may not impose duties on goods that" it has determined "are outside the scope of an antidumping or countervailing duty order."<sup>200</sup>

On appeal, the Federal Circuit affirmed the Court of International Trade and rejected the government's argument that Arcelor failed to exhaust administrative remedies before filing suit.<sup>201</sup> The court reasoned that because the first administrative review "did not define what criteria should be applied to determine whether particular steel was Belgian in origin[,] nor did it state which entries were subject to antidumping or countervailing duties[,] " Arcelor had no relevant grounds on which to challenge the first administrative review, and thus, no administrative remedies to exhaust.<sup>202</sup> The Federal Circuit viewed the government's real argument as frustration that importers should not enjoy the ability to make such belated country-of-origin corrections, but held that "neither the [antidumping and countervailing duty] statute[,] nor the regulations impose a time limit on the correction of errors such as those made here by Arcelor."<sup>203</sup>

Therefore, the Federal Circuit found Commerce's liquidation instructions for entries subject to the first administrative review as contrary to its long-established precedent that SSPC hot rolled in one country, and not further cold rolled elsewhere, originates in the country where it undergoes hot rolling.<sup>204</sup> In this case, Arcelor and the fourth administrative review liquidation instructions correctly deemed SSPC hot rolled in Germany and not further cold rolled in Belgium, and therefore not of Belgian origin.<sup>205</sup>

In *NMB Singapore Ltd. v. United States*,<sup>206</sup> the Federal Circuit reviewed Commerce's decision, in a second sunset review of an antidumping duty order on ball bearings, to continue the order while reducing the dumping margins to levels lower than before the order

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199. *Id.*

200. *Id.* (quoting *Ugine & ALZ Belgium, N.V. v. United States*, 517 F. Supp. 2d 1333, 1343 (Ct. Int'l Trade 2007)).

201. *Id.* at 1349.

202. *Id.* at 1348.

203. *Id.*

204. *Id.* at 1349.

205. *Id.* at 1346.

206. 557 F. 3d 1316 (Fed. Cir. 2009).

took effect.<sup>207</sup> The Federal Circuit affirmed Commerce's decision to continue the order, but vacated and remanded the decision to reduce the subject dumping margins.<sup>208</sup>

JTEKT Corporation and Koyo Corporation of U.S.A. (JTEKT) argued that Commerce's second sunset review determination failed to consider evidence that JTEKT submitted, specifically that import levels did not decrease substantially, that a U.S. recession caused any decreases in JTEKT's import levels around 2001,<sup>209</sup> and that, more broadly, "substantial evidence" did not support Commerce's decision.<sup>210</sup> The Federal Circuit found it consistent with Commerce's Statement of Administrative Action and Sunset Policy Bulletin to continue an antidumping duty order based merely on dumping at any level above *de minimis*, and thus found it unnecessary to consider JTEKT's argument that Commerce failed to consider its evidence of import volume.<sup>211</sup> Because JTEKT did not challenge the validity of the Statement of Administrative Action or the Sunset Policy Bulletin, the Federal Circuit inferred their validity.<sup>212</sup> Moreover, the Federal Circuit reaffirmed its holding in *Timken U.S. Corp. v. United States*<sup>213</sup> that 19 U.S.C. § 1677f(i) "does not require us to invalidate a decision of Commerce if Commerce failed to explicitly address a party's non-dispositive argument."<sup>214</sup>

The Timken Company argued on cross-appeal that Commerce both lacked substantial evidence to reduce the subject dumping margins and deviated from its established methodology in the process.<sup>215</sup> Noting for example that Commerce did not specify what data it used to determine certain importer's import volumes, the Federal Circuit agreed with Timken and found that:

it is difficult to square many of Commerce's statements that the Japanese importers' levels of imports were steady or increasing with

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207. *Id.* at 1318, 1320. *See generally* Antifriction Bearings (Other than Tapered Roller Bearings) & Parts Thereof From Japan, 54 Fed. Reg. 18,873, 19,101 (Dep't of Commerce May 3, 1989).

208. *NMB Singapore Ltd.*, 557 F.3d at 1331.

209. *Id.* at 1320.

210. *Id.*; *see Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1350 (Fed. Cir. 2005) (holding that the Federal Circuit will support Commerce's decisions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law" (citing 19 U.S.C. § 1516a(b)(1)(B)(i) (2000))).

211. *NMB Singapore Ltd.*, 557 F.3d at 1320–22 (citing Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 63 Fed. Reg. 18,817, 18,871 (Dep't of Commerce Apr. 16, 1998); 1994 U.S.C.C.A.N. at 4213–14).

212. *Id.* at 1322.

213. 421 F.3d 1350 (Fed. Cir. 2005).

214. *NMB Singapore Ltd.*, 557 F.3d at 1323 (citing *Timken*, 421 F.3d at 1357).

215. *Id.* at 1323.

the actual data before Commerce, even if we accepted the arguments that Commerce could permissibly consider different types of import data and different segments of the five-year review period for different importers while ignoring pre-order levels.<sup>216</sup>

The Federal Circuit further agreed that Commerce deviated from its past practice of comparing pre-order volumes to volumes during the life of an antidumping order because Commerce only considered volumes during the life of the order in this instance.<sup>217</sup> The Federal Circuit also vacated and remanded Commerce's recalculation of its dumping margins for further analysis of whether Commerce correctly substituted respondents' export data for Japanese companies' U.S. market share, the traditional relevant metric.<sup>218</sup>

In *Sango International L.P. v. United States*,<sup>219</sup> the Federal Circuit affirmed Commerce's determination, on remand, that Sango International L.P.'s gas meter swivels and nuts fell within the scope of the antidumping duty order on certain malleable iron pipe fittings (MIPFs) from China.<sup>220</sup> Sango's products came under the scope of the subject antidumping duty order because Customs classified them upon entry under HTSUS subheading 7307.19.90.60, which covers "[t]ube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel: Cast fittings: Other: Other Threaded."<sup>221</sup> Sango requested classification under HTSUS subheading 9028.90.00 as parts for and accessories to gas meters, but Customs denied this request.<sup>222</sup>

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216. *Id.* at 1326.

217. *Id.* at 1329; *accord* *Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–84 (Fed. Cir. 2004) (“[I]f Commerce has a routine practice for addressing like situations, it must either apply that practice or provide a reasonable explanation as to why it departs therefrom.” (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983))).

218. *See NMB Singapore Ltd.*, 557 F.3d at 1331 (“[I]f it is the case that the U.S. market share of the Japanese companies could be determined from the data before Commerce, then Commerce’s determination went against the practice it had established as of the time of the decision under review.”).

219. 567 F.3d 1356 (Fed. Cir. 2009).

220. *Id.* at 1364. *See generally* *Certain Malleable Iron Pipe Fittings from the People’s Republic of China*, 68 Fed. Reg. 69,376, 69,377 (Dep’t of Commerce Dec. 12, 2003). The Federal Circuit remanded Commerce’s first scope determination in this matter for lack of substantial evidence to support the determination. *See Sango Int’l, L.P. v. United States*, 484 F.3d 1371, 1373 (Fed. Cir. 2007) (considering the factors set forth in 19 C.F.R. § 351.225(k)(2) as required by the Federal Circuit, Commerce reached the same decision on remand); *Sango Int’l L.P. v. United States*, 556 F. Supp. 2d 1327, 1332–38 (Ct. Int’l Trade 2008), *aff’d*, 567 F.3d 1356 (Fed. Cir. 2009) (detailing the § 351.225(k)(2) factors: “(i) the physical characteristics of the product; (ii) the expectations of the ultimate purchasers; (iii) the ultimate use of the product; (iv) the channels of trade in which the product is sold; and (v) the manner in which the product is advertised and displayed.”) (quoting 19 C.F.R. § 351.225(k)(2) (2008)).

221. *Sango Int’l Ltd.*, 567 F.3d at 1359.

222. *Id.*

Commerce's remand determination followed the requirements of 19 C.F.R. § 351.225(k)(2) and generally determined that Sango's gas meter swivels and nuts cannot be used without each other and were properly classified in the tariff heading that subjected them to the applicable antidumping duty order.<sup>223</sup> The Court of International Trade affirmed Commerce's remand determination, accepting its arguments that Sango's parts are distributed through the same avenues of trade as MIPFs and to purchasers of MIPFs, among other factors.<sup>224</sup>

On appeal to the Federal Circuit, Sango argued that both Commerce's decision to treat its products collectively and Commerce's remand determination lacked substantial evidence in the record.<sup>225</sup> The Federal Circuit rejected Sango's first argument because it agreed with Commerce and the Court of International Trade that Sango's gas meter swivels and nuts could not be used without each other, and the fact that Sango packaged and sold the products separately was unavailing as a matter of law.<sup>226</sup> Sango's second argument failed because the Federal Circuit read the antidumping duty order as including MIPFs that connect a pipe or a pipe fitting to an apparatus, which Sango's gas meters and swivels did.<sup>227</sup> The Federal Circuit further found that Sango's gas meters and swivels and the MIPFs subject to the antidumping duty order shared physical characteristics and were marketed through the same channels of commerce.<sup>228</sup>

In *Huvis Corp. v. United States*,<sup>229</sup> the Federal Circuit affirmed Commerce's use of a constructed market price in valuing Huvis Corporation's imported polyester staple fiber subject to an antidumping duty order.<sup>230</sup> Huvis appealed after Commerce issued its findings in the fifth administrative review.<sup>231</sup>

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223. *Id.* at 1359–60 (finding that Sango's products must bond together to function, that Sango's own scope ruling request treated them as one collective product, that gas meter nuts cannot be used without gas meter swivels, and that they are generally "never used individually").

224. *Id.* at 1362.

225. *Id.*; see also *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998) (establishing that the Federal Circuit will defer to Commerce's scope rulings unless it finds them to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law" (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (1994))).

226. *Sango Int'l Ltd.*, 567 F.3d at 1363.

227. *Id.* at 1363–64.

228. *Id.* at 1364.

229. 570 F.3d 1347 (Fed. Cir. 2009).

230. *Id.* at 1353.

231. *Id.* at 1348.

Huvis purchased all of a key component used in the production of polyester staple fiber from affiliated companies during this period, which triggered the “major input rule” under 19 U.S.C. §§ 1677b(f)(2)–(3) and 19 C.F.R. § 351.407(b).<sup>232</sup> The “major input rule” requires Commerce to determine the value of an affiliate-sourced key production component as the higher of (1) the transfer price, (2) the market value, or (3) the cost of production.<sup>233</sup>

As it had done previously, during the fifth administrative review, Commerce requested that Huvis submit the transfer price, market value and cost of production for the major inputs at issue.<sup>234</sup> For qualified-grade and purified terephthalic acids—the major inputs at issue—Huvis submitted only transfer price and cost of production, explaining that its supplier considered market price data proprietary.<sup>235</sup> Though Commerce had, in three of four cases, previously applied the major input rule for only the two measures Huvis supplied, for the fifth administrative review Commerce chose to construct a market price from “facts available.”<sup>236</sup> In this case, Commerce arrived at a market price by adding an average profit rate, taken from suppliers’ submitted financial statements, and added it to Huvis’ submitted cost of production.<sup>237</sup> This constructed market price exceeded both the transfer price and cost of production submitted by Huvis, and thus Commerce used it to value the subject major inputs.<sup>238</sup>

Huvis filed suit in the Court of International Trade to challenge Commerce’s constructed market price as unsupported by substantial evidence.<sup>239</sup> The Court of International Trade found that Commerce’s constructed market value—which relied on Huvis’ own data—was supported by substantial evidence and did not apply any adverse inferences against Huvis.<sup>240</sup> The Court of International Trade nonetheless remanded to Commerce based on the court’s finding that Commerce’s use of constructed market price was inconsistent

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232. *Id.* at 1348–49.

233. *Id.* at 1349 (quoting 19 C.F.R. § 351.407(b) (2009)).

234. *Id.*

235. *Id.*

236. *See id.* (“Commerce is required to use the facts otherwise available in reaching the applicable determination” if “necessary information is not available on the record” (quoting 19 U.S.C. § 1677e(a) (2006)) (internal quotation marks omitted)). Commerce may not draw “adverse inferences” against an importer, absent that importer’s failure to cooperate with the investigation. *Id.* at 1350 (citing § 1677e(b)).

237. *Id.* at 1350.

238. *Id.*

239. *Id.*

240. *Id.*

with its past practice of simply using the highest available price measure.<sup>241</sup>

On remand, Commerce stood by its methodology and explained that it only now realized it had enough data to construct a market price, and that doing so provided “a more complete analysis under the major input rule, and result[ed] in a more accurate calculation of Huvis’s dumping margin.”<sup>242</sup> The Court of International Trade accepted this methodology and affirmed Commerce’s constructed market value determination.<sup>243</sup>

Huvis appealed to the Federal Circuit, again under the theory that the constructed market price was unsupported by substantial evidence and contrary to law.<sup>244</sup> Huvis argued that Commerce’s standard practice was to look only at the available measures and not to construct a major input value, which made it the “law of the proceeding” and a practice that Huvis should expect from Commerce during the fifth administrative review.<sup>245</sup> Finally, Huvis argued that Commerce’s methodology of adding cost of production to profit renders the cost of production variable in the major input test meaningless, since the market value would always be higher.<sup>246</sup>

First, the Federal Circuit found that Commerce’s constructed market value methodology in this case was permissible under the antidumping statute.<sup>247</sup> The Federal Circuit deemed Commerce’s addition of an average profit to cost of production reasonable “since there is no suggestion here that product sales were unprofitable or that the profit margins were unusually low.”<sup>248</sup> The court also found it reasonable for Commerce to differentiate between varying grades of terephthalic acids because Huvis’ own transfer price data showed that it paid more for higher grade materials.<sup>249</sup>

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241. *Id.*

242. *Huvis Corp. v. United States*, No. 06-00380, 2008 WL 2977890, at \*2 (Ct. Int’l Trade Aug. 5, 2008), *aff’d* 570 F.3d 1347 (Fed. Cir. 2009).

243. *Huvis*, 570 F.3d at 1351.

244. *Id.*

245. *Id.* Huvis also argued that Commerce’s construction of a market price amounted to a penalty on Huvis for failing to provide market value data that, because its suppliers would not share, Huvis could not provide. *Id.*

246. *Id.* at 1351–52.

247. *See id.* at 1353 (“[T]he new policy is permissible under the statute, . . . there are good reasons for it, and . . . the agency *believes* it to be better, which the conscious change of course adequately indicates.” (quoting *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1804 (2009))).

248. *Id.* at 1354.

249. *Id.*

Second, the Federal Circuit ruled that Commerce had a “good reason” to deviate from its past practice.<sup>250</sup> In this case, the court endorsed Commerce’s determination that it could increase the accuracy of its estimated market prices—and consequently its dumping margins—by calculating the market price for Huvis.<sup>251</sup> The court rejected Huvis’s argument that Commerce could not abruptly change course, as Huvis offered no evidence of actual detrimental reliance.<sup>252</sup> Thus, Commerce was permitted to proceed with its fifth administrative review based on a calculated market price for certain of Huvis’ terephthalic acids.<sup>253</sup>

*Ningbo Dafa Chemical Fiber Co. v. United States*<sup>254</sup> concerned an antidumping duty investigation of recycled polyester staple fiber (PSF) from China.<sup>255</sup> Commerce issued a final determination imposing a 4.86% dumping rate for Ningbo Dafa Chemical Fiber Co.<sup>256</sup> The Federal Circuit agreed with the Court of International Trade and affirmed Commerce’s final determination, finding that it was supported by substantial evidence.<sup>257</sup>

PSF is made in part from recycled polyethylene terephthalate (PET) bottle flake, and the color of the PET flake used in production corresponds with the color of the finished PSF.<sup>258</sup> Commerce requested the invoices from Ningbo’s market economy purchases of PET flake during its investigation, in furtherance of its obligation to use the “best available information” to value the subject PSF.<sup>259</sup> In response, Ningbo gave Commerce fifty-eight invoices from its qualifying market economy PET purchases, but very few of those identified the color of PET flake purchased.<sup>260</sup> After Commerce unsuccessfully made a second inquiry for invoices that matched purchase price with PET flake color, Commerce made its

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250. *Id.* (citing *Fox Television*, 129 S. Ct. at 1811; *Nippon Steel Corp. v. U.S. Int’l Trade Comm’n*, 494 F.3d 1371, 1377–78 n.5 (Fed. Cir. 2007)).

251. *Id.* at 1355.

252. *Id.* The Court had previously been persuaded by the company’s claims of detrimental reliance when this reliance could be demonstrated. *See Fox Television*, 129 S. Ct. at 1811 (providing that in changing a policy an agency must consider the reliance interests at stake); *Shikoku Chems. Corp. v. United States*, 795 F. Supp. 417, 421 (Ct. Int’l Trade 1992) (overturning Commerce’s use of a new methodology since respondents demonstrated reliance on the old methodology).

253. *Huvis*, 570 F.3d at 1356.

254. 580 F.3d 1247 (Fed. Cir. 2009).

255. *Id.* at 1249. PSF is used to stuff consumer items, such as sleeping bags, mattresses, pillows, and furniture. *Id.* at 1250.

256. *Id.* at 1253.

257. *Id.* at 1262.

258. *Id.* at 1250.

259. *Id.* at 1250–51 (citing 19 U.S.C. § 1677b(c)(1) (2006)).

260. *Ningbo*, 580 F.3d at 1251.



determination based on “neutral partial ‘facts available’” inferences.<sup>261</sup>

First, the Federal Circuit upheld Commerce’s use of “facts available” inferences in this case because “Ningbo did not provide the requested information in the form and manner requested” and because Commerce reasonably determined the color of PET flake to be relevant to its value.<sup>262</sup> The court emphasized that the reason behind a respondent’s failure to provide information reasonably requested by Commerce is “of no moment”—including if the respondent is from a non-market economy country—and the failure alone allows Customs to make facts available inferences.<sup>263</sup>

Second, the Federal Circuit held that substantial evidence supported Commerce’s final determination.<sup>264</sup> The court deferred to Commerce’s conclusion that it required color-specific PET flake values and that color-specific, surrogate PET flake values from India did not exist.<sup>265</sup> The Federal Circuit then decided that Commerce’s application of its neutral facts available inferences was supported by substantial evidence.<sup>266</sup> Noting that Commerce’s methodologies are “presumptively correct” under *Thai Pineapple Public Co. v. United States*<sup>267</sup> and *Florida Citrus Mutual v. United States*,<sup>268</sup> Ningbo’s claim that it would have been impossible to produce color-specific PET flake invoices as requested by Customs was not persuasive.<sup>269</sup> In the court’s view, Commerce had incomplete information to work with and acted reasonably when it used the best information available to assign colors to the market economy invoices that lacked colors.<sup>270</sup> Moreover, the Federal Circuit found that substantial evidence supported Commerce’s color-specific PET flake valuations, both because the incomplete information provided by Ningbo made an exact correlation between Ningbo’s PET flake purchases and its PSF production possible<sup>271</sup> and because Commerce’s calculated values matched up with the prices derived from a co-respondent that did

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261. *Id.* (citing Certain Polyester Staple Fiber from the People’s Republic of China, 72 Fed. Reg. 19,690, 19,691 (Apr. 19, 2007)).

262. *Id.* at 1252. The court also noted that Commerce applied neutral, rather than adverse, facts available. *Id.*

263. *Id.* at 1254.

264. *Id.* at 1257.

265. *Id.*

266. *Id.* at 1256.

267. 187 F.3d 1362 (Fed. Cir. 1999).

268. 550 F.3d 1105 (Fed. Cir. 2008).

269. *Ningbo*, 580 F.3d at 1259–60.

270. *Id.* at 1261.

271. *Id.*

provide color-specific PET flake invoices.<sup>272</sup> Thus, Commerce's final determination and dumping margin for Ningbo were affirmed.<sup>273</sup>

The Federal Circuit upheld an "adverse facts available" (AFA) antidumping ruling in *PAM, S.P.A. v. United States*.<sup>274</sup> The appeal considered the Court of International Trade's affirmance of Commerce's determination of a 45.49% AFA margin for PAM S.P.A. (PAM), an Italian producer and exporter of pasta, in compliance with the Court of International Trade's earlier instructions on remand to recalculate an AFA antidumping margin in accordance with 19 U.S.C. § 1677e(c).<sup>275</sup>

This appeal concerned the sixth administrative review, during which PAM filed questionnaire responses with Commerce and participated in the verification of its sales databases.<sup>276</sup> However, PAM failed to report sales to AGEA, a governmental entity, and a set of invoices for pasta shipped directly from an external warehouse to PAM's customers.<sup>277</sup> These omissions represented approximately two-thirds of PAM's total domestic sales.<sup>278</sup>

Based on these omissions, Commerce determined that PAM failed to cooperate with its investigation and applied an AFA margin.<sup>279</sup> The AFA margin of 45.49% applied to PAM represented the highest margin applied to any party that had been previously upheld in the course of the investigation.<sup>280</sup> PAM challenged Commerce's decision and the Court of International Trade remanded, finding that Commerce had not "adequately corroborated" the subject margin.<sup>281</sup> On remand, Commerce took into account PAM's databases but found the same margin that it found in the sixth administrative review.<sup>282</sup>

Noting that "Congress has made very clear the importance of accurate and complete reporting of home market sales to the Department of Commerce," the Federal Circuit found that

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272. *Id.*

273. *Id.* at 1262.

274. 582 F.3d 1336 (Fed. Cir. 2009).

275. *Id.* at 1338. *See generally* Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less than Fair Value: Certain Pasta from Italy, 61 Fed. Reg. 38,547 (Dep't of Commerce July 24, 1996) (discussing obligations of parties subject to administrative protective orders).

276. *PAM*, 582 F.3d at 1338.

277. *Id.*

278. *Id.*

279. *Id.* (citing Notice of Preliminary Results: For the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 68 Fed. Reg. 47,020 (Aug. 7, 2003)).

280. *Id.* at 1338.

281. *Id.*

282. *Id.*

“Commerce’s discretion in applying an AFA margin is particularly great when a respondent is uncooperative by failing to provide or withholding information.”<sup>283</sup> The court identified substantial evidence for the 45.49% AFA margin based on Commerce’s finding that at least twenty-nine sales occurred with margins at or above 45.49%.<sup>284</sup> The court rejected PAM’s argument that its high margin sales were mere outliers, as 0.5% of total sales, based on *Ta Chen Stainless Steel Pipe, Inc. v. United States*.<sup>285</sup> In that case, the Federal Circuit held that, “[s]o long as the data is corroborated,” Commerce may choose to rely on a small subset of data to support an AFA margin.<sup>286</sup>

*Qingdao Taifa Group Co. v. United States*<sup>287</sup> required the Federal Circuit to decide whether the Court of International Trade had the power to halt liquidation of entries for importers of hand trucks made and exported by Qingdao Taifa Group Co. (Taifa) so that Taifa could challenge antidumping duties imposed on it by Commerce.<sup>288</sup> Various U.S. companies purchased Taifa hand trucks in 2005 and 2006 and paid cash deposits pursuant to the applicable antidumping duty order, but Taifa did no importation of its own and thus paid no cash deposits directly.<sup>289</sup> Commerce later notified all interested parties of the opportunity to request a review of the entries.<sup>290</sup> Commerce initiated a review based in part on Taifa’s request and sent personnel to China to visit Taifa and interview its employees.<sup>291</sup>

During its visit to China, Commerce detected “concealment, destruction, and tampering with responsive documents” and, as a result, applied an AFA margin under 19 U.S.C. § 1677e(b) and assigned the general antidumping duty rate used for China, which was much higher than the rate generally applied to individual exporters.<sup>292</sup> Taifa challenged this determination at the Court of International Trade, which granted Taifa’s motion for a preliminary injunction and halted liquidation pending the outcome of its

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283. *Id.* at 1339–40 (citing 19 U.S.C. § 1677e (2006)); *see also* F. Illi De Cecco Di Filippo Fara S. Martino S.P.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (explaining that Commerce is inclined to select adverse facts to deter companies from being uncooperative).

284. *PAM*, 582 F.3d at 1340.

285. 298 F.3d 1330 (Fed. Cir. 2002).

286. *Id.* at 1339 (citing *Illi De Cecco*, 216 F.3d at 1032).

287. 581 F.3d 1375 (Fed. Cir. 2009).

288. *Id.* at 1377.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 1377–78.

review.<sup>293</sup> Certain domestic producers who later intervened in the Court of International Trade action appealed to the Federal Circuit.<sup>294</sup>

The Federal Circuit reviewed the Court of International Trade's grant of an injunction under an "abuse of discretion" standard.<sup>295</sup> Pursuant to this standard, the lower court will only be reversed if it "made a clear error of judgment in weighing the relevant factors or exercised its discretion based on an error of law or clearly erroneous fact finding."<sup>296</sup>

As an initial matter, the Federal Circuit rejected the government's argument that the intervening domestic producers had waived their right to participate because they did not intervene until after the injunction was granted.<sup>297</sup>

In affirming the Court of International Trade's decision, the Federal Circuit determined that Taifa faced irreparable forfeiture in the event that an injunction was not granted.<sup>298</sup> The court further reasoned that no other statutory framework or process existed for Taifa to challenge the validity of Commerce's chosen antidumping duty margins, and thus the company would have no recourse after liquidation was completed.<sup>299</sup> Moreover, the court found that the legislative history of the antidumping statute supports an injunction, as "[t]he Tariff Act . . . expressly contemplates protections for foreign as well as domestic manufacturers."<sup>300</sup> And the court finally determined that Taifa demonstrated "at least a 'fair chance of success on the merits.'"<sup>301</sup> Though "no party proffers any significant evidence about the merits of the imposed tariff rate,"<sup>302</sup> Taifa at least claimed that it should not be subject to the China-wide rate because it is not a government-controlled entity.<sup>303</sup> Based on this limited argument, the

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293. *Id.* at 1378 (Fed. Cir. 2009). In fact, the Court of International Trade granted the requested injunction before the deadline passed for the government to file its reply. *Id.*

294. *Id.*

295. *Id.* at 1379 (quoting *Tegal Corp. v. Tokyo Electron Am., Inc.*, 257 F.3d 1331, 1335 (Fed. Cir. 2001)).

296. *Id.* (quoting *Lab. Corp. of Am. Holdings v. Chiron Corp.*, 384 F.3d 1326, 1331 (Fed. Cir. 2004)).

297. *See id.* (reasoning that the domestic producers could not control the fact that the Court of International Trade ruled before the deadline passed for parties to file oppositions).

298. *Id.* at 1380.

299. *Id.*

300. *Id.* (citing S. REP. NO. 96-249 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 636).

301. *Id.* at 1381 (quoting *U.S. Ass'n of Imps. of Textiles & Apparel v. Dep't of Commerce*, 413 F.3d 1344, 1347 (Fed. Cir. 2005)).

302. *Id.*

303. *Id.*

Federal Circuit saw no cause to overturn the Court of International Trade's finding that Taifa demonstrated some likelihood of success on the merits.<sup>304</sup> Therefore, the Federal Circuit sustained the injunction granted by the Court of International Trade.<sup>305</sup>

*B. International Trade Commission*

The Federal Circuit issued only one decision in 2009 arising out of the ITC, and it related to the constitutionality of the now-repealed Byrd Amendment.<sup>306</sup> The case discussed below continued to the Federal Circuit, even though Congress repealed the statute, because the private parties' claim for distributions predated the Amendment's repeal.<sup>307</sup>

In 2009, the Federal Circuit upheld the constitutionality of the Byrd Amendment,<sup>308</sup> which provided for the distribution of antidumping duties collected by the federal government to certain "affected domestic producers" of the dumped goods, against First and Fifth/Fourteenth Amendment challenges.<sup>309</sup> SKF USA (SKF) challenged the ITC's 2005 denial of its request for Byrd Amendment distributions.<sup>310</sup> The ITC reasoned in its denial that SKF was not eligible for distributions because it was not a petitioner and had not supported the petition resulting in the antidumping duty order.<sup>311</sup> The Court of International Trade agreed with SKF and found that the Byrd Amendment's language that limited eligible claimants to petitioners or supporters of the petition violated the equal protection guarantees of the Fifth Amendment.<sup>312</sup>

On appeal, the Federal Circuit declined to decide threshold questions of jurisdiction and simply assumed that the Court of International Trade had jurisdiction to hear SKF's claim and that the

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304. *Id.*

305. *Id.* at 1382.

306. *See* SKF USA, Inc. v. U.S. Customs & Border Prot., 556 F.3d 1337, 1340 (Fed. Cir. 2009), *reh'g and reh'g en banc denied*, 583 F.3d 1340 (Fed. Cir. 2009) (concluding that the Byrd Amendment is constitutional).

307. *See id.* at 1341–42 (discussing the history of the Byrd Amendment).

308. Congress repealed the Byrd Amendment in 2006, but the case discussed herein concerned distributions allegedly earned prior to the Amendment's repeal. *See* Repeal of Continued Dumping and Subsidy Offset, Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154 (2006) (noting that actions prior to the repeal will still be assessed under the Byrd Amendment).

309. SKF, 556 F.3d at 1340. An "affected domestic producer" is "a petitioner or interested party in support of the petition with respect to which an antidumping duty order . . . has been entered." 19 U.S.C. § 1675c(b)(1)(A) (2000).

310. SKF, 556 F.3d at 1340.

311. *Id.*

312. *Id.*

claim was not barred by any applicable statute of limitations.<sup>313</sup> The Court further determined that, since SKF challenged the Byrd Amendment as applied to its claim for distributions and not on its face, the claim could only accrue once SKF filed suit to collect the duties.<sup>314</sup>

Stressing its adherence to the doctrine of constitutional avoidance, the Federal Circuit first considered SKF's First Amendment argument.<sup>315</sup> The Court rejected SKF's argument that the Byrd Amendment's restriction of distributions functioned to penalize domestic producers who declined to speak in support of antidumping petitions because "[p]arties who are awarded antidumping distributions under the Byrd Amendment may say whatever they want about the government's trade policies generally or about the particular antidumping investigation, provided they do so outside the context of the proceeding itself."<sup>316</sup> In this regard, the Federal Circuit found that the Byrd Amendment, rather than chilling opposing views, rewards the efforts of domestic producers who aid enforcement.<sup>317</sup>

SKF based its equal protection argument on the theory that no rational basis for distributing antidumping duties only to domestic producers that supported an antidumping petition furthered the compensatory purpose of the Byrd Amendment.<sup>318</sup> The government countered that the Byrd Amendment "identifies a group of beneficiaries that are entitled to compensation for unfair trade practices" and thus rationally supports its purpose.<sup>319</sup> The Court of International Trade agreed with SKF because it saw the antidumping laws as "designed to benefit entire industries rather than individual companies."<sup>320</sup> But the Federal Circuit rejected this line of reasoning and—extending its First Amendment findings to its equal protection analysis—found that the Byrd Amendment was rationally related to

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313. *See id.* at 1348 ("We assume, but do not decide, that the statute of limitations in § 2636(i) is jurisdictional . . .").

314. *Id.*

315. *See id.* at 1349 (recognizing the obligation of courts to construe statutes to minimize constitutional difficulties).

316. *Id.* at 1351–52.

317. *Id.* at 1352. The Federal Circuit, in a lengthy First Amendment discussion, also found that the Byrd Amendment furthers the legitimate government purpose of enforcing trade laws and, in fact, often fails to "adequately compensate those who support such petitions for their efforts." *Id.* at 1358.

318. *Id.* at 1346.

319. *Id.*

320. *Id.*

the legitimate purpose of enforcing U.S. trade laws and rewarding those in the private sector who assist in that enforcement.<sup>321</sup>

In a split decision, the Federal Circuit denied a petition for a panel rehearing and a petition for rehearing en banc on September 29, 2009.<sup>322</sup>

#### CONCLUSION

In 2009, the Federal Circuit issued nineteen precedential international trade-related decisions that will undoubtedly prove important to both the import and export community's day-to-day business operations and the future activities of Customs, Commerce and the ITC. The Federal Circuit's review of international trade-related appeals from the Court of International Trade remains a small but extremely important body of law, and the Federal Circuit's role in creating judicial precedent for the ever-changing regime of U.S. trade policy and trade regulations is only likely to increase with time.

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321. *Id.* at 1360.

322. *SKF USA, Inc. v. U.S. Customs & Border Patr.*, 583 F.3d 1340, 1341 (Fed. Cir. 2009) (*per curiam*).