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International Trade Decisions of the Federal Circuit: 2006 Cases and Highlights of 2003-2005

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Abstract

Over the past four years, the United States Court of Appeals for the Federal Circuit (“Federal Circuit”) has, as it has done since its establishment in 1982, exercised its jurisdiction under 28 U.S.C. § 1295(a)(5) to review decisions of the United States Court of International Trade (“CIT”) regarding U.S. regulation of international trade. While trade cases currently make up only about six percent of the docket of the Federal Circuit, decisions in these cases can have a significant discernable impact on the day-to-day investigation and regulation of trade matters of the three U.S. agencies featured most prominently in the trade decisions of the Federal Circuit—United States Customs and Border Protection (“Customs”), the United States Department of Commerce (“Commerce”), and the United States International Trade Commission (“ITC” or “Commission”)—and on the parties involved in trade disputes before these agencies. This article covers all cases decided by the Federal Circuit in 2006, and selected cases from 2003-2005, dealing with international trade matters from tariff classification to investigations of dumping and subsidies, and jurisdictional issues related to appeals of these matters. A significant number of the cases that arrive at the Federal Circuit from the CIT are accompanied by a complex history—sometimes described as “a long and tortuous path”—and the case summaries below highlight the major holdings of each case within the context of this history and the unique fact patterns encompassing each case.

Keywords

International Trade, Federal Circuit, Court of Appeals, Department of Commerce, Customs and Border Protection, International Trade Commission, Court of International Trade

INTERNATIONAL TRADE DECISIONS OF THE FEDERAL CIRCUIT:

2006 CASES AND HIGHLIGHTS OF 2003–2005

ALEXANDRA E. P. BAJ*

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INTRODUCTION

Over the past four years, the United States Court of Appeals for the Federal Circuit (“Federal Circuit”) has, as it has done since its establishment in 1982, exercised its jurisdiction under 28 U.S.C. § 1295(a)(5)² to review decisions of the United States Court of International Trade (“CIT”) regarding U.S. regulation of international trade. While trade cases currently make up only about six percent of the docket of the Federal Circuit,³ decisions in these cases can have a significant discernable impact on the day-to-day investigation and regulation of trade matters of the three U.S. agencies featured most prominently in the trade decisions of the Federal Circuit—United States Customs and Border Protection (“Customs”), the United States Department of Commerce (“Commerce”), and the United States International Trade Commission (“ITC” or “Commission”)—and on the parties involved in trade disputes before these agencies.

This article covers all cases decided by the Federal Circuit in 2006, and selected cases from 2003-2005, dealing with international trade matters from tariff classification to investigations of dumping and subsidies, and jurisdictional issues related to appeals of these matters. A significant number of the cases that arrive at the Federal Circuit from the CIT are accompanied by a complex history⁴—sometimes described as “a long and tortuous path”⁵—and the case summaries below highlight the major holdings of each case within the context of this history and the unique fact patterns encompassing each case.

I. U.S. CUSTOMS LAWS

As fewer unfair trade investigations involving Commerce and the ITC were initiated and appealed between 2003 and 2006, customs enforcement cases represent the largest number of trade regulation cases decided by the Federal Circuit during this period. Customs has been an agency within the United States Department of Homeland Security since 2003. While Customs currently has many functions

2. “The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from a final decision of the United States Court of International Trade.” 28 U.S.C. § 1295(a)(5) (2000).

3. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350 (Fed. Cir. 2006).

4. *See Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1346-47 (Fed. Cir. 2006) (noting that “[l]ike many appeals from the Court of International Trade, this appeal has a somewhat complex history”).

5. *See Heartland By-Products, Inc. v. United States*, 424 F.3d 1244, 1245 (Fed. Cir. 2005) (indicating that the dispute began in 1995 and subsequently included three rulings by the Court of International Trade and one ruling by the Federal Circuit).

related to security, as well as trade, the focus of the Customs trade cases at the Federal Circuit involve Customs' functions of "[a]ssessing and collecting Customs duties, excise taxes, fees and penalties due on imported merchandise."⁶ As a result, during 2003-2006 Customs found itself defending in the Federal Circuit a significant number of tariff classification decisions and had to defend a wide range of other customs-related matters, including deemed liquidation, duty drawback, and Byrd Amendment distributions. In addition, as discussed below, a large number of 2006 Customs cases involved jurisdictional issues.

A. *Tariff Classification*

While the majority of Customs' tariff classification decisions necessarily turn on the details of the products being imported, classification decisions rising to the level of the Federal Circuit typically address issues with a broader impact on importers than whether a product fits under one subheading or another of the Harmonized Tariff Schedule of the United States ("HTSUS").⁷ As shown in the cases described below, 2006 was no exception in this regard.

*Motorola, Inc. v. United States*⁸ involved the tariff classification of eight models of circuits used in battery packs for cellular phones.⁹ In this case, Motorola, Inc. ("Motorola") argued that all eight of its circuits should be classified under HTSUS subheading 8542.40.00 for "hybrid integrated circuits," which enter duty-free.¹⁰ Customs had classified the circuits under subheading 8536.30.80, which carries a duty rate of 3.2% ad valorem.¹¹ The CIT had sustained Customs' classification, relying on the HTSUS Explanatory Notes for guidance.¹² The Federal Circuit affirmed the CIT on this issue,

6. U.S. Customs and Border Patrol, *U.S. Customs Service—Over 200 Years of History*, <http://www.cbp.gov/xp/cgov/home.xml> (follow "about cbp" hyperlink; then follow "History" hyperlink; then follow "U.S. Customs Service—Over 200 Years of History" hyperlink).

7. United States International Trade Commission, Official Harmonized Tariff Schedule, <http://www.usitc.gov> (follow "Official Harmonized Tariff Schedule" hyperlink) (describing the Harmonized Tariff Schedule, the source for establishing tariff classifications for goods imported into the United States).

8. 436 F.3d 1357 (Fed. Cir. 2006).

9. *Id.* at 1358.

10. *Id.* at 1358-59.

11. *See id.* at 1359 (stating that the subheading covers "other apparatus for protecting electrical circuits").

12. *See id.* at 1360-61 (noting that the CIT used the Explanatory Notes to the HTSUS, an "instructive, but not binding" source, to determine that the Motorola circuits did not meet the "combined . . . indivisibly" requirement of "hybrid integrated circuits").

finding that Motorola had not met its burden in challenging the tariff classification, and noting that “[b]ecause the court used the Explanatory Note for guidance as to the meaning of a definitional term and did not treat the Explanatory Note as setting forth an additional definitional requirement, we conclude that the trial court did not commit legal error by referring to the Explanatory Note.”¹³

In a second issue in this case, the Federal Circuit confronted whether some or all of Motorola’s circuits should be entered duty-free on the grounds that Customs had previously granted the same or similar circuits duty-free treatment and failed to publish its contrary ruling for notice and comment.¹⁴ Here, giving *Chevron*¹⁵ deference to Customs’ interpretation of 19 U.S.C. § 1625(c),¹⁶ despite the fact that Customs’ interpretation in 19 C.F.R. § 177.12(c)(1)(ii) postdated the events to which the interpretation was applied,¹⁷ the Federal Circuit ruled that Customs’ expedited “bypass” procedures, in which goods are admitted pursuant to representations by the importer and are not independently examined or reviewed, do not constitute “treatment” of the goods.¹⁸ Therefore, the Federal Circuit remanded to the CIT to address whether the particular entries in this case were processed without review or examination by Customs.¹⁹

In *Brother International Corp. v. United States*,²⁰ the Federal Circuit addressed whether Brother International Corp.’s (“Brother’s”) misclassification of multifunction centers (“MFCs”), which are office equipment with multiple functions, such as printing, copying, faxing, and scanning, was due to a mistake of fact or a mistake of law.²¹ 19 U.S.C. § 1520(c)(1) allows the reliquidation of goods previously misclassified based on a mistake of fact (but not if the mistake also involved a mistake of law).²² In this case, Brother entered the MFCs

13. *Id.* at 1361.

14. *Id.* at 1362.

15. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (requiring courts to defer to statutory interpretations made by administrative agencies as long as the interpretations are reasonable).

16. *See Motorola*, 436 F.3d at 1363-64 (pointing out that 19 U.S.C. § 1625(c) (2000) provides that a proposed Customs interpretive ruling or decision that would modify or revoke a prior interpretive ruling or decision must first be published in the Customs Bulletin to allow for comment by interested parties).

17. *See id.* at 1366 (finding that *Chevron* deference is appropriate in such situations as long as the agency’s interpretation is supported by other regulations or administrative rulings and is not intended to protect past agency action from attack).

18. *Id.* at 1366-67.

19. *Id.* at 1368.

20. 464 F.3d 1319 (Fed. Cir. 2006).

21. *Id.* at 1320-22.

22. *See id.* at 1321 (pointing out that despite the repeal of 19 U.S.C. § 1520(c) on December 3, 2004, the case involves events from 1997, resulting in current

in 1996 and 1997 with Brother's customs broker mistakenly classifying the MFCs under the category for photocopying apparatus with a 3.7% duty.²³ Later in 1997, Brother requested a tariff classification for the same type of machine and Customs concluded that the correct heading was the heading for other laser printer units, a duty free provision.²⁴ Relying on 19 U.S.C. § 1520(c)(1), Brother requested reliquidation of the earlier entries of MFCs.²⁵ Customs refused and the CIT affirmed, finding that the original misclassification was due to a combination of a mistake of fact and of law and therefore ineligible for reliquidation under 19 U.S.C. § 1520(c)(1).²⁶ The Federal Circuit disagreed, finding that the only mistake was the factual error on the part of the customs broker who did not know that the essential character of the MFCs was the printer and that "a mistake of fact that leads to a misclassification is still a mistake of fact."²⁷ As a result, the Federal Circuit reversed and remanded the case to the CIT to further remand to Customs so that Customs could reliquidate the goods and refund the excess duties to Brother.²⁸

*Cummins Inc. v. United States*²⁹ dealt with whether certain crankshafts classified under HTSUS subheading 8483.1030 undergo a tariff shift in Mexico (after importation to Mexico from Brazil and before importation into the United States), thus entitling them to preferential treatment under the North American Free Trade Agreement ("NAFTA") as goods originating in Mexico.³⁰ In this appeal, the Federal Circuit affirmed the CIT's holding that the crankshafts were not entitled to preferential treatment under NAFTA as they were not Mexican in origin.³¹

Under General Notes 12(b)(i)-(iv), 12(b)(ii)(A), 12(t)/84.243(A), HTSUS, products may be considered to "originate in the territory of a NAFTA party" if they are "transformed in the territory" of a NAFTA

application of the repealed statute); *see also* Pub. L. No. 108-429, § 2105, 118 Stat. 2598 (2004) (repealing § 1520(c)).

23. *See Brother Int'l*, 464 U.S. at 1322-23 (observing that the customs broker could not determine the MFC's principal function and thus mistakenly classified the machines).

24. *See id.* (finding that despite its multifunction capabilities "the printing function . . . dictates the principal function of [the] machine").

25. *Id.*

26. *See id.* at 1322-23 (concluding that Brother's customs broker's decision to classify the MFCs under a particular provision of HTSUS and further reliance on a Customs ruling constituted determinations of law).

27. *Id.* at 1324.

28. *Id.*

29. 454 F.3d 1361 (Fed. Cir. 2006).

30. *Id.* at 1361-62.

31. *Id.* at 1363, 1366.

party, including a transformation by undergoing a “change in tariff classification.”³² Cummins argued before Customs, the CIT, and the Federal Circuit that the crankshafts it imports into the United States undergo a tariff shift in Mexico, and thereby are entitled to preferential duty treatment under NAFTA.³³ Cummins contended that the proper classification of its crankshafts upon import into Mexico was heading 7224 as “semifinished products of other alloy steel,” which have not been further worked beyond being roughly shaped by forging.³⁴ While the parties disputed the meaning of the term “further worked,”³⁵ the Federal Circuit looked to its common and commercial meanings, which it found to be “to form, fashion, or shape an existing product to a greater extent.”³⁶ Under this definition, the Federal Circuit found that the crankshafts were “further worked” before importation into Mexico³⁷ and that, moreover, under HTSUS General Rule of Interpretation 2(a) (which classifies an incomplete or unfinished product as the finished article if it has the “essential character” of the finished article) the product “imported into Mexico had the general shape of a crankshaft and was intended for use only in producing a finished crankshaft,” resulting in a proper classification of the product under subheading 8483.10.30 upon importation into Mexico.³⁸

In affirming the CIT’s summary judgment ruling against Cummins, the Federal Circuit also found that the CIT did not improperly rely on an opinion of the World Customs Organization (“WCO”) because the CIT had accorded no deference to the WCO opinion and instead made its own independent assessment, relying on the WCO opinion only as persuasive authority.³⁹

In *Processed Plastics Co. v. United States*,⁴⁰ the Federal Circuit affirmed the CIT’s decision granting summary judgment for the United States and holding that Customs properly classified two children’s backpacks and one children’s beach bag under HTSUS subheading

32. *Id.* at 1361-62.

33. *Id.* at 1362-63.

34. *See id.* at 1363-64 (noting that classification under heading 7224 means the product underwent a tariff shift and is entitled to preferential NAFTA treatment).

35. *See id.* (stating that if the product had been “further worked” prior to importation into Mexico, then it could not be classified within heading 7224).

36. *Id.* at 1365.

37. *See id.* (determining that the product was forged, trimmed, coined, shot blasted, milled, and mass centered in Brazil, satisfying the “further worked” definition).

38. *Id.* at 1365-66.

39. *See id.* at 1366 (pointing out that U.S. courts do not give deference to WCO opinions, but may rely on them as persuasive authority).

40. 473 F.3d 1164 (Fed. Cir. 2006).

4202.92.45 (for traveling bags, knapsacks, and backpacks) instead of subheading 9503.70.00 (for certain toys).⁴¹

The two backpacks were made of polyvinyl chloride plastic sheeting with plastic mesh on the bottom, contained imprints of “Pooh” and “Barbie” characters, and were approximately eleven inches high, nine inches wide, and three and a half inches deep.⁴² The beach bag was a vertical cylinder twelve inches high and nine inches in diameter made generally of the same materials as the backpacks.⁴³ Processed Plastics Co. (“Processed”) sold the backpacks and bag with an assortment of sand toys inside each bag.⁴⁴

Processed argued in its appeal, and the Federal Circuit agreed, that the court should use the standard adopted in *Minnetonka Brands, Inc. v. United States*⁴⁵ to determine whether Processed’s merchandise should be classified as a toy, as the HTSUS does not define the word “toy.”⁴⁶ In that case, the CIT determined that the principal use of a “toy” is amusement, diversion, or play rather than practicality.⁴⁷ However, in applying this standard, the Federal Circuit disagreed with Processed that the seven factors cited in *Minnetonka* were definitive in defining a toy, finding instead that the factors were “simply areas of inquiry that may prove useful in determining what is the principal use of merchandise alleged to be a ‘toy.’”⁴⁸ The Federal Circuit then agreed with the CIT’s finding that Processed failed to allege facts sufficient to conclude that the primary use of Processed’s merchandise was for play and, therefore, a toy.⁴⁹ The Federal Circuit also agreed with the CIT that there were no genuine issues of material fact preventing a determination that the merchandise was properly classified as a backpack under subheading 4202.92.45, since Processed’s only argument against this classification was that the bags were limited in how much weight they could carry and heading 4202 contains no weight or structural integrity requirement.⁵⁰ The Federal

41. *Id.* at 1167.

42. *Id.*

43. *Id.* at 1167-68.

44. *Id.* at 1168.

45. 110 F. Supp. 2d 1020 (Ct. Int’l Trade 2000). In *Minnetonka*, the Court of International Trade held that imported products consisting of hollow plastic bodies and heads in the shape of cartoon characters used to sell bubble bath were classifiable as toys, not as plastic bottles and lids for conveyance of goods. The Court listed seven factors for determining whether an import is of “class or kind” covered by a particular tariff. *Id.*

46. *Processed*, 473 F.3d at 1169.

47. *See id.* (noting the Federal Circuit’s agreement with the specific *Minnetonka* “toy” standard).

48. *Id.* at 1170.

49. *Id.*

50. *Id.* at 1171.

Circuit rejected additional related arguments under General Rules of Interpretation 1 and 3 of the HTSUS, finding that the items were properly classified under 4202.92.45.⁵¹

In *Fujitsu Compound Semiconductor, Inc. v. United States*,⁵² the Federal Circuit affirmed the CIT's decision affirming Customs' denial of Fujitsu Compound Semiconductor, Inc.'s ("Fujitsu's") request for reliquidation of certain imports of laser diode modules.⁵³ Fujitsu imported laser diode modules, which were classified under HTSUS subheading 8541.40.95 with a duty rate of 4.2%, in 1991 and 1992.⁵⁴ In June 1992, in response to a protest by another importer, Customs changed the classification of laser diode modules to HTSUS subheading 8541.40.20 with a duty rate of two percent and applied this new classification to unliquidated Fujitsu entries.⁵⁵ This appeal involved Fujitsu entries which were liquidated within ninety days before Customs' ruling changing the liquidation of the entries.⁵⁶

Fujitsu filed a "Mistake of Fact" petition under 19 U.S.C. § 1520(c)(1), arguing that Customs was required to reliquidate its entries because the entries were not final when the Customs' ruling was issued, but were within the ninety-day protest period.⁵⁷ Here, the Federal Circuit agreed with the CIT that Customs was not required to reliquidate the entries at its own initiative.⁵⁸ Instead, the court found that the burden is on the importer to file a timely protest in order to obtain the benefit of any post-liquidation rulings during the ninety-day protest period.⁵⁹

B. Jurisdictional Issues

In two recent cases, the Federal Circuit addressed whether Customs made a protestable decision conferring jurisdiction on the CIT under 28 U.S.C. § 1581(a)⁶⁰ where Customs liquidated certain merchandise that might have been entitled to duty-free treatment under NAFTA,

51. *See id.* at 1172-73 (denying Processed's argument that the "rule of relative specificity" in General Rule of Interpretation 3(a) leads to classification as a toy).

52. 363 F.3d 1230 (Fed. Cir. 2004).

53. *Id.* at 1231.

54. *Id.* at 1232.

55. *Id.*

56. *Id.*

57. *See id.* (highlighting Fujitsu's argument that "Customs committed a mistake of fact by failing sua sponte to reclassify and reliquidate these entries in light of the [other ruling]").

58. *Id.* at 1235.

59. *Id.*

60. *See* 28 U.S.C. § 1581(a) (2000) (granting the CIT exclusive jurisdiction over civil actions challenging denial of a protest under section 515 of the Tariff Act of 1930).

but the importer did not make a proper NAFTA claim prior to liquidation. In both cases, the Federal Circuit determined that an importer must satisfy the statutory requirements for NAFTA eligibility in order for Customs to have made a “protestable decision” subject to review by the CIT. In *Corpro Companies, Inc. v. United States*,⁶¹ an importer sought preferential treatment under NAFTA for certain entries of merchandise.⁶² The importer did not make a written declaration and submit certifications regarding NAFTA treatment, as required under the NAFTA implementing regulation⁶³ to be done within one year of importation.⁶⁴ Nevertheless, the importer filed a protest to Customs’ liquidation of its merchandise under 19 U.S.C. § 1514(a), a procedural mechanism regarding protests of Customs decisions pertaining to classification, rate, and amount of duties, and claimed duty-free treatment under NAFTA.⁶⁵ While the CIT had found jurisdiction, the Federal Circuit disagreed, citing the lack of a “protestable decision” by Customs.⁶⁶ In particular, the Federal Circuit held that

[t]here is a protestable decision as to NAFTA eligibility that confers jurisdiction in the Court of International Trade under 28 U.S.C. § 1581(a) only when the importer has made a valid claim for NAFTA treatment, either at entry or within a year of entry, with a written declaration and Certificates of Origin presented in a timely fashion, and Customs has engaged in ‘some sort of decision-making process’ expressly considering the merits of that claim.⁶⁷

Similarly, in a 2005 decision, *Xerox v. United States*,⁶⁸ the Federal Circuit held that Customs’ liquidation of an importer’s entries was not a protestable decision with respect to preferential treatment under NAFTA where Customs did not consider the merits of NAFTA

61. 433 F.3d 1360 (Fed. Cir. 2006).

62. *Id.* at 1362.

63. *See* 19 C.F.R. § 181.11(a) (2005) (stating that “[a] Certificate of Origin shall be employed to certify that a good being exported either from the United States into Canada or Mexico or from Canada or Mexico into the United States qualifies as an originating good for purposes of preferential tariff treatment under the NAFTA”); 19 C.F.R. § 181.21(a) (2005) (stating that the U.S. importer must make a written declaration that a good qualifies for treatment under the NAFTA).

64. *See* 19 U.S.C. § 1520(d) (2000) (stating that even if the importer does not make a NAFTA claim at time of entry, Customs may still grant preferential treatment under NAFTA if the importer files a written declaration and copies of applicable Certificates of Origin within one year of importation).

65. *See Corpro*, 433 F.3d at 1363 (noting that 19 U.S.C. § 1514(a) does not address NAFTA eligibility).

66. *Id.* at 1365.

67. *Id.* (quoting *U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997)).

68. 423 F.3d 1356 (Fed. Cir. 2005).

eligibility because the importer did not make a proper claim for NAFTA treatment.⁶⁹

In another Customs appeal involving jurisdictional issues, *DaimlerChrysler Corporation v. United States*,⁷⁰ the Federal Circuit affirmed the CIT's decision denying DaimlerChrysler Corporation's ("Daimler's") motion to amend its summons to identify seven additional protests of Customs' decisions⁷¹ that Daimler failed to identify in its original summons.⁷² The Federal Circuit agreed with the CIT that it did not have jurisdiction to review the seven omitted protests because Daimler did not file its motion to amend within the 180 day limitation period set forth in 28 U.S.C. § 2636(a).⁷³ In this case, Daimler appealed a large number of protests with the CIT and filed an attached schedule of protests with its summons, omitting seven protests covering more than four hundred entries and ninety-seven entries from a protest specifically identified in the summons.⁷⁴ When Daimler moved to amend its summons more than 180 days after receiving notice from Customs of its denial of Daimler's protests, the CIT held that, while Daimler could include the ninety-seven omitted entries because jurisdiction attached to the listed protests, Daimler could not add the seven omitted protests because the CIT was without jurisdiction.⁷⁵ The Federal Circuit agreed, finding that jurisdiction turned on the sufficiency of the summons as to the omitted protests because the summons must establish the CIT's jurisdiction in a protest appeal and each protest forms the basis for a separate cause of action.⁷⁶ The Federal Circuit held that each protest involved in the suit must be specifically identified in order for jurisdiction to attach to those protests, and where, as here, the protests were not specifically identified, the CIT lacked jurisdiction over those protests.⁷⁷ The Federal Circuit also noted that typical res judicata rules do not apply in protest cases, meaning that protests may intentionally be omitted from a summons in order to preserve the opportunity to relitigate issues regarding the classification of merchandise in a later suit.⁷⁸ As a result, there is no fair notice

69. *Id.* at 1357-58.

70. 442 F.3d 1313 (Fed. Cir. 2006).

71. *Id.* at 1314 (noting that "[u]nder section 515 of the Tariff Act, an importer may challenge Customs' liquidation of imports including classification of merchandise under the HTSUS, by filing a 'protest' with Customs").

72. *Id.*

73. *Id.* at 1322-23.

74. *Id.* at 1316.

75. *Id.*

76. *Id.* at 1317-18.

77. *Id.* at 1319.

78. *Id.* at 1321.

regarding a protest appeal unless it is specifically identified in the summons during the 180-day appeal window.⁷⁹

In *Forest Products Northwest, Inc. v. United States*,⁸⁰ the Federal Circuit affirmed the holding of the Court of Federal Claims (“CFC”) that the CFC did not have jurisdiction over Forest Products Northwest, Inc.’s (“Forest Products”) claim for a refund of antidumping and countervailing duties paid to Customs.⁸¹ Forest Products had imported two shipments of lumber from Canada in October 2003 and, as both entries were allegedly subject to antidumping and countervailing duties, had paid estimated duties at the time of importation.⁸² Forest Products then sued the United States in the CFC, arguing that Customs misclassified the subject imports, that Customs violated the Customs Modernization Act⁸³ by failing to adhere to another Customs ruling, and that Customs should not have applied the antidumping and countervailing duty orders to Forest Products’ imports.⁸⁴ The government filed a motion to dismiss for lack of jurisdiction, which the CFC granted.⁸⁵ Forest Products appealed this dismissal to the Federal Circuit.⁸⁶

In affirming the decision of the CFC, the Federal Circuit noted that the Tucker Act, 28 U.S.C. § 1491(c), specifically excludes from the CFC’s jurisdiction any civil action within the exclusive jurisdiction of the CIT.⁸⁷ In addition, in order for Forest Products to sue in the CFC, it must assert an independent contractual relationship, constitutional provision, federal statute, or executive agency regulation that provides a substantive right to money damages.⁸⁸ Since a substantive right to money damages in cases involving antidumping or countervailing duty orders (such as might be initially addressed in a Commerce administrative review determination or Commerce scope ruling) or Customs’ liquidation of entries (such as might be addressed in a protest to Customs) are under the exclusive jurisdiction of the CIT, as are any other federal statutes or

79. *Id.* at 1321-22.

80. 453 F.3d 1355 (Fed. Cir. 2006).

81. *Id.* at 1356-57.

82. *See id.* at 1357 (noting that Forest Products paid the duties “under protest”).

83. 19 U.S.C. § 1625 (2000).

84. *Forest Prods.*, 453 F.3d at 1357.

85. *Id.*

86. *Id.*

87. *Id.* at 1359. However, the CFC has jurisdiction over “any claim against the United States founded either upon the Constitution, or any act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” 28 U.S.C. § 1491(a)(1) (2000).

88. *Forest Prods.*, 453 F.3d at 1359.

constitutional provisions relating to a substantive right to monetary damages over duties upon importation, Forest Products' claims are not within the jurisdiction of the CFC.⁸⁹

In yet another jurisdictional decision, *International Custom Products, Inc. v. United States*,⁹⁰ the Federal Circuit concluded that the CIT lacked jurisdiction over International Custom Products, Inc.'s ("ICP's") complaint regarding Customs' classification decision for ICP's imports of white sauce.⁹¹ Prior to beginning importation of its white sauce, ICP received a letter ruling from Customs classifying the sauce under one heading in January 1999, but, based on a tariff rate investigation in 2004, Customs classified unliquidated ICP entries under a different tariff heading in 2005, resulting in a substantially increased tariff rate.⁹² Customs then liquidated the entries under that heading. ICP did not file a protest of the liquidation with Customs, but instead appealed to the CIT, arguing that Customs' actions violated 19 U.S.C. § 1925(c)(1) or (2) by effectively revoking the 1999 letter ruling without proper procedures.⁹³ The CIT found that it had jurisdiction under 28 U.S.C. § 1581(i)(4).⁹⁴

The Federal Circuit disagreed. The court found that the proper review of Customs' actions is through a protest, with review of protest denials available by the CIT under 28 U.S.C. § 1581(a) jurisdiction unless such jurisdiction would be "manifestly inadequate," in which case residual jurisdiction is available under § 1581(i).⁹⁵ ICP alleged: (1) financial hardship; (2) a lack of prospective relief; (3) delays in proceeding under § 1581(a); and (4) futility of a protest.⁹⁶ However, the Federal Circuit found that following the protest procedures would not have been manifestly inadequate because: (1) financial hardship does not make Congress's remedy inadequate; (2) the court would not assume that Customs would disregard a court ruling on current imports when classifying in the future; (3) "delays inherent in the statutory process do not render it manifestly inadequate;" and (4) it is not for the plaintiff to determine whether it would be futile to protest or not.⁹⁷ Therefore, the Federal Circuit remanded the case to

89. *Id.* at 1359-60.

90. 467 F.3d 1324 (Fed. Cir. 2006).

91. *Id.*

92. *Id.* at 1326.

93. *Id.*

94. *Id.*

95. *Id.* at 1326-27 (quoting *Norcal/Crosetti Foods, Inc. v. United States*, 824 F.2d 356, 359 (Fed. Cir. 1992)).

96. *Id.* at 1327-28.

97. *Id.*

the CIT with instructions to dismiss the complaint for lack of jurisdiction.⁹⁸

In *Retamal v. United States Customs and Border Protection*,⁹⁹ the Federal Circuit concluded that the CIT did not have jurisdiction over a suit involving Customs' revocation of a customhouse broker's license after the broker failed to file his triennial status report in a timely manner.¹⁰⁰ The broker contended that the CIT had jurisdiction under the CIT's residual jurisdictional provision, 28 U.S.C. § 1581(i), but the Federal Circuit found that, because the broker's claims did not relate to the "administration and enforcement" of a matter referred to in 28 U.S.C. § 1581(a)-(h) or in § 1581(i)(1)-(3), § 1581(i)(4) could not provide an independent ground for jurisdiction.¹⁰¹

C. Deemed Liquidation

Two 2005 Federal Circuit opinions addressed the issue of "deemed liquidation" under 19 U.S.C. § 1504(d). The first, *NEC Solutions (America), Inc. v. United States*,¹⁰² addressed the issue of the timing of "deemed liquidation." In this case, the Federal Circuit affirmed the CIT's conclusions that the period for "deemed liquidation" was triggered when Customs received an e-mail liquidation notice from Commerce, and that service on the United States Department of Justice did not constitute "notice" to Customs.¹⁰³

19 U.S.C. § 1504(d) requires Customs to liquidate entries within six months of receiving notice that suspension of liquidation of the entries has been removed.¹⁰⁴ If Customs does not liquidate the entries within this six month period, the entries are deemed liquidated at the rate asserted upon entry.¹⁰⁵ In this case, the parties disputed whether an e-mail message sent to Customs regarding entries of NEC Solutions (America), Inc. ("NEC") of Japanese television sets subject to an antidumping duty order was sufficient "notice" to trigger deemed liquidation after six months.¹⁰⁶ The court found that the e-mail notice was sufficient because it was

98. *Id.* at 1328.

99. 439 F.3d 1372 (Fed. Cir. 2006).

100. *Id.*

101. *Id.* at 1375.

102. 411 F.3d 1340 (Fed. Cir. 2005).

103. *Id.* at 1347.

104. *Id.* at 1344 (observing also that the notice must be sufficiently unambiguous of the fact that the suspension of liquidation has been lifted, but it need not include specific liquidation instructions).

105. *Id.* (citing *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002)).

106. *Id.*

unambiguous, despite lacking specific language about the removal of the suspension of liquidation.¹⁰⁷ The Federal Circuit held that

[n]either the statute nor our precedent requires that the notice give explicit instructions to liquidate or use particular language in order to provide notice that the removal of suspension has occurred . . . [and] neither the statute nor our precedent requires that the duty rate be included in the notice in order to satisfy the requirements of 19 U.S.C. § 1504(d).¹⁰⁸

The Federal Circuit also found that “Commerce’s intent and the bureaucratic difficulty of conveying Commerce’s intent are irrelevant.”¹⁰⁹ Finally, in response to an NEC argument that Customs received constructive notice of the lifting of suspension of liquidation for later reviews, the Federal Circuit agreed with the CIT and held “that service of an opinion to attorneys at [the] Justice [Department] does not constitute constructive notice to Customs.”¹¹⁰

*International Trading Co. v. United States*¹¹¹ also dealt with the issue of deemed liquidation pursuant to 19 U.S.C. § 1504(d). In this case, the Federal Circuit affirmed the CIT’s determination that the period for deemed liquidation of entries subject to an administrative review of an antidumping duty order is first triggered when Commerce publishes its final results of administrative review in the Federal Register, even if Commerce later issues explicit liquidation instructions to Customs.¹¹² Because Customs failed to liquidate International Trading Company’s entries of shop towels until more than six months after Commerce published the final results of its administrative review, in which it calculated antidumping duties on this type of towel at 27.31%, the entries were deemed liquidated at the cash deposit rate at the time of entry, or 2.72%.¹¹³

D. Byrd Amendment

*Candle Corp. of America v. United States International Trade Commission*¹¹⁴ presented the issue of whether a company that opposed an antidumping investigation was entitled to receive offset

107. *Id.* at 1345 (citing several phrases from the e-mail and announcing “[w]e read these provisions of the e-mail and the e-mail as a whole as giving notice to Customs that there was nothing preventing the entries of NEC from being liquidated, and thus, that the suspension of liquidation had been removed”).

108. *Id.*

109. *Id.* at 1346.

110. *Id.* at 1347.

111. 412 F.3d 1303 (Fed. Cir. 2005).

112. *Id.* at 1313.

113. *Id.* at 1305-06, 1313.

114. 374 F.3d 1087 (Fed. Cir. 2004).

distributions under the Continued Dumping and Subsidy Offset Act, 19 U.S.C. § 1675c (“Byrd Amendment”) by acquiring U.S. businesses that would have been entitled to Byrd Amendment distributions.¹¹⁵ The Federal Circuit affirmed the CIT in finding that such companies were not entitled to the distributions.¹¹⁶

Under the Byrd Amendment, “affected domestic producers” may receive distributions of antidumping duties imposed on foreign producers.¹¹⁷ “Affected domestic producers” must either be petitioners or interested parties who supported the petition.¹¹⁸ The statute also provides that “[c]ompanies, businesses, or persons that have ceased the production of the product covered by the order or finding or who have been acquired by a company or business that is related to a company that opposed the investigation shall not be an affected domestic producer.”¹¹⁹

In this case, Candle Corporation of America (“CCA”) did not support the antidumping duty petition against petroleum wax candles from the People’s Republic of China because it imported candles subject to the investigation.¹²⁰ However, CCA later acquired substantially all of the assets of two companies that had supported the petition and sought to receive Byrd Amendment distributions on their behalf, which Customs refused.¹²¹

Finding the statutory language ambiguous,¹²² the Federal Circuit looked to the purpose of the relevant section of the Byrd Amendment: “to bar opposers of antidumping investigations from securing payments either directly or through the acquisition of supporting parties” to determine that CCA was not entitled to receive Byrd Amendment funds.¹²³ The Federal Circuit held that the Byrd Amendment barred “claims on behalf of otherwise affected domestic producers if those producers were acquired by a company that opposed the investigation or were acquired by a business related to a company that opposed the investigation.”¹²⁴ The Federal Circuit also found that “[t]his barrier exists whether the claim is made by the

115. *Id.*

116. *Id.* at 1094.

117. 19 U.S.C. § 1675c(a) (2000).

118. *Id.* § 1675c(b)(1).

119. *Id.*

120. *Candle Corp. of Am.*, 374 F.3d at 1089.

121. *Id.* at 1090.

122. *Id.* at 1092-93.

123. *Id.* at 1094.

124. *Id.*

acquiring company on behalf of the acquired entities or by the acquired entities themselves.”¹²⁵

In another Byrd Amendment case, *Dixon Ticonderoga Co. v. United States*,¹²⁶ the Federal Circuit reversed the CIT’s judgment granting Dixon Ticonderoga Company’s (“Dixon’s”) motion for judgment on the administrative record.¹²⁷ The Federal Circuit found that the record contained no evidence that Dixon was substantially prejudiced by Customs’ failure to publish a timely notice of intention to distribute duties under the Byrd Amendment as required by 19 C.F.R. § 159.62(a).¹²⁸

Under the Byrd Amendment and related regulations, Customs is required to publish a Notice of Intent to Distribute duties (“Notice”) at least thirty days before the distribution of a continued dumping and subsidy offset, to publish the Notice at least ninety days before the end of the fiscal year, and to make distributions within sixty days after the fiscal year.¹²⁹ Parties seeking a share of the distribution have sixty days from the date of the Notice to file the required certifications to receive a distribution.¹³⁰ In this case, Customs published its 2003 Notice seventy-eight days prior to the end of the fiscal year and twelve days after the regulatory deadline, while Dixon filed its certifications 102 days after Customs published the Notice.¹³¹ Customs then denied Dixon’s application to receive a Byrd Amendment distribution.¹³² On appeal, although the CIT determined that the regulatory timing requirements were merely procedural aids, the CIT nevertheless held that Dixon was prejudiced by Customs’ failure to meet its regulatory timing requirements and entered judgment for Dixon.¹³³

The Federal Circuit reversed because Dixon had provided no evidence that it requested an extension or that its failure to file a timely application was caused by Customs’ late publication of the notice.¹³⁴ The court found that the CIT’s decision had effectively eliminated the prejudice requirement when an agency misses a statutory or regulatory deadline.¹³⁵

125. *Id.*

126. 468 F.3d 1353 (Fed. Cir. 2006).

127. *Id.*

128. *Id.* at 1354.

129. See 19 U.S.C. § 1675c(c), (d)(2); 19 C.F.R. § 159.62(a) (2003).

130. 19 C.F.R. § 159.63(a) (2003).

131. *Dixon Ticonderoga Co.*, 468 F.3d at 1354-55.

132. *Id.*

133. *Id.* at 1355.

134. *Id.* at 1356 (analogizing to *PAM, S.p.A. v. United States*, 463 F.3d 1345 (Fed. Cir. 2006)).

135. *Id.* at 1357.

E. Other Customs Issues

In *Saab Cars USA, Inc. v. United States*,¹³⁶ the Federal Circuit affirmed the CIT's decision affirming, in part, Customs' decisions denying Saab Cars USA, Inc.'s ("Saab's") protest of decisions denying duty allowances for defective imported automobiles.¹³⁷ Saab had filed a protest with Customs pursuant to 19 C.F.R. § 158.12 seeking an allowance against import duties for the value of certain automobiles imported from Saab's Swedish parent company where the automobiles allegedly contained "latent defects" discovered after importation.¹³⁸ Under 19 C.F.R. § 158.12, importers may receive such an allowance for "[m]erchandise . . . found by the port director to be partially damaged at the time of importation."¹³⁹ The Federal Circuit found that the words "at the time of importation" modify the phrase "partially damaged" and not the verb "found."¹⁴⁰ Therefore, the Federal Circuit held that "the regulation permits allowances for merchandise that the port director finds, at any time, to have been partially damaged at the time of importation."¹⁴¹

Nevertheless, the lower court had rejected virtually all of Saab's claims pursuant to an earlier series of cases that set forth three requirements for an importer to claim an allowance under 19 C.F.R. § 158.12: (1) show that the importer contracted for "defect-free" merchandise; (2) link the defective merchandise to specific entries; and (3) prove the amount of the allowance for each entry.¹⁴² The Federal Circuit affirmed the CIT's decision,¹⁴³ finding that Saab had provided insufficient evidence to demonstrate its entitlement to allowances for over-appraisals of damaged merchandise for some portions of its claims.¹⁴⁴ In particular, the Federal Circuit agreed with the CIT that Saab's information about its port repair claims (close in

136. 434 F.3d 1359 (Fed. Cir. 2006).

137. *Id.* at 1361.

138. *Id.* at 1362.

139. 19 C.F.R. § 158.12(a) (2005).

140. *Saab*, 434 F.3d at 1369.

141. *Id.* at 1369-70.

142. *See* *Samsung Elecs. Am., Inc. v. United States*, 195 F.3d 1367 (Fed. Cir. 1999); *Samsung Elecs. Am., Inc. v. United States*, 106 F.3d 376 (Fed. Cir. 1997); *Samsung Elecs. Am., Inc. v. United States*, 35 F. Supp. 2d 942 (Ct. Int'l Trade 1999).

143. The issue of the correct standard of review for judgment issued on stipulated facts in lieu of trial, as occurred in this case, was an issue of first impression for this court. The Federal Circuit determined that a judgment issued on stipulated facts in lieu of trial resembles a decision on the administrative record and is determinatively different than summary judgment for standard of review purposes. The Federal Circuit held that it reviews the trial court's legal conclusions *de novo* and reviews inferences the lower court drew from the stipulated facts, and its application of the law to those facts, for clear error. *Saab*, 434 F.3d at 1372.

144. *Id.* at 1372-74.

time to importation) was sufficient to establish that the automobile defects were present at the time of importation,¹⁴⁵ while the evidence about warranty repairs did not necessarily indicate damage that existed at the time of importation, and therefore did not, with limited exceptions, meet the requirements for an allowance under 19 C.F.R. § 158.12.¹⁴⁶

*United States v. Ford Motor Co. ("Ford I")*¹⁴⁷ was the first of two cases decided by the Federal Circuit in 2006 regarding Ford Motor Company's ("Ford's") alleged misrepresentations of import entries. In this case, in which the CIT imposed a fine of over \$17,000,000, the Federal Circuit affirmed in part, reversed in part, and remanded for further proceedings.¹⁴⁸

The CIT held that Ford knowingly violated affirmative requirements by omitting information required by 19 U.S.C. § 1484 for Customs to assess proper duties on imports.¹⁴⁹ In particular, the CIT held that Ford had failed to provide information about "assists"—design or engineering work done overseas, not factored into the invoice price, but still subject to import duties and "lump-sum payments"—payments by the importer to the seller that are in addition to the original price and are subject to import duties.¹⁵⁰

On appeal, the Federal Circuit held that 19 U.S.C. § 1484 does require that importers disclose variable pricing agreements relating to entries because a non-final declared value is not one upon which Customs can assess the correct duty.¹⁵¹ However, the Federal Circuit also held that Ford should not be penalized for violating this requirement because the duty to disclose was not widely known and Customs' practice requiring disclosure was unclear when Ford made its import entries.¹⁵²

At the same time, the Federal Circuit affirmed the CIT's holding that Ford had made assists between 1987 and 1992 and that Ford negligently failed to declare the assists on its entry documents or "at once" thereafter.¹⁵³ The Federal Circuit also affirmed that Ford failed to comply with the "at once" requirement regarding lump-sum

145. *Id.* at 1374.

146. *Id.* at 1375.

147. 463 F.3d 1267 (Fed. Cir. 2006).

148. *Id.* at 1271.

149. *Id.* at 1273.

150. *Id.* at 1271, 1273.

151. *Id.* at 1275.

152. *Id.* at 1275-76 (holding that due process considerations precluded imposing penalties on Ford).

153. *Id.* at 1276-77.

payments under 19 U.S.C. § 1485.¹⁵⁴ The Federal Circuit based its holding regarding assists and lump-sum payments in part on Ford's failure to raise certain arguments until late in the proceedings and in part on the unambiguous deadline in a Ford-Customs agreement regarding lump-sum payments.¹⁵⁵

The Federal Circuit also ruled that 19 U.S.C. § 1592(c)(4), which provides a safe harbor for disclosures of import law violations "before, or without knowledge of, the commencement of a formal investigation,"¹⁵⁶ did not provide Ford a safe harbor where Ford was presumed to know about the scope of a Customs investigation of Ford following a meeting with Customs.¹⁵⁷ The court found that Ford presented no evidence sufficient to rebut that presumption.¹⁵⁸

In addition, the Federal Circuit held that the CIT erred when it included, in the calculation of penalties, entries relating to any model year after 1991 as such entries were not included in the scope of Customs' investigation.¹⁵⁹ Also on the subject of penalties, the Federal Circuit remanded the issue of multi-year tenders to determine which portion of the tenders related to the model years under investigation.¹⁶⁰

The Federal Circuit addressed the dutiability of Ford's purchase payments for certain automobiles for import where the price for each vehicle depended on the number of vehicles.¹⁶¹ The Federal Circuit ultimately held that payments made pursuant to this "shortfall" provision were dutiable, basing its holding on its finding that the "shortfall" payments were part of the price "actually paid or payable" for the vehicles under 19 U.S.C. § 1401a(b)(1).¹⁶²

Finally, the Federal Circuit determined that the CIT had not abused its discretion when it imposed the maximum penalty permitted by the statute, subject to the Federal Circuit's adjustments discussed above.¹⁶³

In a companion Ford case decided on the same day as *Ford I, United States v. Ford Motor Co. ("Ford II")*,¹⁶⁴ the Federal Circuit affirmed in part and reversed in part the CIT's finding that Ford was liable for

154. *Id.* at 1277.

155. *Id.* at 1276-77.

156. 19 U.S.C. § 1592(c)(4) (2000).

157. *Ford I*, 463 F.3d at 1281.

158. *Id.*

159. *Id.* at 1282-83.

160. *Id.*

161. *Id.* at 1283.

162. *Id.* at 1284.

163. *Id.* at 1285-86. *See supra* notes 159-160 and accompanying text.

164. 463 F.3d 1286 (Fed. Cir. 2006).

\$3,000,000 (plus interest) for Ford's "grossly negligent misrepresentation" of the value of certain import entries.¹⁶⁵ This case involved duties paid on certain items for the 1990 Lincoln Town car, where the initial purchase order was modified over several years due to design changes.¹⁶⁶

As in *Ford I*, the Federal Circuit held that due process precluded the imposition of liability for Ford's failure to disclose its provisional pricing arrangement as neither 19 U.S.C. § 1484 nor the applicable regulations clearly required such disclosure.¹⁶⁷ Nevertheless, the Federal Circuit in *Ford II* held that Ford's certification at the time of entry that the values were "true and correct" was a violation of 19 U.S.C. § 1484 because Ford had sufficient information about the true value of the declared entries as of the date of entry.¹⁶⁸ As a result, the court affirmed the CIT's finding that Ford's violation was one of gross negligence.¹⁶⁹

The Federal Circuit also held, as had the CIT, that Ford violated 19 U.S.C. § 1485 because Ford failed to answer Customs' forms fully and failed to promptly disclose information about design changes and their effect on dutiable value.¹⁷⁰ The Federal Circuit also affirmed the CIT's holding that Ford's violation of 19 U.S.C. § 1485 was grossly negligent.¹⁷¹

As in *Ford I*, the Federal Circuit ruled that Ford did not qualify under the 19 U.S.C. § 1592(c)(4) safe harbor provision because the CIT's determination that Ford had knowledge of Customs' investigation prior to any disclosures was not clearly erroneous.¹⁷²

Finally, the Federal Circuit affirmed the CIT's denial of Ford's motion to amend its answer to add a counterclaim for overpayments made on its entries.¹⁷³ The Federal Circuit agreed with the CIT that the motion was futile since de novo review under 19 U.S.C. § 1592(e) does not allow consideration of issues unrelated to the investigation that identified the violation in a penalty proceeding.¹⁷⁴

In *Jazz Photo Corp. v. United States*,¹⁷⁵ the Federal Circuit affirmed the CIT's decision ordering Customs to release for entry certain Jazz

165. *Id.*

166. *Id.* at 1289.

167. *Id.* at 1291.

168. *Id.* at 1292.

169. *Id.* at 1293.

170. *Id.* at 1293-94.

171. *Id.* at 1294.

172. *Id.* at 1296.

173. *Id.* at 1296-98.

174. *Id.*

175. 439 F.3d 1344 (Fed. Cir. 2006).

Photo Corporation (“Jazz”) disposable cameras from two shipments denied entry by Customs and ordering Customs to allow Jazz to segregate the two shipments under Customs’ supervision.¹⁷⁶ This was the fourth case to reach the Federal Circuit involving Jazz’s importation of the disposable cameras.¹⁷⁷ Earlier cases involved complaints of patent infringement and resulted in a decision by the Federal Circuit that there was no infringement of Fuji Photo Film Co., Ltd.’s (“Fuji’s”) patent for the importation of cameras where the patent right was exhausted by first sale in the United States, and where the cameras were permissibly repaired using eight steps described in the earlier opinion.¹⁷⁸ Infringement of Fuji’s patents was found for the importation of other disposable cameras and those cameras were excluded from importation into the United States.¹⁷⁹

This appeal involved Customs’ decision to exclude two Jazz shipments of disposable cameras that had been initially manufactured by Fuji or one of its licensees and were refurbished before importation into the United States in 2004.¹⁸⁰ Upon appeal, the CIT held that Jazz’s cameras processed using shells from one collector were first sold in the United States and permissibly repaired and should be released by Customs, while shells from another collector did not meet the same standard and were properly excluded.¹⁸¹ The CIT based its decision on factual findings regarding permissible repair, first sale, and segregation.¹⁸²

Upon appeal to the Federal Circuit by the U.S. Government and Fuji, the Federal Circuit found that the CIT did not err in holding that Jazz satisfied the first sale defense for the subject cameras using one collector’s shells.¹⁸³ Following its holding in *Jazz I* that the

176. *Id.*

177. *See* Fuji Photo Film Co. v. Jazz Photo Corp., 394 F.3d 1368 (Fed. Cir. 2005) (holding Jazz Photo Corp. liable for willful infringement of Fuji patents); Fuji Photo Film Co. v. Int’l Trade Comm’n, 386 F.3d 1095 (Fed. Cir. 2004) (imposing a \$13,675,000 penalty on Jazz Photo Corp. for violating the Exclusion Order); Jazz Photo Corp. v. Int’l Trade Comm’n (*Jazz I*), 264 F.3d 1094 (Fed. Cir. 2001) (upholding an Exclusion Order against the importation of certain lens fitted film packages (“LFFPs”) by the twenty-six respondents who had infringed on fourteen patents owned by Fuji, but excluding LFFPs which were first sold in the United States).

178. Jazz Photo Corp. v. United States (*Jazz IV*), 439 F.3d 1344 (Fed. Cir. 2006) (citing *Jazz I*, 264 F.3d at 1110).

179. *Id.*

180. *Id.* at 1347 (detaining the shipments based on an Exclusion Order against Jazz for previous infringement of Fuji patents).

181. *See id.* at 1348 (distinguishing between shipments based on whether the LFFPs were first sold in the United States).

182. *Id.*

183. *See id.* at 1352-53 (finding that Jazz proved by a preponderance of the evidence that eighty-five percent of its shells used by Photo Recycling, a Jazz

“unrestricted sale of a patented article, by or with the authority of the patentee, ‘exhausts’ the patentee’s right to control further sale and use of that article by enforcing the patent under which it was first sold,” the court evaluated evidence that the collector obtained its shells in the United States (including circumstantial evidence), and concluded that the CIT’s conclusions were not factually or legally erroneous.¹⁸⁴ The Federal Circuit also held that the subject cameras were permissibly repaired under the *Jazz I* eight step standard because the repair steps, including the addition of other minor operations, did not make a new single use camera.¹⁸⁵

The Federal Circuit also held that the CIT did not err in ordering Customs to supervise Jazz’s segregation of its disposable cameras into those allowed entry and those excluded because the cameras were in a Customs warehouse and Customs is obligated to supervise certain activities in its warehouse pursuant to 19 C.F.R. § 19.4(b)(1).¹⁸⁶

Finally, the court held that the CIT did not err in denying Fuji intervenor status because Fuji was denied the ability to intervene under the plain language of 28 U.S.C. § 2631(j).¹⁸⁷

In *Acadia Tech., Inc. v. United States*,¹⁸⁸ the Federal Circuit affirmed the CFC’s holding that Acadia Technology Inc. and Global Win Technology, Ltd. (collectively, “Acadia”) had failed to state a claim on which relief could be granted.¹⁸⁹ Acadia attempted to import over twenty thousand computer cooling fans into the United States in 1997 and 1998.¹⁹⁰ After receiving a letter from Underwriters Laboratories (“UL”) that Acadia’s fans bore UL’s testing trademark without authorization, Customs seized the shipments, which were ultimately held for four years until a forfeiture action was dismissed.¹⁹¹

collector, were purchased in the same location in the United States, and that the trial court’s application of “presumption of regularity” was not in error where the government provided nothing to contradict the presumption that no infringing shells were collected).

184. *Id.* at 1350 (quoting *Jazz I*, 264 F.3d at 1005).

185. *Id.* at 1353-55 (permitting the refurbishment of patented products if it merely involved the replacement of individual unpatented parts, one at a time, and emphasizing that the minor violations did not include impermissible full back replacements).

186. *Id.* at 1355-56 (emphasizing that 19 C.F.R. § 19.4(b)(1) makes supervision by Customs mandatory and that such supervision would not impose “significant administrative demands” on Customs).

187. *Id.* at 1357 (holding additionally that Fuji did not have to be joined as a necessary party under U.S. CT. INT’L TRADE R. 19 as the government was charged with protecting Fuji’s patent rights).

188. 458 F.3d 1327 (Fed. Cir. 2006).

189. *Id.*

190. *Id.* at 1328.

191. *See id.* at 1329 (noting that while Acadia initially filed for dismissal in 1998, the U.S. Department of Justice did not promptly file the request).

At the time of the dismissal, the fans had become obsolete and were valuable only for scrap.¹⁹² Acadia therefore filed an action in the CFC arguing that the government's actions violated the Takings Clause of the Fifth Amendment¹⁹³ and that Acadia was entitled to recover the lost value of the fans as compensation for the taking.¹⁹⁴

The CFC granted the government's motion to dismiss for failure to state a claim.¹⁹⁵ The Federal Circuit affirmed. As an initial matter, the Federal Circuit noted that, for takings purposes, it must "assume that the government conduct at issue was not unlawful."¹⁹⁶ Here, the court held that Customs' "seizure of goods suspected of bearing counterfeit marks is a classic example of the government's exercise of the police power to condemn contraband or noxious goods, an exercise that has not been regarded as a taking for public use for which compensation must be paid."¹⁹⁷ Therefore, while the CFC could hear takings cases, Acadia's allegations did not give rise to a takings claim.¹⁹⁸ Regarding the government's delay in returning the fans, the Federal Circuit held that this was a potential due process violation, but that the CFC lacks jurisdiction over due process claims for money damages against the United States.¹⁹⁹

In *California Industrial Products, Inc. v. United States*,²⁰⁰ the Federal Circuit affirmed the CIT's decision granting California Industrial Products, Inc.'s ("CIP's") motion for summary judgment, finding that Customs erred when it denied CIP manufacturing substitution drawbacks for CIP's exportation of steel scrap under 19 U.S.C. § 1313(b).²⁰¹ The CIT's decision was based on Customs' failure to provide notice and comment proceedings required under 19 U.S.C. § 1625(c) when its denial of CIP's claims resulted in a modification of

192. *See id.* (tracing the reduction in the value of the fans from \$125,130 at the time of seizure to \$41,000 at the time they were returned).

193. U.S. CONST. amend. V.

194. *Acadia Tech., Inc.*, 458 F.3d at 1330 (arguing that the taking was not authorized by statute and that the delay in returning the goods was unreasonable, therefore a taking).

195. *Id.* at 1330.

196. *Id.* at 1331 (limiting the court's takings analysis to whether the government's actions were a taking for which compensation would be paid).

197. *Id.* at 1332 (alluding to the general risk owners of property take because of the State's control of commercial activity).

198. *Id.* at 1331-32 (analogizing to property seized in a foreclosure proceeding and subsequently restored to the owner, which by rule is not a taking).

199. *Id.* at 1333-34 (contending that an owner of seized property has a due process right to have "the government return the property or initiate foreclosure proceedings without unreasonable delay").

200. 436 F.3d 1341 (Fed. Cir. 2006).

201. *Id.*

previously favorable treatment to substantially identical transactions by other companies.²⁰²

This appeal arose under 19 U.S.C. § 1313, which provides for a partial refund of duties, called a drawback, for manufacturers who subsequently export or destroy imported merchandise on which they have paid duties.²⁰³ Section 1313(b) additionally allows manufacturing substitution drawbacks whereby a manufacturer receives a drawback upon substituting goods of the same “kind and quality” as the goods originally imported.²⁰⁴ In order to simplify this process, Customs offers general manufacturing drawback contracts through which manufacturers may receive drawbacks after meeting the requirements of the contract and submitting a letter to Customs indicating their intent to comply with the requirements.²⁰⁵ This appeal also dealt with 19 U.S.C. § 1625(c), which requires notice and comment procedures before issuing an interpretive ruling that changes a pre-existing “treatment.”²⁰⁶ Under regulations issued in 2002, Customs limited certain “substantially identical transactions” requiring § 1625(c) “treatment” to only the transactions of the person requesting the “treatment.”²⁰⁷

Under this statutory framework, CIP sought to obtain drawbacks for steel trim or scrap it produced in its steel conversion mills that manufacture flat-rolled steel sheet products.²⁰⁸ CIP filed a letter of intent to comply with a general Customs drawback contract for manufactured steel articles and filed drawback claims pursuant to that contract.²⁰⁹ Customs denied CIP’s claims, stating that drawback is not allowed on scrap and basing its denial on a new headquarters ruling letter in response to the drawback claims of another company, despite having previously liquidated drawbacks for steel scrap for

202. *Id.* at 1343 (holding that “Customs was bound by this previous favorable treatment”).

203. *Id.*

204. *Id.* (highlighting that 19 U.S.C. § 1313(b) limits the availability of drawback to within three years of the receipt of the imported merchandise).

205. *Id.* at 1344 (mentioning 19 C.F.R. §§ 191.2(f), 191.42 which provide that Customs’ acknowledgment of receipt of the letter of intent validates the general contract for fifteen years and permits manufacturers thereafter to submit individual claims for drawback based on the general contract).

206. *Id.* (providing thirty days after publication for interested parties to submit comments on the proposal and another thirty days for the Secretary to issue a final decision).

207. 19 U.S.C. § 1625(c) (2000).

208. *Cal. Indus. Prods.*, 436 F.3d at 1345 (recalling that CIP’s steel at issue in the case was purchased from domestic companies and therefore import duties on such steel were already paid).

209. *Id.* at 1346 (referring to T.D. 81-74, which specifically disallowed drawback for any waste resulting from the exported articles).

other companies.²¹⁰ Customs then began denying all claims for drawbacks on steel scrap.²¹¹

The Federal Circuit affirmed the CIT's holding under 19 U.S.C. § 1625(c) that Customs was required to conduct notice and comment proceedings before changing its practice through the headquarters ruling letter.²¹² In affirming, the Federal Circuit found that Customs did issue an "interpretive ruling or decision" to CIP, as required for the application of 19 U.S.C. § 1625(c).²¹³ In addition, the Federal Circuit held that the language of 19 U.S.C. § 1625(c) indicated that Congress intended that transactions between Customs and multiple parties be "substantially identical transactions."²¹⁴ Contrary to Customs' 2002 regulations, the Federal Circuit found that "use of the words 'interested parties' indicates that Congress intended, contrary to 19 C.F.R. § 177.12(c)(1)(iii)(A), that 'substantially identical transactions' forming the basis of a 'treatment' include transactions other than transactions of just the person before Customs claiming the right to a notice and comment process."²¹⁵ The Federal Circuit found that Customs could still change its treatment, but that it was required to use notice and comment procedures pursuant to 19 U.S.C. § 1625(c) before changing the treatment.²¹⁶

II. TRADE REMEDY LAWS

A. U.S. Department of Commerce

The United States Department of Commerce ("Commerce"), along with the ITC, is responsible for conducting antidumping and countervailing duty investigations. In an antidumping investigation,

210. *Id.* (noting that the headquarter ruling stated that scrap was waste, therefore disallowed from drawback).

211. *Id.* (discussing the successful appeal by Precision, another steel corporation, to the CIT of Customs' denial of a portion of its drawback claims, in which the Court determined that Customs' grant of drawbacks for the majority of the corporation's claims constituted a "treatment," by which Customs was bound).

212. *Id.* at 1350.

213. *Id.* at 1351 (characterizing Customs' March 13, 1998 protest review decision as within the meaning of "ruling and decision" in 19 U.S.C. § 1625(c)).

214. *Id.* at 1353-56 (noting that while "substantially identical transactions" was not defined by statute, congressional intent was clear based on reading the statute as a whole and legislative intent to create transparency of Customs' actions, and referring to pre-existing law at the time of the creation of the statute, which provided that "treatment" included transactions of multiple parties).

215. *Id.* at 1354 (reasoning that the previous treatment of Precision, permitting drawback on steel scrap, was a "substantially identical transaction" such that CIP had the right to a notice and comment process under § 1625(c)).

216. *Id.* (comparing the current statute to its predecessor, 19 C.F.R. § 177.10(c), which required publication of notice in the Federal Register each time Customs was reviewing a potential change of position).

Commerce determines whether the imports subject to the investigation are, or are likely to be, sold at less than fair value.²¹⁷ In a countervailing duty investigation, Commerce determines whether a government or public entity is providing a countervailable subsidy regarding the manufacture, export, or production of a product subject to investigation.²¹⁸ A finding of dumping or a countervailable subsidy at a margin that is more than de minimis, when combined with an affirmative ITC finding, as discussed below, results in the imposition of an antidumping or countervailing duty order. Commerce also conducts annual administrative reviews of existing antidumping and countervailing duty orders to determine the actual margin of liability for imports subject to the order over the prior year, as well as other proceedings, such as scope inquiries and changed circumstances reviews, upon request. In addition, Commerce, along with the ITC, conducts mandatory five-year reviews of existing orders with Commerce determining whether the revocation of an antidumping or countervailing duty order would lead to the continuation or recurrence of dumping or subsidization.

The cases discussed below touch on the range of Commerce's responsibilities in administering U.S. unfair trade laws. During 2003-2006, the Federal Circuit addressed aspects of Commerce's calculation of antidumping and countervailing duty margins, the division of responsibility between Commerce and Customs, issues involving Commerce's liquidation instructions, and jurisdictional issues in appeals of Commerce unfair trade determinations.

In *Timken U.S. Corp. v. United States*,²¹⁹ the Federal Circuit affirmed the CIT's decision to remand Commerce's administrative review determination regarding cylindrical roller bearings from, inter alia, Germany and to investigate Timken U.S. Corporation and Timken Nadellager, GmbH's ("Timken's") evidence supporting correction of alleged errors associated with Timken's home market sales.²²⁰ In addition, the Federal Circuit affirmed the CIT's support of Commerce's subsequent redetermination and refusal to correct the alleged errors on remand.²²¹ This case involved Commerce's tenth annual administrative review and included bearings imported by Timken to the United States.²²² It is perhaps most interesting for its

217. 19 U.S.C. § 1673d(a)(1) (2000).

218. 19 U.S.C. § 1671d(a)(1) (2000).

219. 434 F.3d 1345 (Fed. Cir. 2006).

220. *Id.*

221. *Id.*

222. *See id.* at 1347 (referring to section 751 of the Tariff Act of 1930 which provides for periodic reviews of antidumping duty orders, 19 U.S.C. § 1481).

clarification of earlier Federal Circuit decisions regarding Commerce's ability to correct importer errors.

In Commerce's original investigation, Commerce requested that Timken identify the channels of distribution for its home market sales.²²³ Timken categorized its sales into five channels, which were subsequently redesignated by Commerce in its preliminary results into three categories based on whether the point at which selling activities occurred was distinguishable.²²⁴ After reviewing Commerce's preliminary results, Timken argued to Commerce that Timken had made certain "clerical" errors in reporting its sales and submitted invoices and purchase orders for the allegedly miscategorized sales.²²⁵ In its final results, Commerce refused to change its preliminary results.²²⁶ Using a test established in an earlier case, Commerce decided not to make Timken's corrections because it found that the errors were not clerical and that the new information was not reliable.²²⁷ On appeal, the CIT remanded to Commerce (although agreeing that Timken's error was not "clerical") because the court was concerned that Commerce's application of its test would result in a grossly erroneous dumping margin and because it was unclear what evidence contradicted Timken's new evidence.²²⁸ On remand, Commerce noted its disagreement with the CIT, but nevertheless reviewed Timken's new evidence and found that the use of this information would not result in a more accurate dumping margin because the new information was not sufficiently supported, whereas Commerce had verified the original information.²²⁹ The CIT affirmed Commerce's redetermination.

In its review of this case, the Federal Circuit first disagreed with the government that the CIT erred in remanding the case for further

223. *Id.*

224. *See id.* (reclassifying the channels based on an examination of Timken's "selling activities, the point in the channel of distribution at which the selling activities occurred, and the types of customers that purchased the subject bearings").

225. *See id.* at 1347-48 (identifying seventeen transactions as channel one instead of channel two and three, which ultimately resulted in an inaccurate dumping margin).

226. *See id.* at 1348 (asserting that the new information conflicted with information in the record and that the late submission of the new information prevented Commerce from verifying it).

227. *See id.* (citing *Certain Fresh Cut Flowers from Colombia; Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 42,833 (Aug. 19, 1996)) (discussing a two-part test for determining whether to substitute the new information and recalculate the dumping margin in which the substitution can be made if the error is clerical and the new evidence is reliable).

228. *Id.*

229. *Id.* at 1348-49.

investigation.²³⁰ The Federal Circuit rejected the government's bright-line rule regarding what kinds of errors may be corrected in the context of antidumping duty determinations and clarified that its holdings regarding limitations on the correction of importer errors in *NTN Bearing Corp. v. United States*²³¹ and *Alloy Piping Products, Inc. v. United States*,²³² on which the government had relied, were "premised exclusively on timeliness."²³³ The Federal Circuit additionally held "that Commerce is free to correct any type of importer error—clerical, methodology, substantive, or one in judgment—in the context of making an antidumping duty determination, provided that the importer seeks correction before Commerce issues its final results and adequately proves the need for the requested corrections."²³⁴

Regarding the substance of Timken's requested reclassification of its home market sales, the Federal Circuit found that, while a "close case," Timken's new evidence was not strong enough to require reclassification.²³⁵ The court reviewed the evidence in detail and found that Commerce's rejection of each piece of evidence was reasonable as much of the evidence was unsubstantiated, while the evidence supporting Commerce's original determination was substantial.²³⁶

In *Royal Thai Government v. United States*,²³⁷ the Federal Circuit addressed Commerce's investigation of countervailable subsidies to the Thai steel industry.²³⁸ Here, the Federal Circuit affirmed the CIT holdings: (1) affirming Commerce's determination that Sahaviriya Steel Industries Public Company Limited's ("SSI's") debt restructuring was not specific and therefore not countervailable; and (2) affirming Commerce's decision not to investigate United States Steel Corporation's ("U.S. Steel's") allegation of equity infusions.²³⁹

230. See *id.* at 1351 (addressing the argument because it was dispositive as to the appeal).

231. 74 F.3d 1204 (Fed. Cir. 1995) (noting that the decision was not based on a distinction in the type of error but the timeliness of the request for correction).

232. 334 F.3d 1284 (Fed. Cir. 2003) (holding that Commerce was not absolutely required by either statute or regulation to correct "clerical" errors made by the importer because the statute and regulation govern only actions by Commerce, not the importer).

233. See *Timken*, 434 F.3d at 1351 (rejecting the government's contention that once Commerce calculated the dumping margin, errors in underlying data could only be corrected where the error was clerical).

234. *Id.* at 1353.

235. *Id.* at 1356.

236. *Id.* at 1354-57 (concluding that Timken failed to provide sufficient, corroborated evidence of the alleged misrepresentations and that the reclassifications were supported by Timken's description of its own channels).

237. 436 F.3d 1330 (Fed. Cir. 2006).

238. *Id.*

239. *Id.* at 1332.

In the same opinion, the Federal Circuit also reversed the CIT's holding "reversing Commerce's decision to countervail the entire amount of import duty exemptions . . . provided to SSI."²⁴⁰

The Federal Circuit first held that it was not unreasonable for Commerce to compare the magnitudes of the restructured debts in lieu of the extensive investigation proposed by U.S. Steel when determining whether SSI's debt restructuring was specific.²⁴¹ U.S. Steel had argued that Commerce should compare the terms of each loan before and after restructuring, while Commerce had determined that such calculations were impracticable due to difficulties in obtaining the necessary information.²⁴²

Second, the Federal Circuit held that substantial evidence, including a United Nations investment report supporting a steel-making plant in Thailand, supported Commerce's determination that there was not "a reasonable basis to believe or suspect that SSI received an equity infusion that provide[d] a countervailable benefit."²⁴³

Finally, the Federal Circuit deferred to Commerce in holding that the whole import duty exemption program was unreasonable because it systematically allowed impermissible drawback of recoverable and resaleable scrap.²⁴⁴ Commerce's consideration of the reasonableness of the program utilized generally acceptable accounting principles used outside Thailand and the court therefore supported Commerce's decision to countervail the entire amount of import duty exemptions.²⁴⁵

240. *Id.*

241. *See id.* at 1336 (acknowledging the strength of U.S. Steel's suggestion, but reasoning that an analysis of the magnitude would be roughly proportional to the benefits conferred).

242. *Id.* at 1335 (stating that U.S. Steel's proposal would require Commerce first to compare the interest rate and repayment schedule before and after the restructuring to determine the benefit conferred and then compare the benefits between companies and industries).

243. *Id.* at 1337 (dismissing U.S. Steel's argument that the Royal Thai Government "induced bidders to invest in an unequityworthy company" through substantial subsidies).

244. *Id.* at 1339 (deferring to Commerce's decision that a system that does not separately account for recoverable and resaleable scrap is unreasonable in light of its finding that the normal allowance of waste does not include allowing drawbacks for such scrap).

245. *Id.* at 1340 (referring to 19 C.F.R. § 351.519(a)(4), which permits Commerce to countervail the entire amount of the drawback unless the home country conforms to certain procedures or applies a system that confirms which inputs are consumed in the production of exported products and rejecting the Royal Thai Government's assertion that Commerce's analysis of reasonableness should be based on accounting practices in the home country).

In *Viraj Group, Ltd. v. United States*,²⁴⁶ the Federal Circuit reversed the CIT, holding that the CIT improperly failed to give priority to a statutory provision regarding the choice of exchange rates in antidumping investigations. In this case, Commerce conducted an antidumping duty investigation in which, as part of its calculations of a dumping margin, Commerce used the rupee-dollar exchange rate on the date of a Viraj Group, Ltd. (“Viraj”) purchase order, which Commerce determined to be the date of sale of the relevant subject merchandise.²⁴⁷ The exchange rate selected did not take into account the over ten percent devaluation of the rupee over the period of investigation after the date of sale.²⁴⁸ On appeal, the CIT disagreed with Commerce’s choice of an exchange rate, finding the result to be absurd.²⁴⁹

The Federal Circuit disagreed. The court found that “[b]oth a statute and a regulation provide specifically and clearly that, with exceptions not relevant to this case, Commerce is to utilize an exchange rate on the date of sale.”²⁵⁰ The Federal Circuit found that concern over the accuracy of dumping margins could not compel Commerce to ignore the unambiguous and specific statutory mandate regarding the date of currency exchange rates for use in its determinations.²⁵¹

Also of interest in this opinion, the Federal Circuit clarified that the government had standing to file this appeal despite the fact that the government had, in response to the CIT’s direction, issued a remand determination that was affirmed by the CIT.²⁵² Thus, even though the government’s decision was affirmed by the CIT, the court found that a justiciable case or controversy existed, stating that “the government prevailed only because it acquiesced and abandoned its original position, which it had zealously advocated, and adopted under protest a contrary position forced upon it by the court. Thus,

246. 343 F.3d 1371 (Fed. Cir. 2003).

247. *See id.* (citing *Viraj Group, Ltd. v. United States (Viraj I)*, 162 F. Supp. 2d 656 (Ct. Int’l Trade 2001)).

248. *Id.* at 1374.

249. *Id.* (citing *Viraj I*, 162 F. Supp. 2d at 662).

250. *See id.* at 1374-75 (discussing *Chevron* deference afforded first to an unambiguous statute, then to agency interpretation, where interpretative issues exist and citing 19 U.S.C. § 1677b-1 (2000) and 19 C.F.R. § 351.415 (2002)).

251. *Id.* at 1375 (finding that Commerce’s sale-date exchange rate is more accurate in achieving an accurate dumping margin than CIT’s purchase date exchange rate).

252. *Id.* at 1375 (recalling the general rule that a judicial remand to an agency is not final and therefore not appealable).

in substance, the government is truly the non-prevailing party in this case.”²⁵³

In *Tung Mung Development Co., Ltd., v. United States*,²⁵⁴ the Federal Circuit addressed whether Commerce was required to assess antidumping duties on all exported merchandise of a foreign producer at a single weighted average rate, even if some sales were made by a reseller. Here, the Federal Circuit affirmed the CIT in upholding Commerce’s decision not to use a single weighted average rate.

In this case, the foreign producers sold some of their own merchandise in the United States and also sold some of their merchandise to a reseller, who sold the merchandise to its U.S. customers.²⁵⁵ In two antidumping investigations, Commerce originally calculated a single weighted average rate, but on remand calculated combination rates, whereby the foreign producers were responsible only for their own dumping and not that of middlemen resellers.²⁵⁶ In so doing, Commerce adopted a knowledge-based standard.²⁵⁷ Under this standard, a foreign producer’s merchandise that was not exported through a reseller would not be assessed duties for the reseller’s dumping if Commerce had “no basis to believe or suspect that the producer was aware or should have been aware that the middleman would be likely to dump subject merchandise into the United States.”²⁵⁸ Commerce also stated that this was not a “settled practice” due to its limited experience with middleman dumping.²⁵⁹

On appeal, the court found that Commerce did not previously have a settled practice in this area and that Commerce had

253. *Id.* at 1376 (arguing that the *Finkelstein* exception to the finality requirement for appealing a decision applied to this case as the court held “accuracy in antidumping margin determination is a goal that can override a specific statute”).

254. 354 F.3d 1371 (Fed. Cir. 2004).

255. *Id.* at 1374 (separating the transactions into three categories: “direct sales by producers to United States customers, sales by producers to the middleman, and sales by the middlemen to United States customers”).

256. *Id.* at 1379 (referring to the Supreme Court’s holding in *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983), that an agency could change its practice or policy if it could give a reasoned analysis for doing so).

257. *Id.* at 1377.

258. *Id.* at 1377-78 (quoting *Alleghany Ludlum Corp. v. United States*, No. 99-06-00369, slip op. at 3-4 (Dep’t Commerce Nov. 28, 2001), and *Tung Mung Dev. Co. v. United States*, No. 99-06-00457, slip op. at 3-4 (Dep’t Commerce Nov. 28, 2001)) (rationalizing its standard by suggesting it would encourage producers to find middlemen who would not dump into the United States while not penalizing producers for such dumping where they were not responsible).

259. *Id.* at 1378.

adequately explained why a combination rate was appropriate here.²⁶⁰ The Federal Circuit also found that it was Commerce's choice as to the wisdom and efficiency of the use of a knowledge-based standard in determining whether to calculate a combination rate.²⁶¹ Therefore, the court affirmed the CIT's affirmance of Commerce's redetermination using a combination rate.

Senior Circuit Judge Friedman dissented in part, finding that the prevailing parties were entitled to recover their costs of appeal under rule 39 of the Federal Rules of Appellate Procedure.²⁶² Judge Friedman issued a dissent on this minor issue due to his concern about "what appears to me to be an increasing practice by the court routinely to deny costs to the prevailing party."²⁶³

In a case involving how strictly Commerce must enforce its notice regulation, *PAM S.p.A v. United States*,²⁶⁴ the Federal Circuit reversed the CIT's judgment and held that rescission of a completed administrative review is not a proper remedy for failure to serve a request for administrative review on a party where the party does not demonstrate substantial prejudice. In this case, the petitioner filed a request for an administrative review, but failed to serve PAM, S.p.A. ("PAM"), a foreign pasta producer, as required by 19 C.F.R. § 351.303(f)(3)(ii).²⁶⁵ Commerce subsequently published notice of its initiation of the administrative review and listed PAM as a respondent. During the review, PAM informed Commerce that it had not been properly served, but did not request rescission of the review.²⁶⁶ Instead, PAM requested, and Commerce granted, numerous extension requests in responding to Commerce's questionnaires.²⁶⁷ In interpreting Commerce's notice regulation, the Federal Circuit held that the CIT should have analyzed whether PAM proved substantial prejudice, regardless of whether the regulation

260. *See id.* at 1380 (citing Commerce's use of the combination rate in Fuel Ethanol from Brazil; Final Determination of Sales at Less than Fair Value, 51 Fed. Reg. 5,572 (Feb. 14, 1986)).

261. *Id.* at 1381 (deferring to Commerce's decision regarding which calculation method would be more efficient).

262. *Id.* at 1382 (Friedman, J., dissenting) (countering the majority's argument, which relied on Federal Rule of Appellate Procedure 39(a), that the awarding of costs is discretionary as the relevant statute states "unless . . . the court orders otherwise").

263. *Id.* at 1382-83 (suggesting that costs should be awarded without regard to the "merit of the losing party's arguments or its financial situation").

264. 463 F.3d 1345 (Fed. Cir. 2006).

265. *See id.* at 1347 (noting that the regulation at issue provides that: "[A]n interested party that files with the Department a request for . . . an administrative review . . . must serve a copy of the request on each exporter . . .").

266. *Id.* at 1346.

267. *Id.* at 1346-47.

conferred an important procedural benefit on foreign companies.²⁶⁸ In addition, under the circumstances of this case, the Federal Circuit found that no substantial prejudice was shown as a matter of law as PAM received notice of the review only seventeen days after it should have been served, was granted extensions during the review in excess of seventeen days, and did not claim that it was impeded by the service failure in its ability to respond to or defend its interests in the review.²⁶⁹

In *Elkem Metals Co. v. United States*,²⁷⁰ the Federal Circuit held that the CIT erred when it overturned Commerce's exclusion of the value-added tax ("VAT") paid by a Brazilian producer on its production inputs from constructed value.²⁷¹ This appeal arose from Commerce's administrative review of an antidumping order of silicon metal from Brazil for the period between July 1, 1999 and June 30, 2000.²⁷² In this review, Commerce applied its policy "of making a case-by-case inquiry as to whether an exporter/producer is able to fully offset its VAT liability by using its VAT credits."²⁷³ Under Commerce's policy, VAT is included as a cost for purposes of calculating constructed value to the extent that an exporter/producer does not fully use the VAT credits generated by export sales under Brazilian law.²⁷⁴ Applying this policy, Commerce determined that the Brazilian producer had fully recovered its outlays for VAT on inputs corresponding to exported goods and, therefore, excluded the VAT on the producer's inputs from the constructed value calculation.²⁷⁵ Based on the resulting constructed value, Commerce determined the Brazilian producer's dumping margin to be de minimis.²⁷⁶

Following an appeal to the CIT by Elkem Metals Co. ("Elkem"), the CIT held that Commerce "must include such internal taxes paid on inputs in its calculation of constructed value" when the taxes are not refunded or remitted upon exportation of the subject merchandise.²⁷⁷ The CIT also found that the Brazilian producer's use of VAT credits to purchase inputs, as permitted under Brazilian law, "did not

268. *Id.* at 1348.

269. *See id.* at 1349 (explaining that the total amount of additional time that Commerce granted to PAM "far exceeded" the seventeen days lost due to lack of service).

270. 468 F.3d 795 (Fed. Cir. 2006).

271. *Id.* at 797.

272. *Id.* at 798.

273. *Id.*

274. *Id.*

275. *Id.*

276. *See id.* (explaining that antidumping duties would not be assessed on imported silicon because of the de minimis dumping margin).

277. *Id.* at 799 (internal quotation marks omitted).

constitute a remittance or refund upon exportation.”²⁷⁸ On remand, Commerce recalculated constructed value pursuant to the CIT’s directions and found that the producer’s dumping margin was higher than at the time of the first remand, but still de minimis.²⁷⁹ The CIT sustained Commerce’s redetermination. Elkem appealed Commerce’s decision to rely on the producer’s questionnaire responses as a proper accounting for VAT, while Commerce (and the producer) cross-appealed, arguing that VAT should have been excluded from the constructed value calculation.²⁸⁰

In accordance with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁸¹ the Federal Circuit first reviewed the language of the statutory provision regarding constructed value, 19 U.S.C. § 1677b(e).²⁸² The Federal Circuit found that under section 1677b(e), Commerce would be required to exclude Brazilian VAT from constructed value if it were refunded or remitted upon export, but that the statute includes no requirement that Commerce include VAT not refunded or remitted upon export because Congress has not “directly spoken to the precise question at issue.”²⁸³ Under the second prong of the *Chevron* test, the Federal Circuit held that Commerce’s policy of individual determinations regarding the extent to which VAT is a cost was a reasonable interpretation of the statute.²⁸⁴ As a result, the Federal Circuit held that the CIT had accorded Commerce insufficient deference regarding its policy of excluding VAT from constructed value, and reversed and remanded for further proceedings. Based on this decision, the Federal Circuit also held Elkem’s appeal to be moot.²⁸⁵

*Norsk Hydro Canada, Inc. v. United States*²⁸⁶ involved the division of authority between Commerce and Customs in implementing U.S. countervailing duty law.²⁸⁷ Here, Customs had collected countervailing duties from Norsk Hydro Canada, Inc. (“NHC”) at a “deemed liquidated rate” ranging from about three percent to seven percent instead of the proper countervailing duty rate of 2.02% as calculated by Commerce during an administrative review of NHC’s

278. *Id.*

279. *See id.* at 799-800 (stating that the dumping margin was 0.48%).

280. *Id.* at 800.

281. 467 U.S. 837 (1984).

282. 19 U.S.C. § 1677b(e) (2000) (describing the calculation of a constructed value for imported merchandise); *Chevron*, 467 U.S. 837.

283. *Elkem Metals*, 468 F.3d at 801.

284. *See id.* at 802 (noting with approval that Commerce promulgated its policy on the exclusion of VAT through note and comment rulemaking).

285. *Id.* at 803.

286. 472 F.3d 1347 (Fed. Cir. 2006).

287. *Id.* at 1348.

1997 magnesium and magnesium alloy imports.²⁸⁸ (“Deemed liquidation” takes place if entries are not actually liquidated within six months of the removal of suspension of liquidation when Commerce instructs Customs about the proper countervailing duty rate following an annual administrative review. As the court noted here “[w]hile actual liquidation occurs at the rate instructed by Commerce, deemed liquidation under [19 U.S.C.] § 1504(d) occurs at the (sometimes higher, sometimes lower) cash deposit rate”).²⁸⁹ NHC did not protest the overcharge by Customs, but instead sought a setoff of the overcharge against duties due on its imports for 2001 through a Commerce administrative review of NHC’s 2001 entries. Commerce refused to grant the setoff, citing a lack of statutory authority.²⁹⁰ On appeal, the CIT remanded to Commerce with instructions to grant the setoff.

The Federal Circuit reversed. Citing 19 U.S.C. § 1675 (for Commerce administrative reviews of subsidy determinations) and 19 U.S.C. § 1514(a)(5) (for Customs protests for liquidation errors), the court noted that “the procedures for contesting an erroneous subsidy calculation [made by Commerce] are different from those for contesting an erroneous duty assessment [by Customs].”²⁹¹ While Commerce determines the amount of any net countervailable subsidy in an administrative review, it typically calculates the countervailing duty rate based only on entries made during the one-year period of the review.²⁹² Customs, on the other hand, liquidates entries and collects the duty by applying the calculated rate to the value of the entered merchandise.²⁹³ The court noted that “[a] liquidation decision itself is ‘final and conclusive’ as to all parties, including the United States, unless protested with Customs, and this is so even if the liquidation contains a ‘clerical error, mistake of fact, or other inadvertence’ adverse to the importer.”²⁹⁴

NHC argued that Commerce was required to take into account Customs’ past liquidation errors because 19 U.S.C. § 1671 requires the “duty imposed” to be “equal to the amount of the net

288. *Id.*

289. 19 U.S.C. § 1504(d) (2000) (providing that “[a]ny entry . . . not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record”); *Norsk Hydro*, 472 F.3d at 1351.

290. *Id.* at 1358-59 (relying on 68 Fed. Reg. 53,962 (Sept. 15, 2003)).

291. *Id.* at 1350.

292. *Id.*

293. *Id.* at 1351.

294. *Id.* at 1352.

countervailing subsidy.”²⁹⁵ The Federal Circuit disagreed and held that Commerce properly imposed the countervailing duties for 1997 when it entered an order instructing Customs about the 2.02% rate for that period and it was entitled to assume that Customs would follow its instructions.²⁹⁶ In addition, the court held that Commerce’s refusal to consider the 1997 entries during its review of NHC’s 2001 entries was a permissible interpretation of 19 U.S.C. § 1675, particularly as Commerce conducts its administrative reviews on an annual basis, making it “duplicative and wasteful for later reviews to revisit matters subject to review in prior PORs [periods of review].”²⁹⁷ The Federal Circuit therefore reversed and remanded to the CIT so that the setoff issued by Commerce at the direction of the CIT could be vacated.

In *Consolidated Bearings Co. v. United States*,²⁹⁸ the Federal Circuit found that the CIT was correct in its decision to find jurisdiction under 28 U.S.C. § 1581(i), and agreed with the CIT that the exhaustion doctrine did not apply under the facts in this case (although for a different reason than the CIT).²⁹⁹ However, in considering the merits, the court determined that the CIT erred in its interpretation of 19 U.S.C. § 1675(a)(2)(C), and vacated and remanded the case for further proceedings.³⁰⁰

In this case, Consolidated Bearings Co. (“Consolidated”) challenged Commerce’s 1998 liquidation instructions directing Customs to liquidate all entries of antifriction bearings from Germany (which were subject to an antidumping duty order) that were not liquidated by the instructions that Commerce issued in 1997.³⁰¹ The 1997 instructions had implemented the final results of a Commerce antidumping administrative review for participating importers. Consolidated had purchased antifriction bearings from Germany produced by FAG Kugelfischer Georg Schaefer KgaA (“FAG”) from an unrelated reseller, and imported those bearings into the United States between 1989 and 1997.³⁰² Consolidated paid cash deposits for antidumping duties based on the rates assigned to FAG and did not participate in Commerce’s administrative review. Under Commerce’s 1998 instructions, Customs liquidated

295. 19 U.S.C. § 1671 (2000); *Norsk Hydro*, 472 F.3d at 1358.

296. *Id.* at 1358.

297. *Id.* at 1361.

298. 348 F.3d 997 (Fed. Cir. 2003).

299. *Id.* at 999-1000 (differing as to whether the “pure question of law” provision applies).

300. *Id.* at 1007-08.

301. *Id.* at 1001.

302. *Id.* at 1000.

Consolidated's entries at the cash deposit rate instead of at the significantly lower rates for importers who participated in the administrative review.³⁰³ Consolidated appealed to the CIT.

Here, the Federal Circuit held that the CIT had jurisdiction under the CIT's residual jurisdiction in 28 U.S.C. § 1581(i) because Consolidated was not challenging Commerce's final administrative review results, which are reviewable only under 28 U.S.C. § 1581(c), but was instead seeking application of those final results to its entries of antifriction bearings manufactured by FAG.³⁰⁴ The Federal Circuit found that "an action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the 'administration and enforcement' of those final results" for which 28 U.S.C. § 1581(i)(4) grants jurisdiction.³⁰⁵ In a related holding, the Federal Circuit found that Consolidated's appeal should not be dismissed for a failure to exhaust administrative remedies, despite the fact that Consolidated did not participate in the administrative review, because Consolidated was challenging the liquidation instructions and not the administrative review itself.³⁰⁶

Regarding the merits of the appeal, the court found that 19 U.S.C. § 1675(a)(2)(C) required Commerce to apply its final administrative review results to all entries covered by the review and that "[i]f the review did not examine a particular importer's transaction, then that importer's entries enjoy no statutory entitlement to the rates established by the review."³⁰⁷ Here, because the reseller that exported the bearings to Consolidated was not covered by the review, the court found that Consolidated's imports were not within the scope of the review or the 1997 instructions.³⁰⁸ However, the Federal Circuit remanded the case to the CIT for additional proceedings regarding whether Commerce's 1998 instructions arbitrarily departed from its past practice. The court found that the CIT needed to supplement the record for this case with a comparison of the 1998 instructions with Commerce's actions in similar circumstances before this case to determine whether Commerce had a consistent past practice regarding imports from unrelated resellers not covered by a review

303. *Id.* at 1001.

304. *Id.* at 1001-02.

305. *Id.* at 1002.

306. *Id.* at 1003-04 (noting that the record did not disclose a statutory or regulatory provision that would have allowed a party to challenge Commerce's administrative review).

307. *Id.* at 1005-06.

308. *Id.* at 1006.

and whether the 1998 instructions departed from this past practice without reasonable explanation.³⁰⁹

In *Belgium v. United States*,³¹⁰ the Federal Circuit reversed and remanded the CIT's denial of a request made by Arcelor, an importer of stainless steel plate in coils ("SSPC"), for a preliminary injunction to prevent Customs from liquidating certain entries in an appeal of Commerce's liquidation instructions. The CIT had denied Arcelor's request because it found that Arcelor failed to make a persuasive case of irreparable harm or likelihood of success on the merits.³¹¹

Arcelor mistakenly declared Belgium, instead of Germany, to be the country of origin of its steel imports between 1998 and 2002.³¹² SSCP from Belgium were subject to antidumping and countervailing duties during that time. When Arcelor discovered the error, it filed disclosures and timely protests with Customs to correct the country of origin.³¹³ Arcelor also disclosed the error to Commerce in the fourth administrative review of the antidumping duty order of SSCP from Belgium.³¹⁴ Commerce determined that the correction of the country of origin would apply to entries covered by the fourth review and future entries, but not prior entries, and instructed Customs to liquidate prior entries as though they were subject to the SSPC from Belgium order.³¹⁵ Arcelor filed protests with Customs for the liquidated entries and a complaint with the CIT regarding the liquidation instructions for the unliquidated entries.³¹⁶ Arcelor also requested a preliminary injunction, which the CIT denied.³¹⁷

On appeal regarding the denial of the injunction, the Federal Circuit remanded for entry of a preliminary injunction. The Federal Circuit first found that, while Commerce may turn out to be correct in its conclusion that Arcelor's "country-of-origin designations were applicable only to entries in the fourth administrative review period and later" regardless of whether or not they were liquidated, the issue was not "so clear cut" that the court was ready to dispose of the appeal based on a lack of likelihood of success on the merits.³¹⁸ Regarding the balance of hardships, the Federal Circuit found that

309. *Id.* at 1008.

310. 452 F.3d 1289 (Fed. Cir. 2006).

311. *Ugine & ALZ Belgium, N.V. v. United States*, 391 F. Supp. 2d 1284, 1289-90 (Ct. Int'l Trade 2005), *rev'd and remanded*, 452 F.3d at 1297.

312. *Belgium*, 452 F.3d at 1290-91.

313. *Id.* at 1291.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 1295.

there was no strong public interest against injunctive relief. The court then determined that Arcelor had made “a strong showing of irreparable harm” because the denial of a preliminary injunction could result in a denial of any opportunity for a decision on the merits of its claim.³¹⁹ Finally, in remanding for the entry of a preliminary injunction, the court also stated that it gave strong weight to the fact that all parties had consented to a preliminary injunction before the CIT denied the injunction.³²⁰

In a non-precedential opinion involving a Commerce antidumping duty determination, *Agro Dutch Industries Ltd. v. United States*,³²¹ the Federal Circuit reversed and remanded for further proceedings the CIT’s dismissal of a case appealing the final results of an antidumping duty administrative review on jurisdictional grounds.³²² The CIT originally dismissed the case because the plaintiff had not responded to the court’s request for information about whether any entries of the subject merchandise for the period of review remained unliquidated.³²³ While Agro Dutch Industries, Ltd. had filed an appeal and been granted an injunction against liquidation of its entries, the injunction was not effective before Customs “liquidated many of the shipments that had entered the United States during the period of review.”³²⁴ The Federal Circuit found that the parties agreed that there remained unliquidated entries from the affected period (and that the CIT had not imposed a deadline on its request for information about the entries) and, as a result, found that “the jurisdictional ground on which the trial court initially dismissed the action cannot stand.”³²⁵ The Federal Circuit remanded to the CIT to address the complaint on the merits. While the CIT had indicated that it was prepared to dispose of the case on the merits, in favor of the government, the Federal Circuit found that that discussion was not an alternative ground for decision by the CIT and therefore remanded to the CIT for further proceedings.³²⁶

B. *United States International Trade Commission*

The United States International Trade Commission’s (“ITC’s”) area of expertise and responsibility in unfair trade cases, including

319. *Id.* at 1297.

320. *Id.*

321. 167 F. App’x 202 (Fed. Cir. 2006).

322. *Id.* at 204-05.

323. *Id.* at 203.

324. *Id.* at 202.

325. *Id.* at 204.

326. *Id.* at 205 (remanding the case to the same trial court judge, notwithstanding Agro Dutch’s protestations).

antidumping and countervailing duty investigations and reviews, is the injury determination.³²⁷ More specifically, in an antidumping or countervailing duty investigation, the ITC must determine whether a U.S. industry is materially injured, or is threatened with material injury, by imports or sales of the subject merchandise, or whether imports or sales of the subject merchandise have materially retarded the establishment of a U.S. industry.³²⁸ Without an affirmative injury determination from the ITC, Commerce cannot issue an antidumping or countervailing duty order.

While the ITC had relatively few unfair trade cases before the Federal Circuit in 2003 through 2006 compared with Commerce and Customs, several cases involving the ITC—most notably *Nippon Steel Corp. v. United States*³²⁹ and *Bratsk Aluminium Smelter v. United States*³³⁰—were among the most interesting and potentially far-reaching trade cases decided by the court during this period.

Nippon Steel is a case with a long procedural history, including four determinations by the ITC, four opinions from the CIT, and one prior Federal Circuit opinion.³³¹ Prior to this 2006 Federal Circuit opinion, the ITC had ultimately issued, under protest, a negative material injury determination upon instruction from the CIT.³³² The issue in this appeal was whether the ITC's findings that dumping of Japanese imports of tin- and chromium-coated steel sheets ("TCCSS") could be linked to price effects in, and causation of injury to, the domestic market such that the findings detracted from the evidence in support of injury as to render the ITC's affirmative material injury determination unsupported by substantial evidence.³³³ Here, the Federal Circuit found that the ITC's original affirmative material injury determination was supported by substantial evidence, and

327. See, e.g., *Nippon Steel Corp. v. United States*, 458 F.3d 1345 (Fed. Cir. 2006) (explaining that Congress bifurcates the inquiry into antidumping allegations between Commerce and the ITC).

328. 19 U.S.C. § 1673 (2000).

329. 458 F.3d 1345 (Fed. Cir. 2006).

330. 444 F.3d 1369 (Fed. Cir. 2006).

331. 458 F.3d at 1347-50 (engaging in a "cursory" overview of the procedural history, citing the following cases: *Nippon Steel Corp. v. United States*, 182 F. Supp. 2d 1330 (Ct. Int'l Trade 2001) (*Nippon I*); *Nippon Steel Corp. v. United States*, 223 F. Supp. 2d 1349 (Ct. Int'l Trade 2002) (*Nippon II*); *Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379 (Fed. Cir. 2003) (*Nippon III*); *Nippon Steel Corp. v. United States*, 350 F. Supp. 2d 1186 (Ct. Int'l Trade 2004) (*Nippon IV*); *Nippon Steel Corp. v. United States*, 2005 Ct. Int'l Trade LEXIS 40 (Mar. 23, 2005) (*Nippon V*)).

332. *Id.* at 1348.

333. *Id.* at 1347-48.

therefore reversed the CIT and directed it to reinstate the original affirmative ITC determination.³³⁴

In evaluating the ITC's analysis of the record evidence and the CIT's holdings, the Federal Circuit found that, while it supported the CIT's rejection of evidence of price effects containing miscalculations, it could not support the CIT's rejection of the ITC's analysis of certain domestic producer accounting data.³³⁵ In addition, the Federal Circuit found that there was substantial evidence on both sides of the issue of whether domestic producers were in a cost-price squeeze, and that the statutory substantial evidence standard required that the ITC's conclusion that the domestic industry was in a cost-price squeeze be given deference.³³⁶ As a result, the Federal Circuit could not support the CIT's conclusion regarding domestic price suppression. Similarly, the Federal Circuit could not support the CIT's rejections of ITC findings regarding conditions of competition in the domestic industry because it did not agree with the CIT that the ITC's conditions of competition findings were unreasonable in light of the evidence as a whole.³³⁷ The Federal Circuit also concluded that the CIT "improperly substituted its own credibility determinations for those of the Commission" regarding causation.³³⁸ In making these conclusions, although noting that the CIT "may well have conducted a better analysis than did the Commission, and that we would have reached the same conclusion as the trade court if deciding the case in the first instance,"³³⁹ the Federal Circuit stated that "[t]he assessment of the proper weight to accord to testimony is within the role of the Commission, not this court and not the Court of International Trade."³⁴⁰ As the Federal Circuit found that substantial evidence supported the ITC's original affirmative material injury determination, it did not decide the scope of the CIT's authority to reverse an ITC determination without remand.³⁴¹

In *Bratsk Aluminium Smelter v. United States*,³⁴² the Federal Circuit vacated the CIT's decision affirming the ITC's determination that the

334. *Id.* at 1354 (acknowledging, however, that substantial evidence existed to support the CIT's findings).

335. *Id.* at 1353-54.

336. *Id.* at 1354.

337. *Id.*

338. *Id.* at 1357.

339. *Id.* at 1358.

340. *Id.* at 1356.

341. *Id.* at 1359 (explaining that the authority to reverse would come from 19 U.S.C. § 1516(a), which outlines the provisions for judicial review in countervailing duty and antidumping proceedings).

342. 444 F.3d 1369 (Fed. Cir. 2006).

domestic silicon metal industry was materially injured by reason of Russian silicon metal imports sold at less than fair value. In making an affirmative injury determination in an antidumping investigation, the ITC must determine both that the domestic industry is suffering from present material injury and that the material injury is “by reason of” the imports under consideration during the investigation (“subject imports”).³⁴³ This appeal dealt with whether the ITC properly established that the domestic industry was injured “by reason of” the subject imports.³⁴⁴ In considering the “by reason of” requirement, the Federal Circuit clarified its earlier decision in *Gerald Metals, Inc. v. United States*.³⁴⁵

During its injury investigation in *Bratsk*, the ITC had not made a specific determination regarding whether non-subject imports of silicon metal, a commodity product, would simply replace subject imports if the subject imports were excluded from the U.S. market. The ITC had also dismissed *Gerald Metals* as factually distinguishable.³⁴⁶ The CIT affirmed the ITC’s decision without specifically discussing the causation issue.³⁴⁷

On appeal, the Federal Circuit first noted that

[w]here commodity products are at issue and fairly traded, price-competitive, non-subject imports are in the market, the Commission must explain why the elimination of subject imports would benefit the domestic industry instead of resulting in the non-subject imports’ replacement of the subject imports’ market share without any beneficial impact on domestic producers.³⁴⁸

The Court clarified that

[u]nder *Gerald Metals*, the increase in volume of subject imports priced below domestic products and the decline in the domestic market share are not in and of themselves sufficient to establish causation [U]nder *Gerald Metals*, the Commission is required to make a specific causation determination and in that connection to directly address whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic producers.³⁴⁹

The Federal Circuit expressed its concern that the ITC had not explained its causation analysis in accordance with *Gerald Metals*, instead limiting that case to its “unique facts.” The Federal Circuit

343. *Id.* at 1371.

344. *Id.* at 1372.

345. 132 F.3d 716 (Fed. Cir. 1997); *see Bratsk*, 444 F.3d at 1373-74.

346. *Bratsk*, 444 F.3d at 1372.

347. *See id.* (affirming the Commission’s remand determination “in its entirety”).

348. *Id.* at 1373.

349. *Id.* at 1374-75.

raised this concern despite the fact that this case, like *Gerald Metals*, involved an interchangeable product with significant non-subject imports sold at prices generally below domestic product prices during the period of investigation.³⁵⁰ Here, the court clarified that

[t]he Commission is obligated to follow the holdings of our cases, not to limit those decisions to their particular facts. The holding of *Gerald Metals* is not limited to situations in which non-subject imports increased during the period of review. The obligation under *Gerald Metals* is triggered whenever the antidumping investigation is centered on a commodity product, and price competitive non-subject imports are a significant factor in the market.³⁵¹

The Federal Circuit remanded the case to the CIT so that it could remand back to the ITC to address whether the non-subject imports would have replaced subject imports and continued to cause injury to the domestic industry if subject imports were excluded from the U.S. market.³⁵²

Senior Circuit Judge Archer dissented, finding that the ITC had “adequately considered” the effect of subject and non-subject imports and that “neither the statute nor *Gerald Metals* imposes the rigidity in findings or analysis that the majority seems to require.”³⁵³

Caribbean Ispat Ltd. v. United States,³⁵⁴ involved an exception to the general rule under 19 U.S.C. § 1677(7)(G)(i) that the ITC must cumulate imports from all countries subject to an injury investigation when analyzing the volume, price, effect, and impact of subject imports. In particular, Caribbean Ispat Limited’s (“CIL’s”) appeal focused on the application of the exception mandated by the Caribbean Basin Economic Recovery Act (“CBERA”),³⁵⁵ which exempts Caribbean nations from the cumulation rule, to the ITC’s investigation of imports of steel wire rod from Trinidad and Tobago.³⁵⁶

The ITC took the position, upheld by the CIT, that the ITC was prohibited from considering the effect of subject imports from non-CBERA countries when determining whether the domestic industry was materially injured “by reason of” imports from Trinidad and Tobago.³⁵⁷ The Federal Circuit disagreed, stating that “the

350. *Id.* at 1375.

351. *Id.*

352. *Id.* at 1376.

353. *Id.* at 1376, 1378.

354. 450 F.3d 1336 (Fed. Cir. 2006).

355. 19 U.S.C. § 1677(7)(G)(ii)(III) (1996).

356. *Caribbean Ispat*, 450 F.3d at 1337.

357. *Id.* at 1337.

Commission had authority to treat LTFV [less than fair value] imports from non-CBERA countries as an ‘other economic factor,’ just as the Commission ordinarily treats fairly traded imports as an ‘other economic factor’ in dumping investigations that do not involve CBERA countries.”³⁵⁸ Citing its recent decision in *Bratsk*, the Federal Circuit also held that the ITC was required in this case to make a specific causation determination and address directly whether other imports (whether or not subject to the investigation) would have replaced Trinidad and Tobago’s imports without any positive effect on domestic producers.³⁵⁹ Therefore, the court remanded for further consideration of the causation analysis.³⁶⁰

In *Altx, Inc. v. United States*,³⁶¹ the Federal Circuit affirmed the CIT’s decisions. The court found that the CIT did not abuse its discretion when it remanded the Commission’s first remand determination in the appeal and also held that CIT’s second remand determination was supported by substantial evidence and free of legal error.³⁶²

This case involved an antidumping investigation of circular seamless stainless steel hollow products (“CSSSHP”) from Japan.³⁶³ In its original investigation, the ITC found that the domestic CSSSHP industry was not materially injured or threatened with material injury by reason of subject imports during the period of investigation, and issued a negative determination.³⁶⁴ On appeal, the CIT remanded to the ITC to consider the relevant arguments of the domestic producers.³⁶⁵ In its first remand, the ITC entered an affirmative determination of injury after a new member of the ITC joined the original dissent.³⁶⁶ The Japanese producers then appealed and the CIT again remanded to the ITC for additional consideration of arguments by the parties.³⁶⁷ On second remand, the ITC reinstated its original negative determination, again without any Commissioner changing its vote, as the temporary appointment of the Commissioner who had provided the decisive vote on remand expired, and also addressed the arguments of domestic producers in greater depth.³⁶⁸ The CIT affirmed the second remand

358. *Id.* at 1339.

359. *Id.* at 1341.

360. *Id.*

361. 370 F.3d 1108 (Fed. Cir. 2004).

362. *Id.* at 1110.

363. *Id.*

364. *Id.* at 1111.

365. *Id.* at 1114.

366. *Id.*

367. *Id.* at 1115.

368. *Id.*

determination as it found that the ITC had addressed significant arguments and evidence undermining its reasoning and conclusions.³⁶⁹

Here, while the court's jurisdiction attached as a result of the CIT's final decision affirming the second remand determination,³⁷⁰ the Federal Circuit noted that its jurisdiction "nonetheless encompasses the entirety of the proceedings before the court, including intermediate remand orders that would not, independently, be appealable."³⁷¹ The court found that it appropriately would review the CIT's earlier decisions in this case under an "abuse of discretion" standard because the remand decisions did not evaluate the substantiality of the ITC's evidence, but instead simply requested further explanation.³⁷² The court reviewed the CIT's final decision de novo in considering whether the ITC's final remand determination was supported by "substantial evidence."³⁷³

In reviewing the CIT's decisions, the Federal Circuit found that the CIT's decision to remand after the first remand determination was justified due to the ITC's "deficient treatment" of certain areas of evidence, including non-subject imports.³⁷⁴ As a result, the Federal Circuit did not reach the argument about whether the first remand determination was supported by substantial evidence.³⁷⁵ Regarding the second remand determination, the Federal Circuit held that the ITC's views were supported by substantial evidence.³⁷⁶ The court found that the ITC was within its discretion to refuse to conform its decision to a theoretical economic model found to be inconsistent with empirical data.³⁷⁷ The court also found that the ITC's findings regarding non-subject imports were supported by substantial evidence and that the ITC "is not required to determine that non-subject imports are significant in order to conclude that the subject imports are not significant."³⁷⁸ Finally, the Federal Circuit also found that the ITC's decision to reject semi-annual data and rely solely on annual data was reasonable where there was a risk that the semi-annual data was "incomplete, unrepresentative, or inaccurate."³⁷⁹

369. *Id.* at 1124.

370. *Id.* at 1116.

371. *Id.*

372. *Id.* at 1117.

373. *Id.* at 1116.

374. *Id.* at 1119.

375. *Id.* at 1119-20.

376. *Id.* at 1121.

377. *Id.*

378. *Id.* at 1123.

379. *Id.* at 1124.

III. OTHER TRADE CASES

A. *United States Trade Representative and Presidential Trade Authority*

In *Gilda Industries, Inc. v. United States*,³⁸⁰ the Federal Circuit affirmed in part, vacated in part, and remanded the CIT's decision. This case involved a December 1985 prohibition by the European Community ("EC") of imports of meat from animals treated with hormones.³⁸¹ The United States challenged the prohibition at the World Trade Organization ("WTO") and ultimately received authorization by the WTO to increase its duties on EC products in response to the prohibition.³⁸² Following the WTO's ruling and pursuant to 19 U.S.C. § 2416, the United States Trade Representative ("USTR") created a "retaliation list," which subjected certain EC products to increased duties of one hundred percent ad valorem.³⁸³ Included on the list was HTSUS subheading 9903.02.35 for "[r]usks, toasted bread and similar products."³⁸⁴ *Gilda Industries, Inc.* ("Gilda"), which imports toasted breads from Spain, appealed USTR's retaliation list under 28 U.S.C. § 1581(i).³⁸⁵ The Federal Circuit confirmed that jurisdiction was available under that provision because Gilda was appealing USTR's action and not Customs' classification of the entries.³⁸⁶

Gilda first argued that retaliation lists may include only products affected by the foreign country's noncompliance with the WTO's ruling ("reciprocal goods").³⁸⁷ The Federal Circuit disagreed, finding that, while the retaliation list must include reciprocal goods, it could also include nonreciprocal goods.³⁸⁸ The Federal Circuit also rejected Gilda's argument that the list had expired because no domestic industry that "benefits from" the list had requested its continuation since the domestic beef industry had requested continuation and that industry benefits from any pressure the list places on foreign governments to comply with the WTO ruling.³⁸⁹

380. 446 F.3d 1271 (Fed. Cir. 2006).

381. *Id.* at 1274.

382. *Id.*

383. *Id.* at 1275.

384. *Id.*

385. *Id.* at 1275-76.

386. *Id.* at 1276.

387. *Id.* at 1277.

388. *Id.*

389. *Id.*

Gilda also argued that the USTR had failed to comply with 19 U.S.C. § 2416(b)(2)(C), which requires the USTR to review and revise the list every 180 days because the USTR had not revised the list since its implementation in July 1999.³⁹⁰ While the Federal Circuit questioned Gilda's standing to challenge this provision under the "zone of interests" test because Gilda could be seen as seeking relief that would frustrate the objectives of the statute,³⁹¹ the Federal Circuit did not reach this question because the government waived the argument by not raising it in its brief.³⁹² The Federal Circuit instead remanded this issue to the CIT to determine whether the USTR had determined that resolution of the hormone dispute is "imminent"—a determination which would have excused USTR from the requirement to review and revise the list.³⁹³ However, the court also found that Gilda is not entitled to a refund of duties paid or removal of its products from the list regardless of whether the USTR had complied with its duties to review and revise the list because the only remedy available is for the list to be reviewed and revised.³⁹⁴ The Federal Circuit also ruled that Gilda was entitled to notice and the opportunity to comment only when the list was originally created.³⁹⁵

Finally, the Federal Circuit also ruled that Gilda could not challenge the implementation of the list on the ground that it violates the WTO's recommendation by collecting duties in excess of those authorized by the WTO because WTO decisions are not binding on U.S. courts and 19 U.S.C. § 3512(c)(1)(B) provides that no person other than the United States may challenge any action or inaction of the U.S. government on the ground that it is inconsistent with the Uruguay Round Agreements Act.³⁹⁶

In a case involving Presidential trade authority, *Motions Systems Corp. v. Bush*,³⁹⁷ the Federal Circuit addressed the President's decision not to grant import relief to the U.S. pedestal actuator industry under section 421 of the U.S.-China Relations Act of 2000. Section 421 established procedures for import relief by the President in the form of increased duties or other import restrictions by U.S. industries threatened by "market disruption" resulting from increased imports of products from China.³⁹⁸

390. *Id.* at 1278.

391. *Id.* at 1280.

392. *Id.*

393. *Id.* at 1280-81.

394. *Id.* at 1284.

395. *Id.* at 1283-84.

396. *Id.* at 1284.

397. 437 F.3d 1356 (Fed. Cir. 2006).

398. *Id.* at 1357.

In this case, Motion Systems Corporation (“Motion Systems”) properly filed a petition with the ITC alleging that imports of Chinese pedestal actuators had increased rapidly during 2000-2002, resulting in market disruption.³⁹⁹ The ITC conducted an investigation, made an affirmative finding of market disruption, and recommended that the President impose a quantitative restriction on the subject imports for a three-year period.⁴⁰⁰ However, the President exercised his discretion under the statute not to impose any relief, finding that such relief would only cause imports to shift to other offshore sources, and that any benefit to the domestic industry would be outweighed by the increased cost to downstream users and consumers.⁴⁰¹

Motion Systems sued the President and the USTR at the CIT seeking declaratory and injunctive relief.⁴⁰² After the CIT found in favor of the defendants, Motion Systems appealed to the Federal Circuit.⁴⁰³ In an en banc decision, the Federal Circuit found that there was no right of judicial review to challenge the acts of the President or USTR in this case.⁴⁰⁴ With no explicit statutory cause of action in section 421, the issue became whether Motion Systems could challenge the President’s discretionary actions under section 421 as outside the scope of authority delegated to the President by Congress.⁴⁰⁵ The Federal Circuit determined that, under *Dalton v. Specter*,⁴⁰⁶ there is no right of judicial review available because section 421 committed the decision about import relief to the discretion of the President, despite placing some limits on that discretion, and the President’s duties under section 421 were not purely ministerial.⁴⁰⁷ The Federal Circuit also held that the CIT lacked jurisdiction to review the USTR’s actions because they were not final actions, but merely recommendations for Presidential action.⁴⁰⁸ In a concurring opinion, Circuit Judge Gajarsa disagreed with the majority’s determination of no right to judicial review, finding that “it is the judiciary’s role, and its duty, to review whether the President acted within the statutory parameters.”⁴⁰⁹ In reviewing the merits of this

399. *Id.*

400. *Id.* at 1357-58.

401. *Id.* at 1358.

402. *Id.*

403. *Id.*

404. *Id.* at 1359.

405. *Id.*

406. 511 U.S. 462 (1994).

407. *Motion Sys. Corp.*, 437 F.3d at 1359.

408. *Id.* at 1361.

409. *Id.* at 1362.

case, Judge Gajarsa would have affirmed the CIT on the merits as he agreed with the CIT that there was “no basis to conclude that the President’s decision is based on a ‘clear misunderstanding of the governing statute’ or that it constituted ‘action outside his delegated authority.’”⁴¹⁰

B. Trade Adjustment Assistance

In *Steen v. United States*,⁴¹¹ the Federal Circuit upheld the CIT’s decision denying trade adjustment cash benefits to Ron Steen. Mr. Steen had applied to the Department of Agriculture for cash benefits under the Trade Act of 1974, as amended (“Trade Act”), which provides for trade adjustment assistance for U.S. workers, including “agricultural commodity producers,” harmed by competition from imports.⁴¹² Under the Trade Act, producers may, among other things, apply for a cash benefit.⁴¹³ In order to receive a benefit, however, producers must meet certain requirements, including that the producer’s “net farm income (as determined by the Secretary) for the most recent year is less than the producer’s net farm income for the latest year in which no adjustment assistance was received by the producer.”⁴¹⁴ The regulations implementing the Trade Act clarify that that fishermen may also apply for assistance and that all producers must certify, among other things, that their “net farm or fishing income for the most recent tax year was less than that during the producer’s pre-adjustment year.”⁴¹⁵

Mr. Steen applied for cash benefits under the Trade Act as a fisherman of Pacific salmon.⁴¹⁶ The Agriculture Department denied Mr. Steen’s application because he failed to show that his net fishing income in 2002 was lower than his net fishing income in 2001.⁴¹⁷ Mr. Steen appealed to the CIT, arguing that his net fishing income should be calculated with respect to Pacific salmon (the imported product) only, and not with respect to income from other commercial fishing activity.⁴¹⁸ The CIT and the Federal Circuit disagreed. The CIT and the Federal Circuit found that the term “net farm income” in the Trade Act includes (for fishermen) net income from all fishing activity based on a plain meaning of the term, the

410. *Id.* at 1375.

411. 468 F.3d 1357 (Fed. Cir. 2006).

412. *Id.* at 1358 (citing 19 U.S.C. §§ 2271-2321 (2004)).

413. *Id.*

414. *Id.* at 1359 (quoting 19 U.S.C. § 2401e(a)(1) (2004)).

415. *Id.* (quoting 7 C.F.R. § 1580.301(e)(4) (2004)).

416. *Id.* at 1360.

417. *Id.*

418. *Id.*

goals that Congress intended the statute to promote (namely, to adjust production to avoid the impact of competing imported goods), and the Agriculture Department's reasonable definition of the term.⁴¹⁹ Therefore, as Mr. Steen's net farm income from all fishing activities was higher in 2002 than his net fishing income in 2001, the Federal Circuit upheld the CIT's decision upholding the Agriculture Department's denial of cash benefits for Mr. Steen.⁴²⁰

In *Former Employees of Quality Fabricating, Inc. v. United States Secretary of Labor*,⁴²¹ the Federal Circuit held that the CIT did not possess jurisdiction to consider the Department of Labor's ("Labor's") determination on secondarily-affected worker benefit eligibility for former employees of Quality Fabricating, Inc. ("Quality").⁴²² Secondarily-affected workers are workers whose employers were indirectly affected by increased imports from or shifts of production to other countries.⁴²³ In this case, the Federal Circuit found that the CIT lacked jurisdiction to review Labor's determination because the CIT did not have jurisdiction to review all of Labor's determinations, administration, and enforcement of trade adjustment assistance certifications, and "no statute waives immunity nor authorizes suit in the court of International Trade with respect to Labor's determinations on secondarily-affected worker benefits."⁴²⁴

CONCLUSION

The Federal Circuit addressed a wide range of international trade issues during 2003-2006 and, in so doing, clarified trade practice and law involving matters before Customs, Commerce, the ITC and USTR, as well as for the CIT. Interestingly, in reviewing the cases summarized above, the Federal Circuit more often affirmed the CIT in this period in cases involving Customs than in cases involving Commerce or the ITC, perhaps reflecting the relative complexity and extensive procedural history of some of the Commerce and ITC unfair trade cases in comparison with the Customs matters addressed by the CIT and Federal Circuit during this period. Overall, the Federal Circuit issued well-reasoned and thoughtful decisions involving international trade during 2003-2006, with many of those decisions likely to have an important impact on the practice of international trade law in the years to come.

419. *Id.* at 1360-61.

420. *Id.* at 1363.

421. 448 F.3d 1351 (Fed. Cir. 2006).

422. *Id.* at 1352.

423. *Id.*

424. *Id.* at 1356.