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International Trade Decisions of the Federal Circuit: Three Years of Rigorous Review

INTERNATIONAL TRADE DECISIONS OF THE FEDERAL CIRCUIT: THREE YEARS OF RIGOROUS REVIEW

BERND G. JANZEN*

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INTRODUCTION

When Congress created the Court of Appeals for the Federal Circuit in 1982,¹ one of the many powers vested in the new court was the power to review decisions of the U.S. Court of International Trade, also a new federal court at the time.² The statutory provision conferring this jurisdiction, 28 U.S.C. § 1295(a)(5), is deceptively simple, stating merely that the Federal Circuit shall have exclusive jurisdiction over any “appeal from a final decision of the United States Court of International Trade.” However, as reflected in the Federal Circuit’s international trade jurisprudence of the last three years, reviewed in this article, this area of jurisdiction encompasses scores of distinct and difficult issues arising from the federal government’s regulation of international trade. Perhaps not surprisingly, given the steady increase over the years in both the volume of trade across the United States border and the level of complexity of the trade laws, the Federal Circuit’s caseload in this area has grown beyond levels anticipated by Congress in 1982.³

In reviewing the Federal Circuit’s recent international trade jurisprudence, this article stresses three related themes. The first is the standard of review applied by the court, which varies depending on the type of government regulatory action under review. This standard has not been static in recent years—particularly with respect to certain determinations of the U.S. Customs Service.⁴ The second

1. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982). Prior to enactment of the Federal Courts Improvement Act, appellate jurisdiction over international trade cases resided with the Court of Customs and Patent Appeals. See S. REP. NO. 97-275, at 3 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 13.

2. Congress created the U.S. Court of International Trade through the Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980).

3. The Senate Report accompanying the Federal Courts Improvement Act of 1982 states the Senate’s anticipation that the structure and jurisdiction of the Federal Circuit “will produce a reasonable caseload.” S. REP. NO. 97-275, at 6, *reprinted in* 1982 U.S.C.C.A.N. 11, 16. According to the Senate Report, during Fiscal Year 1981, the Court of Customs and Patent Appeals terminated thirty cases involving “Customs, commerce, and international trade.” *Id.* By contrast, in the most recent twelve-month period for which the Federal Circuit has provided this figure (ending September 30, 2002), it terminated a total of 128 international trade cases—more than a four-fold increase. See U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT ANN. REP. 2002, tbl.B-8, *available at* <http://www.fedcir.gov/pdf/b08sep02.pdf> (last modified Apr. 22, 2003).

4. As of March 1, 2003, the U.S. Customs Service was combined with certain other government agencies and renamed the Bureau of Customs and Border Protection, a unit of the new Department of Homeland Security. See Customs &

theme is the remarkably high rate of reversal of the Court of International Trade, as compared to other areas of Federal Circuit subject matter jurisdiction. Indeed, the court's own statistics reveal a consistently high reversal rate—in one recent twelve-month period even exceeding fifty percent.⁵ The third theme is the intensely litigated nature of many of the international trade disputes before the Federal Circuit, and the attendant commercial uncertainty for interested parties—particularly in cases involving the trade remedy laws, where final disposition of a case may follow multiple remands for reconsideration by the U.S. Department of Commerce or the U.S. International Trade Commission and drag on for years.⁶

For purposes of this Article, the Federal Circuit's international trade cases over the last three years are divided into three broad categories: the U.S. customs laws, the U.S. trade remedy laws, and trade and the environment.⁷

I. U.S. CUSTOMS LAWS

Even within the specialized niche of U.S. customs laws, the Federal Circuit is called upon to consider a rich and diverse array of issues, and the period from 2000 through 2002 was no exception. If anything, changes prompted by the Supreme Court in longstanding rules governing the standard of review made this a particularly dynamic and unpredictable period for litigants before the Federal Circuit. The discussion below begins with the most heavily litigated area of customs law—questions of classification under the Harmonized Tariff Schedule of the United States (“HTSUS”)⁸—and

Border Protection, U.S. Department of Homeland Security, at <http://www.customs.ustras.gov/xp/cgov/toolbox/about/mission/cbp.xml> (last visited May 14, 2003).

5. For the twelve-month period ended September 30, 2002, the Federal Circuit reversed some aspect of twenty-six percent of the international trade cases terminated during that same period; for the twelve-month period ended March 31, 2001, the figure is twenty-eight percent; and for the period ended September 30, 2002, the figure is a remarkable fifty-four percent (as compared to an overall reversal rate of fifteen percent). See U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT ANN. REP. 2002, tbl.B-8, available at <http://www.fedcir.gov/pdf/b08sep02.pdf> (last modified Apr. 22, 2003).

6. Review of international trade decisions by the Supreme Court is very rare, so as a practical matter, final disposition of an international trade dispute arising under U.S. law is virtually always by the Federal Circuit; several notable exceptions are discussed in the Article.

7. This Article discusses only published decisions of the Federal Circuit, representing the vast majority of the court's international trade decisions over the three-year review period.

8. The HTSUS is codified at 19 U.S.C. § 1202, but is not published in the Code. Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202 (2000). Pursuant to 19 U.S.C. § 3007, the HTSUS is published, as annotated for statistical

moves on to issues surrounding the appraisal of imported merchandise, duty drawback, final assessment of duties and other charges owed on entries of merchandise, and other issues affecting the flow of goods and people across the U. S. border. The discussion below also reviews the Federal Circuit's jurisprudence over the last three years with respect to the so-called Harbor Maintenance Tax, an area characterized during this period by a series of hotly contested disputes. As detailed below, over the last three years, the Federal Circuit frequently reversed the Court of International Trade.

A. *Tariff Classification*

The Federal Circuit's decision in *Haggar Apparel Co. v. United States*,⁹ upon remand from the Supreme Court,¹⁰ marked the end of an intensely litigated dispute and a turning point in the court's jurisprudence concerning the level of deference owed to Customs classification decisions. *Haggar Apparel* involved a Customs decision under the "maquiladora" provision of the HTSUS, which allows a partial exemption from import duties for certain U.S.-origin articles that have been assembled or subjected to "operations incidental to the assembly process" abroad.¹¹ The dispute arose from a refund proceeding for Customs duties imposed on Haggar Apparel's imports of men's pants, assembled in Mexico with U.S.-origin parts, and "permapressed" prior to importation.¹² Haggar Apparel claimed that permapressing was an operation "incidental to the assembly process"¹³ and, thus, that its men's pants qualified for a partial duty exemption under HTSUS 9802.00.80.¹⁴ Customs, however, denied Haggar Apparel's claim pursuant to a regulation, 19 C.F.R. § 10.16(c), listing examples of operations not considered incidental to assembly for purposes of subheading 9802.00.80.¹⁵ One of the listed operations was "chemical treatment of components or

reporting purposes, by the U.S. International Trade Commission. See U.S. International Trade Commission, HTSUS, available at <http://www.dataweb.usitc.gov/SCRIPTS/tariff/toc.html> (last modified Apr. 15, 2003).

9. 222 F.3d 1337 (Fed. Cir. 2000).

10. *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999).

11. *Haggar Apparel*, 222 F.3d at 1338-39. The exemption applies to "Articles . . . assembled abroad in whole or in part of fabricated components, the product of the United States, which . . . (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting." *Id.* (quoting HTSUS, 19 U.S.C. § 1202, Subheading 9802.00.80).

12. *Id.* at 1338.

13. *Id.* at 1339.

14. *Id.*

15. *Id.*

assembled articles to impart new characteristics, such as . . . permappressing”¹⁶ Following a protest proceeding,¹⁷ Hagggar Apparel challenged Customs’ decision in the Court of International Trade, which held that 19 C.F.R. § 10.16(c) does conflict with the plain language of the HTSUS because it is too narrowly drawn, denying the allowance with respect to certain assembly operations within the scope of the statute.¹⁸ Accordingly, the Court of International Trade found that the regulation was not entitled to *Chevron* deference.¹⁹ Customs appealed to the Federal Circuit, which affirmed the lower court’s decision.²⁰ Customs then petitioned the Supreme Court for a writ of certiorari.²¹ The Supreme Court granted the writ, and reversed the Federal Circuit’s decision, holding that HTSUS 9802.00.80 was ambiguous and, thus, that *Chevron* deference was indeed owed to Customs.²² The Supreme Court, however, did not decide whether 19 C.F.R. § 10.16(c) constituted a reasonable reading of the statute, leaving that issue for evaluation by the Federal Circuit on remand.²³

In applying *Chevron* principles on remand, the Federal Circuit rejected Hagggar Apparel’s arguments concerning Congress’s intent, instead agreeing with Customs that “the statute permits the so-called ‘categorical’ or ‘qualitative’ analysis adopted by Customs.”²⁴ The permitted analysis involved the delineation, by regulation, of examples of value-added operations are not considered “incidental to

16. 19 C.F.R. § 10.16(c)(4) (2002).

17. See *Hagggar Apparel*, 222 F.3d at 1339 (noting that Hagggar Apparel followed the protest and review procedures set out in 19 U.S.C. § 1515 (1994)).

18. *Hagggar Apparel Co. v. United States*, 938 F. Supp. 868, 874 (Ct. Int’l Trade 1996).

19. See *id.* at 875 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). As later explained by the Federal Circuit, prior to the Supreme Court’s decision in *Hagggar Apparel*, the Federal Circuit or the Court of International Trade never applied *Chevron* deference to a Customs’ interpretation of a tariff heading. *Hagggar Apparel*, 222 F.3d at 1343 (citing *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491-93 (Fed. Cir. 1997) and *Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (Fed. Cir. 1997)). The *Chevron* standard is used to analyze regulations that administrative agencies make pursuant to their rulemaking authority. *Hagggar Apparel*, 222 F.3d at 1340. The standard first asks whether “Congress has directly spoken to the precise question at issue” and if so then the investigation stops; however, if “the statute is silent or ambiguous with respect to the specific issue” then the court asks “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* (quoting *Chevron*, 467 U.S. at 842-44).

20. *Hagggar Apparel Co. v. United States*, 127 F.3d 1460 (Fed. Cir. 1997), *vacated by United States v. Hagggar Apparel Co.*, 526 U.S. 380 (1999).

21. *Id.*, *cert. granted*, *United States v. Hagggar Apparel Co.*, 524 U.S. 981 (1998).

22. *Hagggar Apparel*, 526 U.S. at 380.

23. *Id.* at 397.

24. *Hagggar Apparel*, 222 F.3d at 1341.

the assembly process” for purposes of subheading 9802.00.80.²⁵ The Federal Circuit also rejected Hagggar Apparel’s contentions as to the preferred analytical framework in implementing subheading 9802.00.80.²⁶ The court held that a judicial determination of which approach best reflects Congressional intent would, given the broad delegation of power, usurp the agency’s authority to implement the intent of Congress in the first instance.²⁷ Upon concluding that 19 C.F.R. § 10.16(c) constituted a permissible interpretation of an ambiguous statute, the Federal Circuit also upheld Customs’ underlying application of the regulation in its finding that “permapressing” was an operation not “incidental to the assembly process.”²⁸

In a companion decision to *Hagggar Apparel—Levi Strauss & Co. v. United States*²⁹—the Federal Circuit also affirmed Customs’ reliance on 19 C.F.R. § 10.16 to determine whether merchandise assembled outside the United States from U.S.-origin components qualified for a partial duty exemption under subheading 9802.00.80.³⁰ In this instance, the merchandise was denim fabric shipped to Guatemala for assembly and “stonewashing” prior to U.S. importation.³¹ The procedural history of *Levi Strauss* was identical to that of *Hagggar Apparel*,³² and the court incorporated by reference its analysis in *Hagggar Apparel*.³³

In *Ciba-Geigy Corp. v. United States*,³⁴ the Federal Circuit affirmed a tariff classification decision of the Court of International Trade regarding certain synthetic organic coloring matter, known as “PERGASCRIPTS,” used to produce carbonless copy paper.³⁵ Ciba-Geigy sought to overturn Customs’ classification of PERGASCRIPTS as “synthetic organic coloring matter” under HTSUS Heading 3204, arguing instead for classification as “ink” under Heading 3215.³⁶

25. *Id.*

26. *Id.* at 1342.

27. *Id.*

28. *Id.*

29. 222 F.3d 1344 (Fed. Cir. 2000).

30. *Levi Strauss*, 222 F.3d at 1346.

31. *Id.* at 1345.

32. The underlying Customs ruling was that the merchandise at issue did not fall under subheading 9802.00.80 because the processing operations, performed outside the country, were not incidental to the assembly process. *Id.* at 1345-46. Customs’ decision was affirmed first by the Court of International Trade, then by the Federal Circuit, and reversed by the Supreme Court.

33. *Id.* at 1346-47.

34. 223 F.3d 1367 (Fed. Cir. 2000).

35. *Id.* at 1369.

36. *Id.*

Applying a *de novo* standard of review,³⁷ but also clarifying that Customs classification decisions are presumed to be correct, the Federal Circuit rejected *Ciba-Geigy's* contention that ambiguities in the notes to Chapter 32 compelled classification under Heading 3215.³⁸ The dispute turned on the interpretation of Note 1(a) to Chapter 32, which excludes from that chapter “separate chemically defined elements or compounds (except those of heading . . . 3204. . . .”³⁹ *Ciba-Geigy* argued that Note 1(a) is ambiguous, and does not direct where in Chapter 32 a specific “synthetic organic coloring matter” must be classified once it is included in Chapter 32.⁴⁰ The Federal Circuit disagreed, holding that, read in conjunction with Note 2(f) to Chapter 29,⁴¹ Note 1(a) is clear that any “separate chemically defined compound” (such as PERGASCRIPTS) is classifiable only under Heading 3204.⁴² In reaching this decision, the court found it significant that the chapter notes failed to exclude Heading 3215 classification from the general rule that “separate chemically defined compounds” cannot be classified under Chapter 32.⁴³ Notably, the court also rejected *Ciba-Geigy's* argument, pursuant to General Rule of Interpretation (“GRI”) 3(a), that Heading 3215 offered a more specific product description than did Heading 3204.⁴⁴ According to the court, that argument amounted to a request “to place the cart before the horse,” because a product must in fact be classifiable in the more specific heading before the GRI 3 specificity requirement can be applied.⁴⁵ As noted, however, the Federal Circuit found classification under Heading 3215 to be precluded—notwithstanding the arguable specificity of that heading.⁴⁶

In *JVC Co. of America v. United States*,⁴⁷ the Federal Circuit again affirmed a decision by the Court of International Trade to sustain a

37. *Id.* at 1371 (citing *Baxter Healthcare Corp. of Puerto Rico v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) and *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994)).

38. *Id.* at 1372.

39. *Id.* at 1369 (quoting HTSUS, Chap. 32, Note 1(a) (1992)).

40. *Id.* at 1372.

41. *Id.* at 1370 (concluding that note 2(f) excludes, among other things, a “synthetic organic coloring matter” from classification under Chapter 29).

42. *Id.* at 1370.

43. *Id.* at 1373.

44. *Id.* at 1372. GRI 3(a) provides that “[t]he heading which provides the most specific description shall be preferred to headings providing a more general description.” *Id.* The GRIs are an integral part of the legal text of the HTSUS.

45. *Id.*

46. *Id.*

47. 234 F.3d 1348 (Fed. Cir. 2000).

Customs tariff classification.⁴⁸ The lower court granted the government's motion for summary judgment that certain video camera recorders imported by JVC were properly classified under HTSUS subheading 8525.30.00 as "television cameras."⁴⁹ JVC sought classification under certain residual provisions (i.e., provisions covering unspecified or "other" articles) elsewhere in HTSUS Chapters 84 or 85.⁵⁰ Applying a *de novo* standard of review⁵¹—but also stating that "considerable deference" was owed the trial court⁵²—the Federal Circuit rejected JVC's arguments, including that its camcorders were "more than" mere television cameras because they also had a recording function.⁵³ The court noted that the question whether the "more than" doctrine applied to cases involving the HTSUS (as opposed to its predecessor, the Tariff Schedules of the United States, or "TSUS") was "an issue of first impression,"⁵⁴ and ruled on this question for future classification disputes by holding that it did not.⁵⁵ The court concluded more broadly that the GRIs prescribed by statute, which fully and systematically set standards for classification, supercede the "more than" doctrine created by the courts and preclude its application to HTSUS cases.⁵⁶ The court also dismissed JVC's reliance on Federal Circuit cases supposedly establishing a common meaning of the term "television camera" because those cases, like the "more than" doctrine, construed the TSUS rather than the HTSUS.⁵⁷

In *North American Processing Co. v. United States*,⁵⁸ the Federal Circuit affirmed the lower court's classification of certain bovine fat trimmings containing both meat and fat as "meat" under HTSUS

48. *Id.* at 1350.

49. *JVC Co. of Am. v. United States*, 62 F. Supp. 2d 1132, 1133 (Ct. Int'l Trade 1999), *aff'd*, 234 F.3d 1348 (Fed. Cir. 2000).

50. *JVC Co.*, 234 F.3d at 1350.

51. *Id.* at 1351 (citing *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999)).

52. *Id.* (quoting *Elekta Instrument S.A. v. O.U.R. Scientific Int'l, Inc.*, 214 F.3d 1302, 1306 (Fed. Cir. 2000)).

53. *Id.* at 1353.

54. *Id.* at 1353. The court acknowledged that a series of prior Federal Circuit decisions involving cases under the HTSUS had appeared to approve of application of the "more than" doctrine. *Id.* The court, however, distinguished those earlier cases, finding that this issue was not "squarely presented" to the court previously. *Id.* (quoting *UMC Elecs. Co. v. United States*, 816 F.2d 647, 654 (Fed. Cir. 1987)).

55. *Id.* at 1354.

56. *Id.*

57. *Id.* at 1354-55 (citing *Mitsubishi Int'l Corp. v. United States*, 182 F.3d 884, 886 (Fed. Cir. 1999) and H.R. CONF. REP. NO. 100-576, at 549-50 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582-83).

58. 236 F.3d 695 (Fed. Cir. 2001).

subheading 0202.30.60.⁵⁹ The court departed from its usual explication of the standard of review and presented it as entailing a two-step process: first, ascertaining the proper meaning of the specific terms in the tariff provision, a question of law; and second, determining whether the merchandise at issue fits within such terms, a question of fact.⁶⁰ The court further stated that it exercised “complete and independent review” over the first step, but reviewed the second “for clear error.”⁶¹ Applying this standard, the Federal Circuit rejected North American Processing’s arguments seeking classification of the imported fat trimmings as “fats,” rather than as “meat,” under HTSUS subheading 1502.00.00.⁶² Citing the Explanatory Notes to Chapter 2, which state that “fat present in the carcass or adhering to meat is treated as forming part of the meat,”⁶³ as well as USDA regulations setting forth a comparable definition of “meat,”⁶⁴ the court reasoned that the imported merchandise could only be classified as meat under subheading 0202.30.60.⁶⁵

The Federal Circuit again affirmed the lower court’s tariff classification decision—this time involving plywood made from tropical hardwoods in Brazil and classified under HTSUS subheading 4412.12.20—in *Russell Stadelman & Co. v. United States*.⁶⁶ In this instance, the dispute centered around the commercial meaning of “Baboen,” a term used in subheading 4412.11 to designate tropical wood, but not defined in the HTSUS or legislative history.⁶⁷ While the importer, Stadelman, sought classification of the plywood under subheading 4412.11, Customs had classified the plywood under a

59. *Id.* at 696.

60. *Id.* at 697 (citing *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999)).

61. *Id.*

62. *Id.* at 698.

63. *Id.* The court noted that the Explanatory Notes are “not legally binding or dispositive,” but “may be consulted for guidance” and that they “are generally indicative of the proper interpretation of the various HTSUS provisions.” *Id.* (citing *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 n.1 (Fed. Cir. 1999)). The Explanatory Notes form part of the Harmonized Commodity Description and Coding System, as maintained by the Customs Cooperation Council, now known as the World Customs Organization (“WCO”). See *Jewelpak Corp. v. United States*, 97 F. Supp. 2d 1192, 1195 n.6 (Ct. Int’l Trade 2000) (stating that the Notes are, according to the WCO, the official interpretation of the scope of HCDGS, which forms the basis for HTSUS).

64. 236 F.3d 695, 698 (Fed. Cir. 2001) (citing 9 C.F.R. § 301.2 (2000), which defines “meat” as “muscle . . . with or without the accompanying and overlying fat”).

65. *Id.*

66. 242 F.3d 1044 (Fed. Cir. 2001).

67. *Id.* at 1048. Subheading 4412.11 provides for plywoods “[w]ith at least one outer play of the following tropical woods: . . . Baboen.” *Id.* at 1047.

residual provision for “other” plywood, subheading 4412.12.20.⁶⁸ In construing “Baboen,” the court explained that, absent evidence to the contrary, the meaning of a tariff term that is not defined in the HTSUS or legislative history must be its ordinary or dictionary meaning.⁶⁹ It also clarified, however, that the ordinary or dictionary definition is trumped by a “commercial meaning in existence which is definite, uniform, and general throughout the trade.”⁷⁰ The court further clarified, citing longstanding Supreme Court jurisprudence, that only commercial use in the United States is relevant in construing the tariff term.⁷¹ While some evidence existed that “Baboen” could describe the plywood at issue outside the United States, the Federal Circuit, upon examining a variety of general and technical sources, concluded that “Baboen,” as understood in the United States, could not describe the merchandise.⁷² The court thus affirmed the classification of the plywood at issue in a residual category for “other” plywood, subheading 4412.11.20.⁷³

In *General Electric Co. Medical Systems Group v. United States*,⁷⁴ the Federal Circuit reversed the classification decision of the Court of International Trade with respect to multifunction cameras (“MFCs”) used with computerized tomography X-ray scanners.⁷⁵ Citing *Mead Corp. v. United States*, the court noted that it had no obligation to defer to a Customs classification ruling that did not explicitly interpret an HTSUS provision unless Customs had issued a regulation.⁷⁶ The court also clarified at the outset that, under GRI 3(a), headings providing more specific descriptions are preferable to headings providing less specific descriptions.⁷⁷ The Federal Circuit

68. *Id.* at 1046.

69. *Id.* at 1048 (citing *Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984)).

70. *See id.* (citing *Rohm*, 727 F.2d at 1097) (noting that courts may only apply commercial meanings if both Congress and all of the trade would understand the meaning at the time the law was enacted).

71. *Id.* at 1049 (citing *Two Hundred Chests of Tea, Smith*, 22 U.S. 430, 439 (1824)).

72. *Id.* at 1050 (examining through a lexicographic analysis).

73. *Id.*

74. 247 F.3d 1231 (Fed. Cir. 2001), *amended by* 273 F.3d 1070 (Fed. Cir. 2001).

75. *Id.* at 1232.

76. *Id.* at 1234 (citing *Mead Corp. v. United States*, 185 F.3d 1304, 1306-07 (Fed. Cir. 1999), *cert. granted*, 530 U.S. 1202 (2000), *vacated*, 533 U.S. 218 (2001)). In its amended opinion, based on the decision of the Supreme Court in *Mead*, the Federal Circuit issued a replacement paragraph describing the revised standard of review applicable to Customs tariff classification decisions. *Gen. Elec.*, 273 F.3d at 1071 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001)) (stating that a court must review a customs classification issued without an explicit regulation in accordance with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

77. *Gen. Elec.*, 247 F.3d at 1235.

reversed the lower court's classification of the MFCs under Heading 9006 as fixed focus cameras because, as it explained, merchandise must be classified in its condition as imported,⁷⁸ and the MFCs at issue could, in that condition, only be used as accessories to computerized tomography X-ray equipment.⁷⁹ The court also found that the imported MFCs were "combination apparatuses" because each included both a camera assembly and a separate display monitor.⁸⁰ The court then held that Heading 9022, which described an "apparatus based on the use of x-rays," provided the most specific description of the MFCs.⁸¹ Notably, the court rejected Customs' argument, based on the Explanatory Notes,⁸² that the MFCs could not be classified under Heading 9022 because, in their condition as imported, they could not generate X-rays.⁸³ The court characterized the Explanatory Notes as "non-binding,"⁸⁴ and held that the statutory language clearly contemplated the inclusion in Heading 9022 of articles that do not, by themselves, generate X-rays.⁸⁵

In *Heartland By-Products, Inc. v. United States*,⁸⁶ due in part to the Supreme Court's revision of the applicable standard of review in *Mead*, the Federal Circuit affirmed a Customs classification ruling that had been reversed by the Court of International Trade.⁸⁷ The dispute involved the appropriate HTSUS classification of certain sugar syrups—some of which are under a Tariff Rate Quota ("TRQ"), and others of which are not.⁸⁸ In 1995, Heartland By-Products obtained a

78. *Id.* (citing *Rollerblade, Inc. v. United States*, 112 F.3d 481, 487 (Fed. Cir. 1997)).

79. *Id.*

80. *Id.*

81. *Id.* The court's analysis pertained to ninety-seven of ninety-eight MFCs imported by General Electric. *Id.* at 1232. The single MFC was like the others except that it included a shield that enabled it to be used in connection with magnetic resonance imaging ("MRI") systems. *Id.* The court classified this MFC under subheading 9018.90.80. *Id.* at 1236. In its amended opinion, and based on the agreement of the parties to the litigation, the court reclassified this MFC under subheading 9018.19.80, noting that this subheading was more accurate for MFCs used with MRI systems than the earlier classification. *Gen. Elec.*, 273 F.3d at 1071.

82. *Gen. Elec.*, 247 F.3d at 1236 (stating that Explanatory Notes are non-binding and do not require that an accessory device be imported with an apparatus).

83. *Id.* at 1236.

84. *Id.* (citing *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994)).

85. *Id.*

86. 264 F.3d 1126 (Fed. Cir. 2001).

87. See *Heartland By-Products, Inc. v. United States*, 74 F. Supp. 2d 1324, 1344 (Ct. Int'l Trade 1999), *rev'd*, 264 F.3d 1126 (Fed. Cir. 2001) (finding that Customs abused its discretion in classifying the product inconsistently with the Tariff statute).

88. *Heartland By-Products*, 264 F.3d at 1128-29. Specifically, sugar syrups, classified under HTSUS subheading 1702.90.10 and 1702.90.20, are subject to the TRQ, while syrups classified under HTSUS subheading 1702.90.40 are not. *Id.* at 1129.

ruling letter from Customs classifying the syrups it intended to import under a subheading not subject to the TRQ;⁸⁹ however, U.S. interests opposing this classification sought its review, and in 1999 Customs published notice revoking the earlier ruling, and reclassifying the syrups at issue under a subheading subject to the TRQ.⁹⁰ Heartland By-Products then filed a complaint with the Court of International Trade,⁹¹ which declared Customs' revocation ruling unlawful and ordered classification of the syrups under HTSUS subheading 1702.90.40, as they had been classified prior to the revocation ruling.⁹² The United States and certain U.S. interests appealed the court's decision.⁹³

In articulating the applicable standard of review, the Federal Circuit noted that since issuance of the decision below, the Supreme Court had ruled, in *Mead*, that courts may defer to Custom classifications depending on their power to persuade, pursuant to the Court's 1944 decision in *Skidmore v. Swift & Co.*⁹⁴ The Federal Circuit proceeded to review the lower court's reversal of the Customs revocation ruling—reviewing it in particular for completeness and logic and against relevant sources and prior interpretations⁹⁵—and reversed the decision of the Court of International Trade.⁹⁶ The Federal Circuit identified one factor militating against deference to the revocation ruling, i.e., its inconsistency with the underlying 1995 ruling, but held that this inconsistency was not, by itself, a basis for denying deference to the revocation ruling given that the earlier ruling was not issued pursuant to a notice and comment process, and given that it had not addressed the specific technical points that gave rise to Customs' revocation in 1999.⁹⁷ The Federal Circuit also disagreed with the lower court's reading of the applicable HTSUS

89. *See id.* at 1129 (citing Priv. Ltr. Rul. 810329 (May 15, 1995)) (agreeing with plaintiff Heartland By-Products that because syrup was not lactose, maple, glucose, or fructose, it could not be classified under heading subject to a tariff).

90. *Id.* at 1131 (citing Priv. Ltr. Rul. 33, Cust. Bull. No. 35/36, at 41 (Sept. 8, 1999)).

91. Heartland By-Products obtained jurisdiction under 28 U.S.C. § 1581(h), which permits the Court of International Trade to review the classification of goods prior to importation if the party bringing the challenge can show that irreparable harm will result if judicial review is not obtained prior to importation. *Heartland By-Products*, 74 F. Supp. 2d at 1326, 1329-32.

92. *Id.* at 1345.

93. *Heartland By-Products*, 264 F.3d at 1128.

94. *Id.* at 1133 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001) and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

95. *Id.* at 1135 (citing *Mead*, 533 U.S. at 220).

96. *Id.* at 1136-37 (finding that the Court of International Trade should have deferred to the Customs revocation because it met the *Mead* standard).

97. *Id.* at 1136.

provisions and Explanatory Notes, describing its construction of these provisions as unduly “narrow.”⁹⁸

In *Rocknel Fastener, Inc. v. United States*,⁹⁹ the Federal Circuit affirmed the lower court’s classification of certain metal fasteners imported by Rocknel Fastener from Japan.¹⁰⁰ Customs placed the fastener entries under HTSUS subheading 7318.15.80, a residual subheading covering certain “other” threaded fasteners.¹⁰¹ Rocknel Fastener protested, claiming classification under subheading 7318.15.20, which covers certain “bolts.”¹⁰² The court explained at the outset that where, as here, a tariff term is not statutorily defined, the term’s common meaning applies, and that the common meaning may be discerned by consulting various sources, such as dictionaries and lexicographic or scientific authorities.¹⁰³ The court also acknowledged the Supreme Court’s recent holding in *Mead*, requiring the reviewing court to take into account the persuasiveness of the decision under review.¹⁰⁴ The issue of statutory construction before the Federal Circuit hinged on whether the fasteners at issue were “bolts” or “screws.”¹⁰⁵ Applying longstanding definitions of fasteners embodied in American National Standards Institute (“ANSI”) specifications, Customs’ classification essentially held the latter.¹⁰⁶ The Federal Circuit tested Customs’ analysis by reference to a variety of technical sources, including the Millwrights and Mechanics Guide, Machinery’s Handbook, as well as to Webster’s and American Heritage Dictionaries,¹⁰⁷ and found that the ANSI specifications were consistent with the dictionary definitions.¹⁰⁸ The court also rejected Rocknel Fastener’s proposed alternate definitions, concluding that because Rocknel Fastener’s alternative definitions were not more consistent with the common meaning of the terms, Customs’ classification was appropriate.¹⁰⁹

98. *Id.*

99. 267 F.3d 1354 (Fed. Cir. 2001).

100. *Rocknel Fastener, Inc. v. United States*, 118 F. Supp. 2d 1238, 1238-39 (Ct. Int’l Trade 2000), *aff’d*, 267 F.3d 1354 (Fed. Cir. 2001) (classifying fasteners as screws under subheading 7318.15.80 and denying plaintiff’s motion for summary judgment to classify fasteners as bolts under subheading 7318.15.20).

101. *Rocknel Fastener*, 267 F.3d at 1356.

102. *Id.*

103. *Id.* at 1356-57 (citing *C.J. Tower & Sons v. United States*, 673 F.2d 1268, 1271 (C.C.P.A. 1982)).

104. *Id.* at 1357 (citing *United States v. Mead Corp.*, 533 U.S. 218, 220 (2001)).

105. *Id.* at 1356.

106. *Id.* at 1358-59.

107. *Id.* at 1359-60.

108. *Id.* at 1360.

109. *Id.* at 1361.

The Federal Circuit again affirmed the lower court in *Rollerblade, Inc. v. United States*,¹¹⁰ a case involving in-line skating protective gear. Again applying *Mead* deference principles, the Federal Circuit affirmed the Court of International Trade.¹¹¹ Rollerblade contended that the protective gear should be classified as “other accessories” under HTSUS subheading 9506.70.2090.¹¹² Agreeing with the lower court, however, the Federal Circuit found that the applicable HTSUS provisions did not define “accessories,” such that it was appropriate to turn to the common meaning of the term.¹¹³ That analysis, in turn, led to the conclusion that the protective gear could not be classified as accessories to in-line skates because the gear is not physically connected to and does not contact the skates.¹¹⁴ Moreover, the protective gear merely provides skaters with comfort, but is not necessary to the safe operation of the skates.¹¹⁵ The court concluded that Customs did not err in classifying the protective gear in the most appropriate residual category.¹¹⁶

In *Mead Corp. v. United States*,¹¹⁷ on remand from the Supreme Court,¹¹⁸ the Federal Circuit for the second time reversed the Court of International Trade’s affirmance of a Customs classification ruling.¹¹⁹ The original judgment of the Federal Circuit in *Mead* was reversed for failure to apply deference under *Skidmore*,¹²⁰ however, even applying the more deferential standard required by the Supreme Court, the Federal Circuit held that Customs’ reasoning was unpersuasive and reversed the classification ruling.¹²¹ The merchandise at issue was five models of Mead’s day planners, classified by Customs under HTSUS

110. 282 F.3d 1349 (Fed. Cir. 2002).

111. *Rollerblade, Inc. v. United States*, 116 F. Supp. 2d 1247, 1257 (Ct. Int’l Trade 2000), *aff’d*, 282 F.3d 1349 (Fed. Cir. 2002) (holding that Customs properly classified product under subheading 9506.99.6080).

112. *Rollerblade*, 282 F.3d at 1351.

113. *Id.* at 1352-53.

114. *Id.* at 1353 (citing *Trans Atl. Co. v. United States*, 48 C.C.P.A. 30 (1960)).

115. *Id.*

116. *Id.* at 1354 (citing *EM Indus. v. United States*, 999 F. Supp. 1473, 1480 n.9 (Ct. Int’l Trade 1998)).

117. 283 F.3d 1342 (Fed. Cir. 2002).

118. *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (requiring lower court to consider case under *Skidmore* standard).

119. *Mead*, 283 F.3d at 1344.

120. *Mead*, 533 U.S. at 227 (holding that an agency’s interpretation is entitled to deference because of its expertise).

121. The Federal Circuit explained that, “[w]hile this court . . . recognizes its responsibility to accord a classification ruling the degree of deference commensurate with its power to persuade, this court also recognizes its independent responsibility to decide the legal issue regarding the proper meaning and scope of the HTSUS terms.” *Mead*, 283 F.3d at 1346 (citing *Rocknel Fastener*, 267 F.3d at 1358).

subheading 4820.10.20 as bound diaries.¹²² Mead sought classification under subheading 4820.10.40, a residual basket provision, arguing that the day planners were neither bound nor diaries.¹²³ The Federal Circuit first analyzed whether Customs and the lower court reasonably concluded that the planners were diaries.¹²⁴ Relying on dictionary definitions, and noting in particular the limited amount of space that the planners provided for “detailed notations about events, observations, feelings, or thoughts,” the court concluded that the planners were not diaries.¹²⁵ The court also considered whether Mead’s planners were “bound,” and again disagreed with Customs and the lower court.¹²⁶ Relying on both the structure of the HTSUS and dictionary definitions, the court ruled that the concept of binding did not encompass loose-leaf binding.¹²⁷ In light of this analysis, the court concluded that Customs’ classification was not persuasive under *Skidmore* deference.¹²⁸

In *Franklin v. United States*,¹²⁹ the Federal Circuit reversed the lower court’s grant of summary judgment to the United States with respect to the classification of imported Japanese coral sand packets used to purify water.¹³⁰ Customs classified the coral sand packets under HTSUS subheading 2106.90.99, a residual basket provision covering food preparations.¹³¹ Franklin sought classification under subheading 8421.20.00, which includes machinery used to filter and purify water.¹³² Citing *Mead*, *Rollerblade*, and *Rocknel Fastener*, the court stated that its review would be based on the persuasiveness of Customs’ classification decision.¹³³ The court turned first to Franklin’s contention that the principal purpose of the coral sand packets was to “purify” water, and agreed that the packets should be classified under 8421.20.00.¹³⁴ Because the coral sand removed unwanted chlorine, bacteria, and acidity from water, the court found it fit the definition of purify—“to remove unwanted constituents from a

122. *Id.* at 1344.

123. *Id.* at 1345 (noting that under this subheading, Mead would not owe an import tariff).

124. *Id.* at 1346-47.

125. *Id.* at 1348 (arguing that a day planner is used to plan future events, while diaries account past events).

126. *Id.* at 1350.

127. *Id.* at 1349-50 (finding that a book is bound if it is permanently secured).

128. *Id.* at 1350.

129. 289 F.3d 753 (Fed. Cir. 2002).

130. *Franklin v. United States*, 135 F. Supp. 2d 1336 (Ct. Int’l Trade 2001), *rev’d*, *Franklin v. United States*, 289 F.3d 753 (Fed. Cir. 2002).

131. *Franklin*, 289 F.3d at 755.

132. *Id.* at 756.

133. *Id.* at 757.

134. *Id.* at 758.

substance.”¹³⁵ The court turned next to whether any basis existed for the classification of the sand packets under subheading 2106.90.99, i.e., as a food preparation.¹³⁶ Noting that GRI 3(a) requires classification under the HTSUS Heading providing the most specific description of the product at issue, the court found Heading 8421 provided a more specific description of the coral sand packets than classification as a food preparation.¹³⁷ The court further agreed with Franklin’s argument that coral sand packets are not a food preparation at all because the sand packets are not consumed when placed in water, but purify the water.¹³⁸ The Federal Circuit concluded that the underlying classification decision was not persuasive under *Skidmore*.¹³⁹

Finally, in *Jewelpak Corp. v. United States*,¹⁴⁰ the Federal Circuit affirmed a Court of International Trade decision involving the reclassification of Jewelpak’s imported jewelry boxes.¹⁴¹ The first issue before the Federal Circuit was whether Customs was required, pursuant to 19 U.S.C. § 1315(d) and 19 C.F.R. § 177.10(c)(2), to publish notice of its intended reclassification of the jewelry boxes.¹⁴² Jewelpak contended that the original classification constituted an established and uniform practice (“EUP”) under the precursor to the HTSUS—the TSUS—such that reclassification, which occurred well after the transition to the HTSUS, triggered the statutory publication obligation under § 1315.¹⁴³ Relying heavily on an earlier decision defining the establishment and rescission of EUPs, the Federal Circuit ruled that Jewelpak had failed to meet its burden that any EUP had been applicable.¹⁴⁴ The Federal Circuit also rejected Jewelpak’s related argument that, given the absence of a published notice of the intended reclassification, it was prejudiced.¹⁴⁵ The court

135. *Id.* (quoting *Noss Co. v. United States*, 588 F. Supp. 1408, 1412 (Ct. Int’l Trade 1984)).

136. *Id.* at 760.

137. *Id.*

138. *Id.* at 760-61 (differentiating the coral sand packets from tea bags because a tea bag is placed in water with the intent of drinking the tea, whereas the packets are intended to purify).

139. *Id.* at 761.

140. 297 F.3d 1326 (Fed. Cir. 2002).

141. *Jewelpak Corp. v. United States*, 131 F. Supp. 2d 100 (Ct. Int’l Trade 2001), *aff’d*, 297 F.3d 1326 (Fed. Cir. 2002).

142. *Jewelpak*, 297 F.3d at 1331.

143. *Id.* at 1332.

144. *Id.* at 1332-34 (citing *Heraeus-Amersil, Inc. v. United States*, 795 F.2d 1575 (Fed. Cir. 1986)). The court characterized *Heraeus* as the case most relevant to its analysis, and admonished Jewelpak’s counsel for failing to cite it in its opening brief.

145. *Id.* at 1334.

found it was unreasonable to find that Jewelpak had been prejudiced by the lack of published notice of the change in classification because it had actual notice.¹⁴⁶ In addition, the Federal Circuit rejected Jewelpak's challenge to the Court of International Trade's determination as to the common meaning of "jewelry box" as used in the HTSUS.¹⁴⁷ The Federal Circuit found the lower court had correctly determined the common meaning of "jewelry box" based on the GRIs and relevant caselaw, and that Jewelpak had failed to identify any errors in that reasoning.¹⁴⁸ Finally, the Federal Circuit dismissed as meritless, without explaining its analysis, Jewelpak's contention that action by the International Trade Commission and the President was necessary to justify Customs' reclassification.¹⁴⁹

Judge Gajarsa dissented from the majority opinion, finding that Customs had indeed departed from an EUP, and that, because the effect of the change was to impose a higher tariff rate, the notice and comment requirement of 19 U.S.C. § 1315(d) applied.¹⁵⁰ Judge Gajarsa also criticized the majority opinion for undermining the policy that § 1315(d) seeks to serve—to facilitate efficient international trade by permitting investors to rely on established practices and the knowledge that Customs will give notice before raising duty rates.¹⁵¹

B. Valuation Issues

During the three-year period being reviewed, three cases involving the valuation of imported merchandise for Customs appraisal purposes reached the Federal Circuit, and in two of the three instances, the Federal Circuit reversed. The valuation statute, 19 U.S.C. § 1401a, establishes that the baseline for appraisal of imported merchandise is its "transaction value."¹⁵² The "transaction value" is defined as "the price actually paid or payable for the merchandise when sold for exportation to the United States," and is subject to certain statutorily enumerated adjustments and exceptions.¹⁵³

First, *Century Importers, Inc. v. United States*¹⁵⁴ involved the importation of Canadian beer by Century Importers. Customs

146. *Id.*

147. *Id.* at 1336.

148. *Id.* at 1336-37.

149. *Id.* at 1337.

150. *Id.* at 1337-38 (Gajarsa, J., dissenting).

151. *Id.* at 1340.

152. 19 U.S.C. § 1401a(a)(1)(A) (2000).

153. 19 U.S.C. § 1401a(b)(1).

154. 205 F.3d 1308 (Fed. Cir. 2000).

initially assessed duties for the imported beer according to the invoice price.¹⁵⁵ However, based on a separate agreement in which the Canadian exporter agreed to reimburse Century Importers for U.S. import duties, Century Importers initiated an action in the Court of International Trade seeking adjustment of the transaction value, and a partial refund of duties paid, to reflect the duty reimbursements from the Canadian exporter.¹⁵⁶ Century Importers argued that, by agreeing to the duty reimbursement scheme, the exporter had actually reduced the price of the beer.¹⁵⁷ The Court of International Trade agreed with Century Importers, ordering adjustment of the transaction value as sought by Century Importers,¹⁵⁸ but the Federal Circuit reversed.¹⁵⁹ Noting that Customs decisions are entitled to a presumption of correctness,¹⁶⁰ the Federal Circuit reviewed the applicable provisions of the valuation statute, including §§ 1401a(b)(3) and (4).¹⁶¹ The court determined that because Century Importers had not separately identified the duty amount to be reimbursed on its invoices, Customs had no authority to deduct this amount in calculating the transaction value.¹⁶² The court specifically noted that, under § 1401a(b)(4)(B), Customs was precluded from taking into account post-importation “rebates” in establishing transaction value.¹⁶³ The court also found that 19 U.S.C. § 1520(c)(1), which authorized revision of Customs entry papers for the correction of clerical and other inadvertent errors, did not apply because Century Importers had acted “negligently” rather than inadvertently.¹⁶⁴

Judge Newman dissented from the panel majority’s decision, pointing out that Customs had acknowledged it would have valued the merchandise as proposed by Century Importers when entry papers were filed if the invoices had expressly reflected the reimbursement agreement.¹⁶⁵ Judge Newman posited that the failure of the invoices to reflect this fact was the kind of error that section

155. *Id.* at 1310.

156. *Id.*

157. *Id.*

158. *Century Imps., Inc. v. United States*, 19 F. Supp. 2d 1124 (Ct. Int’l Trade 1998), *vacated*, 205 F.3d 1308 (Fed. Cir. 2000).

159. *Century Imps.*, 205 F.3d at 1309.

160. *Id.* at 1311.

161. 19 U.S.C. § 1401a(b)(3)-(4) (2000) (stating that the transaction value does not include duties listed separately).

162. *Century Imps.*, 205 F.3d at 1311-12.

163. *Id.* at 1311.

164. *Id.* at 1312-13.

165. *Id.* at 1313 (Newman, J., dissenting).

1520(c)(1) of the statute was designed to encompass.¹⁶⁶ Judge Newman also charged the panel majority with misunderstanding the nature of the payments from the Canadian exporter to Century Importers, arguing these payments were not a rebate but part of the underlying agreement between the parties establishing the transfer price.¹⁶⁷

Second, *Fabil Manufacturing Co. v. United States*¹⁶⁸ involved a Customs regulation authorizing post-importation reductions in the assessed valuation of merchandise if the merchandise is damaged when it is imported.¹⁶⁹ The Court of International Trade rejected Fabil Manufacturing's claim for a full reduction in the assessed value of certain defective merchandise because Fabil Manufacturing could not "tie" the allegedly defective merchandise to the specific entries for which it sought the reduction, and granted the government's motion for summary judgment.¹⁷⁰ The Federal Circuit, however, held that the regulation did not contain a "tying" requirement¹⁷¹ and found that Fabil Manufacturing's evidence demonstrated a prima facie case for its right to receive a refund of duties paid for the defective merchandise.¹⁷² The Federal Circuit did not direct summary judgment for Fabil Manufacturing, but ordered the Court of International Trade to conduct further proceedings consistent with its decision.¹⁷³ The Federal Circuit also criticized the Court of International Trade for requiring too high a standard of proof in its initial proceeding and clarified that the applicable standard for parties seeking revaluation of damaged merchandise is "preponderance of the evidence," not "clear and convincing."¹⁷⁴

Third, in *Luigi Bormioli Corp. v. United States*,¹⁷⁵ the Federal Circuit affirmed the lower court's grant of summary judgment for the United States in a dispute involving the treatment of certain interest charges in the valuation of glassware imported by Bormioli from its Italian

166. *Id.* at 1314.

167. *Id.* at 1314-15.

168. 237 F.3d 1335 (Fed. Cir. 2001).

169. 19 C.F.R. § 158.12 (2002).

170. *Fabil Mfg. Co. v. United States*, 56 F. Supp. 2d 1183 (Ct. Int'l Trade 1999), *rev'd*, 237 F.3d 1335 (Fed. Cir. 2001).

171. *Fabil Mfg.*, 237 F.3d at 1337.

172. *Id.* at 1339.

173. *Id.*

174. *Id.* at 1339-41. The court relied in large part on its decision in *St. Paul Fire & Marine Ins. Co. v. United States*, which, it explained, holds that the civil preponderance of the evidence standard applies in cases challenging post-importation Customs decisions in the Court of International Trade, but not Customs rulings before importation. *Id.* at 1340 (citing *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763 (Fed. Cir. 1993)).

175. 304 F.3d 1362 (Fed. Cir. 2002).

parent company.¹⁷⁶ Specifically, Bormioli did not agree with Customs' inclusion in the valuation at issue of a 1.25% interest charge specified in an agreement between Bormioli and its parent.¹⁷⁷ The principal issues on appeal to the Federal Circuit were whether Treasury Directive 85-111,¹⁷⁸ which provided guidelines for the treatment of interest expenses in computing transaction value, applied in this instance and, if so, whether it was consistent with the valuation statute, 19 U.S.C. § 1401a.¹⁷⁹ Bormioli argued that "separately invoiced" charges, as it claimed were at issue, were not governed by TD 85-111 but by earlier Customs policy pronouncements.¹⁸⁰ Reviewing *de novo*, the Federal Circuit rejected this argument, explaining that "Bormioli confuses the legal inclusion of a charge in the 'price actually paid or payable' with the physical listing or invoicing of the 'price actually paid or payable'"¹⁸¹ and that TD 85-111 in fact superseded the earlier pronouncements on which Bormioli relied.¹⁸² The court also rejected Bormioli's attempt to show that summary judgment was inappropriate in this case due to material questions of fact.¹⁸³ Noting that the record established that Bormioli and its parent company did not typically adhere to the interest payment terms in their agreement, the Federal Circuit found that the lower court correctly held that the financing arrangement with Bormioli Italy for the subject charges was not in a demonstrable writing, as required by TD 85-111.¹⁸⁴

176. *Id.* at 1363.

177. *Id.* at 1365.

178. Treatment of Interest Charges in the Customs Value of Imported Merchandise, 19 Cust. B. & Dec. 258 (1985), 50 Fed. Reg. 27,886 (July 8, 1985) ("TD 85-111"). TD 85-111 provides that interest payments, whether or not included in the price actually paid or payable for merchandise, should not be considered part of dutiable value provided the following criteria are satisfied:

- (1) The interest charges are identified separately from the price of the goods;
- (2) the financing arrangement was in writing; and
- (3) where required, the buyer can demonstrate that the goods undergoing appraisal are actually sold at the price declared, and the claimed rate of interest does not exceed the level for such transaction prevailing in the country where and when the financing was provided.

Id.

179. *Luigi Bormioli*, 304 F.3d at 1365.

180. *Id.* at 1369.

181. *Id.*

182. *Id.* at 1371.

183. *Id.* at 1372 (discussing Bormioli's argument that three letters from Bormioli Italy to Bormioli satisfy TD 85-111's writing requirement, despite the parties' departure from the terms of those letters).

184. *Id.* at 1372-73.

C. Harbor Maintenance Tax

During the period 2000 through 2002, the Federal Circuit considered a wide range of issues arising out of the Supreme Court's 1998 ruling in *United States v. U.S. Shoe Corp.*,¹⁸⁵ where the court held that the so-called Harbor Maintenance Tax¹⁸⁶ ("HMT"), as applied to exports, violated the Constitution's Export Clause.¹⁸⁷ Even with this issue settled by the Supreme Court in *U.S. Shoe*, implementation of that ruling generated scores of hotly litigated cases and accounted for a substantial portion of the international trade cases before the Federal Circuit during the past three years. The Federal Circuit reversed or remanded to the Court of International Trade in roughly half of these cases.

In *Carnival Cruise Lines, Inc. v. United States*¹⁸⁸ the Federal Circuit considered whether people—or more specifically, passengers on Carnival's cruise ships—are subject to the HMT as applied to exports.¹⁸⁹ Carnival Cruise Lines prevailed before the Court of International Trade, which held that application of the HMT to passengers violates the Constitution's ban on export taxes.¹⁹⁰ The U.S. Government appealed this decision to the Federal Circuit, which reversed. The Federal Circuit first noted that cruise ship passengers are outside the scope of the Constitution's Export Clause because they are "neither 'articles' nor 'goods.'"¹⁹¹ The court further noted that, in enacting the HMT, Congress "could not and did not" transform the carriage of passengers into the export of goods and

185. 523 U.S. 360 (1995).

186. 26 U.S.C. § 4461 (2000). The HMT, enacted as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (1986), placed an *ad valorem* tax on commercial vessel operators for their use of certain ports. *Id.* The Act imposed liability for payment of the HMT on the importer in the case of imports, on the exporter in the case of exports, and on the shipper in all other cases. *Id.*

187. *U.S. Shoe*, 523 U.S. at 370 (finding that the HMT violates the Export Clause, but that exporters may be subject to user fees for harbor maintenance if those fees are proportionate to the exporter's use of the harbor). The Export Clause provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art. I, § 9, cl. 5.

188. 200 F.3d 1361 (Fed. Cir. 2000).

189. *Id.* at 1362. The HMT applies to "commercial cargo," which is defined as including "passengers transported for compensation or hire." 26 U.S.C. § 4462(a) (2000).

190. *Carnival Cruise Lines, Inc. v. United States*, 8 F. Supp. 2d 877 (Ct. Int'l Trade 1998), *rev'd*, 200 F.3d 1361 (Fed. Cir. 2000).

191. *Carnival Cruise Lines*, 200 F.3d at 1364. The court explained that delegates to the Constitutional Convention drafted the Export Clause to assure Southern States that Northern States would not oppress them through taxation of southern commercial exports, making application of the Export Clause to people inconsistent with the basic purpose of the Clause. *Id.* (citing *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 859 (1996)).

thereby bring this activity into the scope of the Export Clause.¹⁹² The Federal Circuit's analysis then turned to the Water Resource Development Act's severability clause and the question of whether, under Supreme Court severability precedent, the Act as a whole could function absent the unconstitutional export tax.¹⁹³ Applying the principle that "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted,"¹⁹⁴ the court found that the remaining portions of the Act (including the application of the HMT to passengers) could function as intended by Congress without the unconstitutional export tax clause.¹⁹⁵ The court also rejected Carnival's other contentions, including its argument that Congress would not have imposed the HMT without applying it to exports, that the Act's severability clause does not apply to the HMT, and that severance of export taxes only from the HMT could lead to conflicts with U.S. trading partners under the General Agreements of Tariffs and Trade ("GATT") rules.¹⁹⁶ On the last point, the court noted that no trading partner of the United States had formally challenged the HMT, and that Congress or the executive branch will act in such a situation.¹⁹⁷

In *Princess Cruises, Inc. v. United States*,¹⁹⁸ the Federal Circuit upheld the application of the HMT to passengers, but also considered two other issues—the application of the HMT to passenger stopovers or layovers,¹⁹⁹ and the assessment of the Arriving Passenger Fee ("APF") on passenger cruises.²⁰⁰ As in *Carnival Cruise Lines*, the Federal Circuit reversed the Court of International Trade's invalidation of the HMT

192. *Id.*

193. *Id.* at 1366-69.

194. *Id.* at 1367 (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)).

195. *Id.* (noting that Congress chose to include exports in the HMT despite its awareness that the Export Clause might invalidate that application).

196. *Id.* at 1367-69.

197. *Id.* at 1369.

198. 201 F.3d 1352 (Fed. Cir. 2000).

199. *Id.* at 1354. The HMT provides that "when a passenger boards or disembarks a commercial vessel at a port within the definition of this section, the operator of that vessel is liable for the payment of the port use fee." *Id.* at 1356 n.4 (citing 19 C.F.R. § 24.24(e)(3)(i) (2002)).

200. *Id.* at 1354; *see* 19 U.S.C. § 58c(a)(5) (2000) (imposing the APF fee on passengers arriving in the United States from abroad on commercial vessels or aircraft). Section 58c creates an exemption for passengers arriving from Canada, Mexico, U.S. territories, or adjacent islands, as well as passengers whose travel originated in the United States but was limited to those destinations. 19 C.F.R. § 24.24(g)(2)(i)(A) (2002). The APF fee is assessed based on the place the journey "originated," which Customs regulations define as "the location where the person's travel begins under cover of a transaction . . . into the customs territory of the United States." 19 C.F.R. § 24.22(g)(2)(i)(B).

as applied to passengers (the lower court did not reach the stopover issue) and remanded the APF claim for recalculation.²⁰¹ On the issue of stopovers or layovers, Princess Cruises argued that, should the Federal Circuit uphold the HMT as applied to passengers, it must also hold that the HMT does not apply to mere stopovers or layovers, because these events do not, under 19 C.F.R. § 24.24, amount to “boarding” or “disembarking.”²⁰² Citing *Haggard Apparel* and applying *Chevron* deference, the court found that application of the HMT to stopovers and layovers, as provided in the regulations, was consistent with congressional intent and therefore constituted a reasonable interpretation of the statute.²⁰³ The court reasoned that discharging and reboarding passengers at a port for shopping and sight-seeing is no different from boarding or discharging passengers at a port at the beginning or end of a cruise.²⁰⁴ The court also rejected Princess’ claim of estoppel against the government, for which Princess Cruises relied on a fax from a Customs official stating that the HMT would not apply to stopovers.²⁰⁵ With respect to the APF, the Federal Circuit again reversed the lower court’s decision and upheld Customs’ regulatory interpretation of “journey” as including all stages of an itinerary, regardless of the mode of transportation.²⁰⁶ Again citing *Haggard Apparel* and applying *Chevron* deference, the court noted that Congress had not defined “journey,” thereby leaving this task to Customs.²⁰⁷ The court also rejected Princess’ argument that the APF statute exempts any passenger whose last port of call before arriving in the United States was an exempt port.²⁰⁸ As explained by the court, under the only reasonable reading of the statute, the origin of the journey raises the exemption and not the last port of call before discharging at port in the United States.²⁰⁹

The Federal Circuit again reversed the Court of International Trade in *International Business Machines Corp. v. United States*,²¹⁰ a test

201. *Princess Cruises*, 201 F.3d at 1355.

202. *Id.* at 1358 (arguing that because neither term is defined in the statute, the court should rely on other Customs regulations for the definition).

203. *Id.* at 1360 (noting Congress’s intent to impose a fee for usage of ports and its failure to explicitly exclude stopovers or layovers with its exclusions for other uses, such as ferries).

204. *Id.*

205. *Id.*

206. *Id.* at 1361 (rejecting Princess’ argument that “journey” does not begin at the location from which the passenger left the United States, but rather at the starting point of the cruise).

207. *Id.*

208. *Id.* at 1361-62.

209. *Id.* at 1362.

210. 201 F.3d 1367 (Fed. Cir. 2000).

case involving the right of parties owed HMT refunds from the U.S. Government to collect interest on those refunds.²¹¹ The lower court held that 28 U.S.C. § 2411, which provides for interest on tax refunds, also applies to HMT refunds, and the U.S. Government appealed.²¹² The Federal Circuit noted at the outset that the issue before it was purely one of statutory construction, warranting full and independent review,²¹³ and that its analysis would focus on whether Congress had expressly waived sovereign immunity by consenting to interest payments on HMT refunds.²¹⁴ The court stated that it was “abundantly clear” that, notwithstanding the codification of the HMT as part of the Internal Revenue Code (“IRC”), Congress intended HMT to be administered and enforced as a customs duty, not a tax under the IRC.²¹⁵ The analysis, thus, turned on whether 28 U.S.C. § 2411, which expressly authorizes interest on tax refunds, is a provision related to “administration and enforcement” of the HMT.²¹⁶ Because the HMT statute did not define “administration and enforcement,” the court examined the ordinary meaning of those terms and interpreted them broadly.²¹⁷ The court found that Congress intended “administration and enforcement” to include judicial enforcement and awards of tax refund interest, in addition to agency action.²¹⁸ The court could find no other statutes expressly providing for interest on HMT refunds and concluded that the taxpayers could not receive interest on the HMT refunds without a specific grant of such relief by Congress.²¹⁹

In another post-*U.S. Shoe* test case, the Federal Circuit in *Swisher International, Inc. v. United States*²²⁰ reviewed whether Customs’ denial of a request for HMT refunds was a “protestable” decision for purposes of 19 U.S.C. § 1514(a), such that subsequent Court of International Trade jurisdiction would be available under 28 U.S.C. § 1581(a), and reversed.²²¹ The lower court held that denials of HMT

211. *Id.* at 1369.

212. *Id.*

213. *Id.* at 1370 (citing *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995)).

214. *Id.* (citing *Library of Cong. v. Shaw*, 478 U.S. 310 (1986)).

215. *Id.* at 1371. 26 U.S.C. § 4462(f)(3) provides, in pertinent part, that the HMT “shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes.”

216. *Int’l Bus. Machs.*, 201 F.3d at 1371.

217. *Id.* at 1372-73.

218. *Id.* at 1373.

219. *Id.* at 1375.

220. 205 F.3d 1358 (Fed. Cir. 2000).

221. *Id.* at 1360. 28 U.S.C. § 1581(a) provides that “[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under § 515 of the Tariff Act of 1930.”

refund requests were not protestable and, accordingly, that such denials could only be challenged pursuant to 19 U.S.C. § 1581(i), the court's "residual" jurisdiction provision.²²² As a result of the two-year statute of limitations for actions initiated under § 1581(i), the Court of International Trade found certain of Swisher's refund claims time-barred under the provision.²²³ The issue was novel because, in *U.S. Shoe*—where the Supreme Court found that the HMT violates the Constitution's Export Clause—the challenge followed a different procedural path, i.e., no Customs protest pursuant to 19 U.S.C. § 1514(a) and jurisdiction under 28 U.S.C. § 1581(i).²²⁴

Noting the existence of considerable confusion concerning the appropriate jurisdictional basis for a challenge at the time of *U.S. Shoe*, the Federal Circuit held that Swisher, or other HMT challengers, are not restricted by *U.S. Shoe* and a two-year statute of limitations.²²⁵ The Federal Circuit also cited various grounds, including decisions of the Court of International Trade, to support its finding that HMT payment issues are protestable decisions with respect to a "charge or exaction" for purposes of 19 U.S.C. § 1514(a)(2), the statute allowing for protests of customs decisions.²²⁶ Finally, the Federal Circuit noted equitable considerations to support its holding, positing that:

[I]f we were to hold that a request for refund was not a protestable decision, Swisher, and others, would be limited to recovering only that HMT paid within two years before filing suit in the Court of International Trade. Given that the constitutionality of the HMT was not seriously questioned until 1994 and not completely resolved until 1998, such a holding would bar recovery of much of the unconstitutional HMT paid by exporters between 1987 and 1998.²²⁷

In *Florida Sugar Marketing & Terminal Ass'n v. United States*,²²⁸ the Federal Circuit affirmed the lower court's ruling that the Constitution does not prohibit assessment of the HMT on shipments between the ports of different states.²²⁹ Noting that the question before it was purely legal, i.e., whether the term "exports"

222. *Swisher Int'l, Inc. v. United States*, 27 F. Supp. 2d 234, 239 (Ct. Int'l Trade 1998), *rev'd*, 205 F.3d 1358 (Fed. Cir. 2000).

223. *Id.*

224. *Id.* at 1362-63.

225. *Id.* at 1365.

226. *Id.* at 1365-67 (citing *Eurasia Imp. v. United States*, 31 C.C.P.A. 202, 211-12 (1944); *Thomson Consumer Elec., Inc. v. United States*, 62 F. Supp. 2d 1182 (Ct. Int'l Trade 1999)).

227. *Id.* at 1368.

228. 220 F.3d 1331 (Fed. Cir. 2000).

229. *Id.* at 1341.

encompasses interstate shipments, the court applied a *de novo* standard of review²³⁰ and turned to various historical sources of law in attempting to ascertain the Framers' intent as to the scope of the Export Clause.²³¹ While Florida Sugar identified an abundance of materials contemporaneous with the Constitution showing that lay usage of the term "export" included interstate shipments,²³² the Federal Circuit found that this lay usage was not dispositive in ascertaining the legal meaning of the term because a term's lay meaning is often broader than its legal definition.²³³ Instead, relying primarily on records from the 1787 Federal Convention, the court found that the debate over the scope of the Export Clause was closely linked to the importation of slaves and clearly tied to overseas commerce.²³⁴ The court also found that the nature of the North-South divide at the time of the Constitutional Convention, in particular the South's opposition to the export tax, strongly indicated that the tax under discussion related exclusively to foreign commerce.²³⁵ The court found the constitutional context of the Export Clause provided further indicators that the Clause was intended to apply only to foreign shipments.²³⁶ These indicators included the fact that the Export Clause only proscribes the activities of the federal government, making the relevant jurisdiction the federal government and not the states.²³⁷ Finally, the court rejected Florida Sugar's reading of Supreme Court jurisprudence on the issue, concluding that, aside from a single dissenting opinion that was arguably not germane, Florida Sugar had failed to cite a Supreme Court case supporting its interpretation of the Export Clause.²³⁸

*Stone Container Corp. v. United States*²³⁹ raised the procedural issue of whether initiation of a class action lawsuit for recovery of

230. *Id.* at 1333.

231. *Id.* at 1333-41 (examining the Constitutional Convention records and the applicable line of Supreme Court cases).

232. *Id.* at 1334 (explaining Florida Sugar offered newspapers, correspondence, advertisements and state statutes to demonstrate the meaning of the term "export").

233. *Id.* at 1334-35 (illustrating that the current legal definition of export refers to international commerce, whereas, a contemporary *New York Times* article uses the term export to refer to the interstate shipment of trash).

234. *Id.* at 1335-36 (citing 2 RECORDS OF THE FED. CONVENTION 220 (Max Farrand ed., 1787) (statement of J. Madison, Aug. 8, 1787)).

235. *Id.* at 1336-37 (explaining that, because the South's economy was based on exporting cash crops overseas and the North's economy was based on the domestic sale of industrial products, the South's fear that the North could discriminate against it with the export tax indicated that the tax could not have been on just interstate commerce but related to shipments from foreign countries).

236. *Id.* at 1337-38.

237. *Id.* at 1338.

238. *Id.* at 1339-41.

239. 229 F.3d 1345 (Fed. Cir. 2000). *Stone Container Corp.* was designated by the

unconstitutional HMT payments tolled the applicable two-year statute of limitations codified at 28 U.S.C. § 2636(i)²⁴⁰ and, if so, for how long.²⁴¹ Applying a *de novo* standard of review,²⁴² the Federal Circuit agreed with the Court of International Trade that, under the circumstances, tolling began with initiation of the class action, but ended upon dismissal of the class by the trial court.²⁴³ Stone Container argued the two-year statute was tolled by the 1994 filing of *Baxter Healthcare Corp. v. United States*,²⁴⁴ which sought the certification of a class of plaintiffs consisting of all persons who had paid the HMT on the export of commercial cargo.²⁴⁵ In 1996, the Court of International Trade denied class certification in *Baxter Healthcare*.²⁴⁶ However, Stone Container argued that tolling continued until such a time as any aspect of *Baxter Healthcare* could no longer be appealed,²⁴⁷ and that it would be unconstitutional to apply any statute of limitations to claims for the repayment of an unconstitutional tax.²⁴⁸ The Federal Circuit disagreed with the latter argument, holding that Supreme Court precedent clearly allowed a “relatively short” limitation period after a tax is found unconstitutional.²⁴⁹ The Federal Circuit did agree with Stone Container that tolling of the statute of limitations was dictated by the rule promulgated by the Supreme Court in *American Pipe & Construction Co. v. Utah*, which suspends the

Court of International Trade as a test case to resolve the limitations issue for thousands of individual claims for recovery of improperly collected HMT payments. *Id.* at 1347.

240. 28 U.S.C. § 2636(i) provides that:

A civil action of which the Court of International Trade has jurisdiction under § 1581 of this title, other than an action specified in subsections (a)-(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

As discussed above, 28 U.S.C. § 1581(i) is the Court of International Trade’s “residual” grant of jurisdiction.

241. *Stone Container*, 229 F.3d at 1347.

242. *Id.* at 1349.

243. *Id.* at 1347.

244. 925 F. Supp. 794 (Ct. Int’l Trade 1996).

245. *Stone Container*, 229 F.3d at 1348.

246. *Baxter Healthcare*, 925 F. Supp. at 796, 800.

247. *Stone Container*, 229 F.3d at 1348.

248. *Id.* at 1349.

249. *Id.* (quoting *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 45 (1990)). The Federal Circuit observed, following its discussion of *McKesson*, that they were clearly required to follow the Court’s guidance because the Court’s statements regarding the statute of limitations were unambiguous and carefully measured. *Id.* at 1350. The Federal Circuit also disagreed with Stone Container’s claim that, due to uncertainty surrounding the available tax refund remedies, a longer, six-year statute of limitations should apply in lieu of the two-year period specified in 28 U.S.C. § 2636(i). *Id.* The court explained, however, that the confusion claimed by Stone Container was not regarding the applicable statute of limitations, but rather whether the Court of International Trade was granted jurisdiction pursuant to 28 U.S.C. § 1581(a) or 1581(i). *Id.* at 1351.

statute of limitations for all members of a class when a class action is initiated.²⁵⁰ However, the Federal Circuit also held that the tolling ended upon dismissal of the class certification by the trial court, thereby significantly limiting the relief sought by Stone Container.²⁵¹

In *Amoco Oil Co. v. United States*,²⁵² the Federal Circuit again addressed the severability of the export provision of the HMT and affirmed the Court of International Trade's decision not to grant Amoco Oil's motion to dismiss for failure to state a claim upon which relief could be granted.²⁵³ On appeal, Amoco Oil argued that severability is a question of fact, not of law, such that it should have been afforded the opportunity by the trial court to engage in discovery and offer additional evidence.²⁵⁴ Amoco Oil also argued that Congress had not intended the export provision of the HMT to be severable, as evidenced by its understanding that a tax solely on imports would breach U.S. international obligations under GATT.²⁵⁵ Relying on recent and controlling precedent in *Princess Cruises, Inc. v. United States*²⁵⁶ and *Carnival Cruise Lines, Inc. v. United States*,²⁵⁷ the Federal Circuit quickly rejected both of Amoco Oil's arguments.²⁵⁸ The court also dismissed certain constitutional arguments made for the first time in Amoco Oil's reply brief as having been waived.²⁵⁹ Further, because Amoco Oil's counsel had failed to acknowledge in their opening briefs the controlling precedent established in *Princess Cruises* and *Carnival Cruise Lines*, the Federal Circuit admonished Amoco Oil's counsel for inappropriate conduct that plausibly violated their duty of candor toward the tribunal.²⁶⁰

In *BMW Manufacturing Corp. v. United States*,²⁶¹ the Federal Circuit affirmed the Court of International Trade's holding that Customs was authorized to assess the HMT on goods imported into a Foreign

250. *Stone Container*, 229 F.3d at 1354 (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974)).

251. *Id.* at 1355 (citing *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1378 (11th Cir. 1998)).

252. 234 F.3d 1374 (Fed. Cir. 2000).

253. *Id.* at 1375.

254. *Id.* at 1376.

255. *Id.*

256. 201 F.3d 1352, 1358 (Fed. Cir. 2000).

257. 200 F.3d 1361, 1365-69 (Fed. Cir. 2000).

258. *Amoco Oil*, 234 F.3d at 1377.

259. *Id.* (stating the court would not address Amoco's arguments regarding HMT's violation of the Uniformity and Port Preference Clauses because the arguments were not introduced in Amoco's opening brief).

260. *Id.* at 1377-78 (suggesting that in light of recent precedent, Amoco should have dropped the appeal after the cases were decided).

261. 241 F.3d 1357 (Fed. Cir. 2001).

Trade Zone (“FTZ”).²⁶² FTZs are defined as areas located at or near ports of entry into the United States which, pursuant to 19 U.S.C. §§ 81a-81u, receive preferential treatment under the U.S. customs laws.²⁶³ BMW argued that the FTZ statute’s bar on the collection of customs duties,²⁶⁴ one aspect of FTZ preferential treatment, precluded HMT import payments.²⁶⁵ Applying a *de novo* standard of review,²⁶⁶ the Federal Circuit rejected BMW’s arguments, holding first that the HMT does indeed apply to imports into FTZs because, while Congress had clearly provided certain exemptions from the HMT, it did not provide an exemption for FTZs.²⁶⁷ The court also found that HMT import charges were not custom duties exempted by the FTZ statute,²⁶⁸ reasoning that, among other things, Congress had clearly structured the HMT as a tax imposed for using ports and not for entering the United States’ customs territory.²⁶⁹

In *Thomson Consumer Electronics, Inc. v. United States*,²⁷⁰ the Federal Circuit again addressed the appropriate jurisdictional basis for the Court of International Trade’s review of HMT refund issues.²⁷¹ Thomson brought suit before the Court of International Trade challenging the constitutionality of the HMT as applied to imports, claiming residual jurisdiction under 28 U.S.C. § 1581(i).²⁷² The Court of International Trade, however, dismissed Thomson’s suit for lack of jurisdiction, holding that 28 U.S.C. § 1581(a), which governs appeals of Customs protest decisions,²⁷³ provided the only jurisdictional basis.²⁷⁴ On appeal, resolution of the issue hinged on whether it would have been futile for Thomson to invoke standard Customs protest procedures to challenge the constitutionality of the HMT as applied to imports.²⁷⁵ The Federal Circuit agreed with Thomson that filing a Customs protest would have been futile,²⁷⁶ as Customs was powerless to do anything other than passively levy the HMT.²⁷⁷ No administrative procedure existed for Thomson to exhaust before

262. *Id.* at 1359.

263. Foreign Trade Zones, 19 U.S.C. § 81b (2000).

264. 19 U.S.C. § 81c(a).

265. *BMW Mfg.*, 241 F.3d at 1360.

266. *Id.*

267. *Id.* at 1361.

268. 19 U.S.C. § 81c(a).

269. *BMW Mfg.*, 241 F.3d at 1362.

270. 247 F.3d 1210 (Fed. Cir. 2001).

271. *Id.* at 1213.

272. *Id.* at 1212.

273. Tariff Act of 1930, 19 U.S.C. § 1514 (2000).

274. *Thomson Consumer Elec.*, 247 F.3d at 1212.

275. *Id.* at 1213-14.

276. *Id.* at 1215.

277. *Id.*

initiating judicial review.²⁷⁸ Consistent with the Supreme Court's holding in *United States v. U.S. Shoe Corp.*,²⁷⁹ Thomson was authorized to avail itself of § 1581(i) residual jurisdiction in challenging the constitutionality of HMT import payments.²⁸⁰

In *U.S. Shoe Corp. v. United States*,²⁸¹ the Federal Circuit reversed the lower court's decision requiring Customs to pay interest on refunds of impermissibly collected HMT payments.²⁸² Applying a *de novo* standard of review,²⁸³ the Federal Circuit emphasized the longstanding rule that a party may only recover interest against the government if the government has explicitly waived sovereign immunity, either by contract or statute, or if the Constitution requires.²⁸⁴ Relying on its earlier decision in *International Business Machines ("IBM")*, the court ruled that no statute permitted the award of interest on refunded HMT payments.²⁸⁵ The court also rejected U.S. Shoe's various arguments that failure of the government to pay interest on HMT refunds amounted to an unconstitutional taking.²⁸⁶ The court noted in conclusion that, given the clarity of Supreme Court jurisprudence limiting the government's payment of interest absent express waivers of sovereign immunity or violation of constitutional rights, it would be an abuse of discretion for a "judge-fashioned" remedy to be applied here.²⁸⁷

Finally, *Hohenberg Bros. Co. v. United States*²⁸⁸ involved a procedure developed by the Court of International Trade for Customs to provide HMT refunds.²⁸⁹ Under the procedure, each claimant,

278. *Id.* The court explained that:

It is unsuitable to apply the exhaustion doctrine in the circumstances of the present case. There are no facts that Customs could have developed regarding whether or not the HMT was constitutional, nor did it have discretion in applying the HMT to Thomson's imports. Moreover, judicial efficiency, administrative autonomy, and the weakening of Customs as an agency are not implicated by this case. Thus, we are not faced here with a premature resort to the courts.

Id.

279. 523 U.S. 360, 365 (1998) (holding that § 1581(i) was the proper jurisdictional basis for HMT disputes).

280. *Thomson Consumer Elec.*, 247 F.3d at 1215.

281. 296 F.3d 1378 (Fed. Cir. 2002).

282. *Id.* at 1380.

283. *Id.* at 1381.

284. *Id.* (citing *Library of Cong. v. Shaw*, 478 U.S. 310, 311 (1986)).

285. *Id.* at 1381-82 (citing *Int'l Bus. Machs. Corp. v. United States*, 201 F.3d 1367, 1374 (Fed. Cir. 2000)).

286. *Id.* at 1383-85 (holding that no taking resulted in violation of the Fifth Amendment because no private property right existed in any interest associated with payment of the HMT).

287. *Id.* at 1386 (citing *Int'l Bus. Machs.*, 201 F.3d at 1374).

288. 301 F.3d 1299 (Fed. Cir. 2002).

289. *Id.* at 1302.

including Hohenberg, executed a consent judgment for the return of HMT principal and interest, depending on the outcome of the *IBM* test case.²⁹⁰ The consent judgments identified that the Court of International Trade had residual jurisdiction under 28 U.S.C. § 1581(i).²⁹¹ When the Federal Circuit in *IBM* determined that no interest could be paid on HMT refunds arising out of judgments under § 1581(i),²⁹² Hohenberg and other exporters sought to amend their consent judgments to invoke jurisdiction under § 1581(a).²⁹³ The lower court denied those motions.²⁹⁴ Hohenberg challenged the denial of the motion, arguing that the Federal Circuit's decision in *Swisher International*²⁹⁵ required the Court of International Trade to amend the jurisdictional statement in the consent judgment.²⁹⁶ The Federal Circuit disagreed, and affirmed the lower court's denial of the motion to amend.²⁹⁷ The Federal Circuit reasoned that Hohenberg could have preserved jurisdiction under § 1581(a), but that it chose not to because it desired to obtain an immediate refund of its HMT payments.²⁹⁸ As the court noted, Hohenberg elected an immediate refund, gambling that the *IBM* case would not lead to advantageous resolution of the interest issue.²⁹⁹ The court also summarily dismissed Hohenberg's other arguments, citing its recent decision in *U.S. Shoe*³⁰⁰ that neither the Constitution nor any statute mandated the payment of interest, leaving Hohenberg unable to demonstrate any entitlement to interest on HMT refunds.³⁰¹

D. Duty Drawback

Since 2000, the Federal Circuit has decided two cases involving contracts for duty drawback under 19 U.S.C. § 1313, i.e., agreements

290. *Id.*

291. *Id.* (noting that the original complaints asserted Court of International Trade jurisdiction pursuant to § 1581(a) and (i), but that the consent judgment was based solely on § 1581(i) jurisdiction).

292. *Int'l Bus. Machs.*, 201 F.3d at 1374.

293. *Hohenberg Bros.*, 301 F.3d at 1303 (noting that Hohenberg sought an award of post-summons interest under 28 U.S.C. § 2644, the section applicable to awards under 1581(a) jurisdiction).

294. *Id.*

295. 205 F.3d at 1358.

296. *Hohenberg Bros.*, 301 F.3d at 1303.

297. *Id.* The applicable standard of review was whether the lower court had abused its discretion in denying the motion. *Id.* (citing *Mass. Bay Transp. Auth. v. United States*, 254 F.3d 1367, 1378 (Fed. Cir. 2001)).

298. *Id.* at 1305.

299. *Id.* (noting that *IBM* can be read to allow interest on HMT refunds to claimants asserting jurisdiction under § 1581(a)).

300. 296 F.3d 1378 (Fed. Cir. 2002).

301. *Hohenberg Bros.*, 301 F.3d at 1306.

between importers and Customs providing for refunds of duties paid on imported merchandise that is incorporated into articles for export.³⁰² The Federal Circuit affirmed in both instances.

In *International Light Metals v. United States*,³⁰³ the Federal Circuit affirmed the Court of International Trade decision, on remand, to direct Customs to repay certain duty drawback payments to International Light Metals (“ILM”) that the company had previously refunded.³⁰⁴ The decision involved certain drawback claims filed by ILM with respect to imports of titanium sponge.³⁰⁵ Customs first allowed the drawback claims, but later reversed in part.³⁰⁶ ILM repaid as required by Customs, and subsequently filed suit in the Court of International Trade challenging Customs’ recalculation of the drawback amount.³⁰⁷ The Court of International Trade affirmed Customs’ drawback recalculation, but was subsequently reversed by the Federal Circuit, which held that ILM was entitled to repayment of a portion of the refunded drawback.³⁰⁸ On remand, the Court of International Trade ordered Customs to repay ILM a specified amount of previously refunded drawback, with interest.³⁰⁹ The U.S. Government appealed this remand decision, contending that the lower court should not have directed Customs to repay a specified amount of drawback, but should instead have remanded the issue to Customs for action consistent with the court’s interpretation of the drawback statute.³¹⁰ According to the government, the trial court’s order violated the settled principle of administrative law that a reviewing court may not dictate to the agency how it is to apply the law to the facts, where the agency has particular expertise.³¹¹ The Federal Circuit rejected this argument, holding that the only issue in the prior appeal had been Customs’ interpretation of the drawback

302. 19 U.S.C. § 1313(a) (2000).

303. 279 F.3d 999 (Fed. Cir. 2002).

304. *Id.* at 1000-01.

305. *Id.* at 1001.

306. *Id.* (Customs discovered ILM had been substituting titanium alloy scrap for titanium sponge in its production process, which it found was improper under the drawback contract).

307. *Id.* at 1002.

308. *Id.* The specific question before the Federal Circuit in the earlier *International Light Metals* case was whether certain exported titanium products were “of the same kind and quality” as certain imported titanium products for purposes of 19 U.S.C. § 1313(b). *Int’l Light Metals v. United States*, 194 F.3d 1355, 1357 (Fed. Cir. 1999). Under this provision, drawback may be requested with respect to certain merchandise substituted for the imported duty-paid merchandise, but only if the substitute merchandise is “of the same kind and quality” as the imported duty-paid merchandise. 19 U.S.C. § 1313(b) (2000).

309. *Int’l Light Metals*, 279 F.3d at 1002.

310. *Id.*

311. *Id.* at 1003.

statute, which determined the specific amount of drawback to be repaid to ILM.³¹² Accordingly, all that remained for Customs on remand was the ministerial act of repaying the amount of drawback initially approved, with interest, an action not requiring agency expertise.³¹³

In *Hartog Foods International, Inc. v. United States*,³¹⁴ the Federal Circuit affirmed the lower court's rejection of the exporter's claim that Customs should have paid interest on certain grants of duty drawback.³¹⁵ The dispute arose when the exporter, Hartog Foods, paid *ad valorem*³¹⁶ duties on imported juice products and, upon export of the merchandise, filed for drawback.³¹⁷ Customs initially denied the request.³¹⁸ Hartog Foods then initiated protest actions and, five years later, Customs paid the requested drawback without interest.³¹⁹ After unsuccessfully seeking payment of interest through another protest action, Hartog Foods brought suit in the Court of International Trade.³²⁰ The Court of International Trade granted the U.S. Government's request for summary judgment, finding that sovereign immunity principles precluded an interest award.³²¹ Hartog Foods appealed. The Federal Circuit's decision turned on application of 19 U.S.C. § 1505, which requires Customs, *inter alia*, to "refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation."³²² Applying a *de novo* standard of review³²³ and emphasizing its obligation to construe waivers of sovereign immunity strictly in favor of the government,³²⁴

312. *Id.*

313. *Id.*

314. 291 F.3d 789 (Fed. Cir. 2002).

315. *Id.* at 790.

316. The definition of *ad valorem* is "proportional to the value of the thing taxed." BLACK'S LAW DICTIONARY 53 (7th ed. 1999).

317. *Hartog Foods Int'l*, 291 F.3d at 790.

318. *Id.*

319. *Id.* at 790-91.

320. *Id.* at 791.

321. *Id.* (reporting that the Court of International Trade affirmed Customs' denial of interest for two reasons: (1) drawback moneys do not qualify as "excess moneys deposited" and (2) sovereign immunity for interest awards on drawback claims is not specifically waived under the United States Code).

322. 19 U.S.C. § 1505(b) (2000). Section 1505(c) further specifies that any qualifying interest accrues from the date estimated duties are deposited with Customs. 19 U.S.C. § 1505(c).

323. *Hartog Foods Int'l*, 291 F.3d at 791 (citing *Mead*, 283 F.3d at 1346) (explaining that while certain Customs rulings are entitled to deference proportional to their persuasiveness, Customs had decided the protest without issuance of a ruling in this case, such that no agency interpretation existed to which to defer).

324. *Id.* (citing *Library of Cong. v. Shaw*, 478 U.S. 310, 314 (1986)) (confirming applicability of the "no interest rule," i.e., that absent an express statutory waiver, the United States is immune from any requirement to pay interest).

the Federal Circuit held that “excess moneys deposited” for purposes of § 1505 applied to the overpayment of estimated duties, but not to standard drawback claims.³²⁵ The court reasoned that Hartog Food’s interest claim was not a claim for “excess moneys deposited” because the company had not paid to Customs an amount “beyond legal requirements.”³²⁶ Additionally, Customs had not, as with all standard drawback situations, held or profited from excessive collections.³²⁷ The court also found it significant that, in the Customs Modernization Act of 1993, Congress had declined to amend § 1505 to expressly authorize interest awards on duty drawbacks.³²⁸ The Federal Circuit distinguished its drawback decision in *International Light Metals*, explaining that the grant of interest on the refund of the drawback amount reclaimed by Customs was merely a way to put ILM in its rightful position before Customs’ error.³²⁹ The court also stated that *International Light Metals* did not involve standard drawback claims or implicate the sovereign immunity principles governing awards of interest by the government.³³⁰

E. Other Customs Issues

Over the period 2000 through 2002, the Federal Circuit reviewed several other Court of International Trade decisions involving aspects of U.S. customs law outside of the general categories discussed above. These decisions reflect the richness and complexity of the U.S. customs laws, as well as the numerous exceptions to the free flow of goods and services across the U.S. border. The Federal Circuit reversed in two of the three cases discussed below, in each case applying a different standard of review.

In *Sea-Land Service, Inc. v. United States*,³³¹ the Federal Circuit considered certain due process issues arising under 19 U.S.C. § 1466, which authorizes Customs to impose duties on the value of certain repairs to U.S. vessels undertaken in foreign ports.³³² In 1994, the Federal Circuit construed that statute in its decision for *Texaco Marine Services, Inc. v. United States*.³³³ The *Texaco* court modified an earlier, more restrictive interpretation of § 1466, holding that covered

325. *Id.* at 792-93.

326. *Id.* at 793.

327. *Id.*

328. *Id.* at 794.

329. *Id.*

330. *Id.* at 794-95.

331. 239 F.3d 1366 (Fed. Cir. 2001).

332. *Id.* at 1367-68.

333. 44 F.3d 1539 (Fed. Cir. 1994).

expenses were those repair expenses that would not have been incurred “but for” the repair work.³³⁴ Following *Texaco*, Customs issued guidelines, published in the Customs Bulletin, announcing the required change in practice and adoption of the “but for” test.³³⁵ Customs applied the test to certain of Sea-Land Service’s vessel repair expense entries.³³⁶ Sea-Land Service filed protests before Customs, and challenged the denial of its protests before the Court of International Trade.³³⁷ Sea-Land Service’s challenge was based on the theory that, in applying the “but for” test, Customs had violated the notice and comment procedures applicable to “interpretative rulings or decisions” as set forth at 19 U.S.C. § 1625(c).³³⁸ The Court of International Trade granted the U.S. Government’s request for summary judgment, and Sea-Land Service appealed.³³⁹

Applying a *de novo* standard of review,³⁴⁰ the Federal Circuit rejected Sea-Land Service’s arguments and affirmed the lower court’s decision.³⁴¹ The court found that Customs was not required to apply the notice and comment procedures of § 1625(c) because it was the Federal Circuit, not Customs, that prompted the change in Customs’ pre-*Texaco* interpretation of the vessel repair statute.³⁴² As the court stated, “*Texaco* wiped the slate of decisions under § 1466(a) clean, requiring the dutiability of *all* vessel repair expenses to be determined by the ‘but for’ test.”³⁴³ Accordingly, in the wake of *Texaco*, Customs was applying a new interpretation of § 1466(a) rather than modifying a “prior interpretative ruling or decision” for purposes of § 1625(c).³⁴⁴ Finally, the court noted that the policy reasons underlying § 1625(c) did not apply because the interested public was informed through publication of the *Texaco* decision that Customs would be required to administer § 1466(a) applying the “but for” test.³⁴⁵

334. *Id.* at 1544-45.

335. *Sea-Land Serv.*, 239 F.3d at 1369 (citing Customs Headquarters Memorandum 113308 from the Assistant Commissioner for Customs Office of Regulations and Rulings, to Customs’ New Orleans Regional Director (Jan. 18, 1995)).

336. *Id.*

337. *Id.*

338. *Id.* at 1370.

339. *Id.* at 1371.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* at 1372.

344. *Id.* at 1373.

345. *Id.* at 1373-74 (holding that although Customs’ individual evaluations of vessel repair expenses was the first time Customs used the new test, the new approach was first directed by the court’s decision in *Texaco*).

In *Bestfoods v. United States*,³⁴⁶ involving the application of federal marking rules to peanut slurry imported from Canada and used in the production of Skippy peanut butter, the Federal Circuit reversed the lower court's invalidation of an implementing regulation.³⁴⁷ The federal marking statute provides that imported articles must be marked "in a conspicuous manner . . . to indicate to an ultimate purchaser the English name of the country of origin of the article."³⁴⁸ However, under 19 C.F.R. § 102.11, promulgated pursuant to the NAFTA, an imported article is deemed to be of U.S. origin if post-importation manufacturing in the United States is sufficient to change the article's tariff classification, i.e., to "shift" the tariff.³⁴⁹ Applying § 102.11, Customs determined that Bestfood's post-importation processing did not change the tariff classification of the imported peanut slurry and, accordingly, that Bestfoods was required to mark the Canadian origin of the final product.³⁵⁰ Following an initial challenge to Customs' application of § 102.11,³⁵¹ Bestfoods raised a new argument that the imported peanut slurry should have qualified for a *de minimis* exception to the marking provisions, 19 C.F.R. § 102.13(b).³⁵² The Court of International Trade agreed with Bestfoods, and effectively extended § 102.13 to certain agricultural products, including Bestfoods' peanut butter.³⁵³ The U.S. Government appealed from this decision.³⁵⁴

Noting that the federal marking statute expressly delegates to Customs the authority to promulgate implementing regulations, the Federal Circuit reviewed the lower court's decision under the Administrative Procedure Act's ("APA's") arbitrary and capricious standard, and reversed.³⁵⁵ The court reasoned that, in light of the broad statutory language of the marking statute, which requires marking of *all* articles with certain enumerated exceptions, it could not conclude that Customs was required to provide additional exceptions.³⁵⁶ The court also found that, by withholding the seven

346. 260 F.3d 1320 (Fed. Cir. 2001).

347. *Id.* at 1322.

348. 19 U.S.C. § 1304(a) (2000).

349. *See Bestfoods*, 260 F.3d at 1322-23.

350. *See id.* (stating that since peanut slurry and peanut butter have the same tariff classification the tariff shift method does not apply).

351. *See id.*

352. *Id.* at 1323. This provision applies to non-agricultural products and excepts from the marking requirements imported material constituting less than seven percent of the overall value of the good into which it is incorporated. *Id.*

353. *Id.*

354. *Id.* at 1322.

355. *Id.* at 1323-24 (citing, *inter alia*, 5 U.S.C. § 706).

356. *Id.* at 1324.

percent exception from agricultural products, the regulation tended to harmonize country-of-origin rules for marking purposes with country-of-origin rules under the NAFTA.³⁵⁷ Finally, the court rejected Bestfoods' arguments that the regulation had been motivated by a misplaced concern for consumer safety and that it led to absurd results.³⁵⁸ Finally, citing pertinent provisions of the NAFTA, the court stated that it was not arbitrary or capricious for Customs to "consider substantially transformed ingredients to be products of the country of manufacture" even if the raw materials come from another country.³⁵⁹

In *Ford Motor Co. v. United States*,³⁶⁰ the Federal Circuit reversed a factual determination of the Court of International Trade arising from a complex and longstanding dispute between Ford and Customs—including a fraud investigation—concerning the treatment of certain car and truck components imported by Ford into its Foreign Trade Subzone ("FTSZ") in Louisville, Kentucky.³⁶¹ Under 19 U.S.C. § 1504(a), an entry not liquidated within one year of the date of entry is deemed liquidated at the rate of entry asserted by the importer at the time of entry.³⁶² However, § 1504(b) authorizes Customs to extend the one-year deadline.³⁶³ On the basis of the ongoing fraud investigation, Customs issued three one-year extensions, ultimately liquidating the entries at issue at rates higher than originally asserted by Ford and claiming additional duties of over \$5 million.³⁶⁴ Ford protested Customs' liquidation and, following denial of the protest, filed suit with the Court of International Trade.³⁶⁵ That court granted summary judgment for the United States, holding that the ongoing fraud investigation justified Customs' three extensions of liquidation.³⁶⁶ Ford appealed to the Federal Circuit, which remanded to the lower court for consideration of the reasonableness of Customs' delays in liquidation.³⁶⁷ Thereupon the Court of International Trade

357. *Id.* at 1325.

358. *Id.* at 1325-26 (noting that under the regulation, consumers would not be informed of any quantity of foreign material in a product where such foreign material had undergone substantial transformation and, therewith, a "tariff shift").

359. *Id.* at 1326 (citing NAFTA Annex 311).

360. 286 F.3d 1335 (Fed. Cir. 2002).

361. *Id.* at 1337-40.

362. 19 U.S.C. § 1504(a) (2000).

363. 19 U.S.C. § 1504(b) (2000).

364. *Ford*, 286 F.3d at 1338.

365. *Id.*

366. *Id.* at 1338-39.

367. *Id.* at 1339.

conducted a three-day trial, and found the delay to constitute a reasonable exercise of Customs' authority under 19 U.S.C. § 1504.³⁶⁸

The Federal Circuit subsequently reversed.³⁶⁹ Recognizing at the outset Customs' broad discretion to extend liquidation of entries under § 1504, and explaining that its review of lower court factual determinations are under a "clear error standard," the Federal Circuit affirmed the Court of International Trade's individual findings of fact, but disagreed with its ultimate factual conclusion.³⁷⁰ Reviewing in detail the record of the Customs investigation, the Federal Circuit stressed that Customs had pointed not to extraordinary circumstances to explain the delay of the fraud investigation, but only to typical workplace exigencies such as "competing responsibilities, an agent taking sick leave, and the various tasks associated with starting a new office."³⁷¹ The Federal Circuit concluded that affirmance under the circumstances "would be setting an unacceptably low bar for reasonableness."³⁷²

Judge Bryson dissented, noting that the Federal Circuit had previously held that Customs enjoys "very broad" discretion in extending liquidation so long as the total pre-liquidation period does not exceed four years.³⁷³ Judge Bryson reasoned that, given this high degree of discretion, combined with the "intensely factual" nature of the lower court's inquiry, he would have affirmed the lower court's decision.³⁷⁴ He also pointed out that a long period of inactivity in a particular investigation does not automatically render the delay unreasonable where, for example, busy agents are conducting multiple investigations simultaneously and are forced by heavy case-loads to prioritize.³⁷⁵

368. *Id.*

369. *Id.* at 1335.

370. *Id.* at 1340-41.

371. *Id.* at 1343 (contrasting the delays caused by typical workplace occurrences with delays caused by outside events such as national catastrophes).

372. *Id.*

373. *See id.* at 1343-44 (Bryson, J., dissenting) (citing *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767-68 (Fed. Cir. 1993)).

374. *Id.* at 1345-46.

375. *Id.* (arguing that prioritization dictates putting less pressing matters off for more immediate deadlines throughout many professions).

II. TRADE REMEDY LAWS

A. *U.S. Department of Commerce*

U.S. industries are heavy users of the trade remedy laws,³⁷⁶ which authorize, among other things, the imposition of duties to offset certain foreign trading practices deemed unfair, such as dumping, i.e., sales in the U.S. market at unfairly low prices, and subsidization by foreign governments. U.S. law provides for antidumping duties in the case of the former,³⁷⁷ and countervailing duties in the case of the latter.³⁷⁸ The vast majority of trade remedy cases before the Federal Circuit involve methodological decisions of the U.S. Commerce Department, and of these decisions, the majority concern the measurement of antidumping “margins,” or the extent to which the value of the imported product is below its fair value as defined under law. The margin, in turn, determines the duty liability of the importer, who is responsible for the payment of any antidumping or countervailing duties ultimately assessed on the imported products.³⁷⁹ The considerable commercial implications of these methodologies ensure a constant stream of intensely litigated cases.³⁸⁰ Moreover, the overhaul of the U.S. trade remedy laws by the Uruguay Round Agreements Act of 1994 (“URAA”) generated scores of new issues of statutory construction that have continued to occupy the Federal Circuit in recent years.³⁸¹

The standard of review applicable to most antidumping and countervailing duty determinations is dictated by statute, requiring the court to overturn any determination which it finds “to be

376. See IMPORT ADMINISTRATION, ANTIDUMPING AND COUNTERVAILING DUTY STATISTICS, at www.ia.ita.doc.gov/stats/iastats1.html (last modified Jan. 17, 2003).

377. 19 U.S.C. § 1673.

378. 19 U.S.C. § 1671.

379. See 19 U.S.C. § 1505 (Supp. 2002) (providing for payment of duties and fees by importer of record).

380. See, e.g., *Xerox Corp. v. United States*, 289 F.3d 792 (Fed. Cir. 2002) (holding that where the scope of antidumping duty order was unambiguous and undisputed, the goods at issue clearly did not fall within the scope of the order); *Novosteel SA v. United States*, 284 F.3d 1261 (Fed. Cir. 2002) (holding that petitions for investigation and antidumping and countervailing duty orders did not unambiguously exclude profile slabs from scope of orders issued); *Wheatland Tube Co. v. United States*, 161 F.3d 1365 (Fed. Cir. 1998) (arising out of claims dealing with the scope of merchandise subject to antidumping and countervailing duty investigations).

381. See, e.g., *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330 (Fed. Cir. 2002) (noting that Commerce found, based on the expanded affiliation provisions of the URAA, that Ta Chen and Sun were affiliated for a portion of the period covered by the third review); *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1303-05 (Fed. Cir. 2001) (discussing antidumping statute as it was amended by the Uruguay Round Agreements Act).

unsupported by substantial evidence on the record, or otherwise not in accordance with law.”³⁸² As discussed below, application of this standard during the last three years yielded frequent reversal of the Court of International Trade.

1. *Scope of merchandise covered by antidumping or countervailing duty proceedings*

During the last three years, the Federal Circuit examined five decisions of the Court of International Trade involving the “scope” of the merchandise subject to an antidumping or countervailing duty investigation, that is, the specific products covered by the proceeding at issue.³⁸³ The Federal Circuit allowed the lower court decision to stand in only *one* of these five cases.³⁸⁴

*Nippon Steel Corp. v. United States*³⁸⁵ involved the so-called “anti-circumvention” provision of the trade remedy laws, 19 U.S.C. § 1677j(c), which allows the Department of Commerce to include in the scope of a proceeding merchandise that is technically outside the scope of the proceeding, but has been “altered in form in minor respects.”³⁸⁶ In this case, the Commerce Department had imposed an antidumping duty order on corrosion-resistant steel from Japan, the scope of which described various technical aspects of the covered steel products, including a list of specified percentages by weight of fifteen listed elements.³⁸⁷ One of these elements was boron and, according to the scope, steel containing 0.0008% or more of boron was not covered by the investigation.³⁸⁸ Subsequently, a domestic steel producer alleged that Japanese exporters were circumventing the order by adding small amounts of boron to their product—an alteration apparently irrelevant to consumers of the steel, but which

382. 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

383. The trade remedy laws authorize the imposition of antidumping and countervailing duties with respect to “a class or kind of merchandise.” 19 U.S.C. § 1673 (2000).

384. *See* *Novosteel*, 284 F.3d at 1261 (affirming the Court of International Trade’s decision holding that substantial evidence supported the scope determination by the Commerce Department).

385. 219 F.3d 1348 (Fed. Cir. 2000).

386. *Id.* at 1349. Subsequent Commerce Department regulations provide that the Department “may include within the scope . . . articles altered in form or appearance in minor respects,” 19 C.F.R. § 351.225(i), and specify procedures for determining whether a particular product is included in the scope. 19 C.F.R. § 351.225(a)-(c) (2000).

387. *Id.* at 1350-51; *see also* *Certain Corrosion-Resistant Carbon Steel Flat Products from Japan*, 58 Fed. Reg. 44,163 (Dep’t Commerce Aug. 19, 1993) (antidumping duty order).

388. *Nippon*, 219 F.3d at 1350.

rendered it outside the literal scope of the order.³⁸⁹ The Commerce Department initiated an anti-circumvention inquiry based on the allegations, and Nippon shortly thereafter filed suit with the Court of International Trade, pursuant to the residual jurisdiction provision, 28 U.S.C. § 1581(i), seeking a temporary restraining order (“TRO”) against the Department, as well as preliminary and permanent injunctions.³⁹⁰ The court granted the TRO and preliminary injunction.³⁹¹ The U.S. Government appealed, arguing that jurisdiction pursuant to § 1581(i) was not available to Nippon, as it could have awaited the Department’s final determination and, at that time, availed itself of jurisdiction pursuant to § 1581(c).³⁹²

The Federal Circuit explained that the availability of jurisdiction under 28 U.S.C. § 1581(i) turned on whether Commerce’s initiation of the minor alterations inquiry was beyond its authority.³⁹³ If the court decided Commerce’s initiation was proper, then the Court of International Trade had no basis for its preliminary injunction.³⁹⁴ Therefore, both the merits of the case and the jurisdictional question hinged on whether Commerce acted within its authority in initiating its inquiry.³⁹⁵ Noting, first, that courts ordinarily should decline to interfere with an agency until it has completed the action at issue, the Federal Circuit reasoned that the Commerce Department had responded to the anti-circumvention petition precisely as authorized by the statute and regulations.³⁹⁶ The Federal Circuit also rejected the lower court’s reasoning that its hands were bound by the Federal Circuit’s decision in *Wheatland Tube Co. v. United States*.³⁹⁷ As the court explained, the major distinguishing factor between *Wheatland Tube* and this case was that, in *Wheatland Tube*, the very product for which domestic producers sought an anti-circumvention inquiry had been expressly excluded from the scope.³⁹⁸ Moreover, in *Wheatland Tube*, the issue was the propriety of the Department’s decision to conduct a

389. *Id.*

390. *Id.* at 1351.

391. *Id.*

392. *Id.* at 1349.

393. *Id.* at 1353.

394. *Id.*

395. *Id.*

396. *Id.* at 1353-54. The court further stated that Commerce was carrying out a function given to it by Congress when it initiated the inquiry to determine “if an antidumping duty order has been circumvented by making minor alterations in the form of the product otherwise subject to that order.” *Id.* at 1354.

397. *Id.* at 1355-56 (citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365 (Fed. Cir. 1998)).

398. *Id.* at 1355.

scope inquiry rather than an anti-circumvention inquiry.³⁹⁹ For these reasons, the Federal Circuit held that the Court of International Trade had improperly enjoined the Commerce Department from conducting the anti-circumvention inquiry, and ordered that court to dissolve the injunction and dismiss Nippon's complaint.⁴⁰⁰

In *Eckstrom Industries, Inc. v. United States*,⁴⁰¹ the Federal Circuit again reversed the Court of International Trade, this time in a dispute arising out of an administrative scope ruling purporting to clarify the scope of the antidumping duty order covering certain stainless steel, butt-welded pipe fittings imported from Taiwan.⁴⁰² The Court of International Trade decision at issue affirmed the Commerce Department's scope ruling that Eckstrom's cast pipe fittings were covered by the order.⁴⁰³ According to Eckstrom, its cast pipe fittings, produced by molding molten steel into the desired shape, were entirely different from the fittings covered by the order, produced by shaping and welding sheets of steel.⁴⁰⁴ Applying the substantial evidence standard, the Federal Circuit agreed with Eckstrom's arguments that the Commerce Department had, in its scope ruling, impermissibly expanded the scope of the antidumping duty order to include Eckstrom's cast fittings.⁴⁰⁵ The court followed the analytic framework set forth in the Commerce Department's scope regulation—19 C.F.R. § 351.225(k)(1)—and examined “the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.”⁴⁰⁶ The Federal Circuit found that each factor confirmed that the scope did *not* include Eckstrom's cast fittings.⁴⁰⁷ In reviewing these factors, the court was critical of the Department's reliance on the fact that Eckstrom's pipe fittings happened to meet one of the conditions of use specified in the order,⁴⁰⁸ and found that petitioners had described a process “never used to manufacture cast fittings.”⁴⁰⁹ The Federal Circuit also rejected the Department's remand scope determination based on the so-called *Diversified Products* factors enumerated at 19

399. *Id.* at 1356.

400. *Id.* at 1357.

401. 254 F.3d 1068 (Fed. Cir. 2001).

402. *Id.* at 1069.

403. *Id.* at 1071.

404. *Id.* at 1072.

405. *Id.* at 1072-1073.

406. 19 C.F.R. § 351.225(k)(1) (2000). *See Eckstrom*, 254 F.3d at 1072.

407. *Eckstrom*, 254 F.3d at 1072-76.

408. *Id.* at 1073.

409. *Id.* at 1074.

C.F.R. § 351.225(k)(2), reasoning that the Department should not have reached these factors because the (k)(1) factors were dispositive in clarifying the scope.⁴¹⁰ The court concluded, “the overwhelming evidence indicates that the Order does not cover cast pipe fittings,” and reversed the scope determination.⁴¹¹

In *Novosteel SA v. United States*,⁴¹² the Federal Circuit affirmed the Court of International Trade’s decision upholding the Commerce Department’s ruling that certain carbon steel profile slabs were covered by the antidumping and countervailing duty orders on cut-to-length carbon steel plates from Germany.⁴¹³ In the scope determination at issue, the Commerce Department found the existing scope record to be ambiguous with respect to whether the profile slabs, imported by Novosteel, were “flat-rolled” or “further worked,” and therefore within the scope.⁴¹⁴ Commerce then conducted a *Diversified Products* analysis pursuant to 19 C.F.R. § 351.225(k)(2).⁴¹⁵ Emphasizing the Commerce Department’s substantial discretion in interpreting and clarifying the scope of antidumping and countervailing duty orders,⁴¹⁶ the Federal Circuit first concluded that the orders did not, as contended by Novosteel, unambiguously exclude the profile slabs.⁴¹⁷ The court also rejected Novosteel’s contention that the petitions’ and orders’ omission of the HTSUS subheading covering the profile slabs was dispositive because “the petitions hardly defined the scope of the products in terms of the HTSUS; rather, they described the products covered by the Orders using ‘dimensional’ criteria and references to non-HTSUS sources”⁴¹⁸ The Federal Circuit then considered two evidentiary issues central to the Commerce Department’s scope ruling: first, whether the profile slabs were “flat-rolled,” a characteristic of

410. *Id.* at 1075-76.

411. *Id.* at 1076.

412. 284 F.3d 1261 (Fed. Cir. 2002). The underlying antidumping and countervailing duty orders were published, respectively, in 58 Fed. Reg. 43,756 (Dep’t Commerce Aug. 17, 1993) (antidumping duty order) and 58 Fed. Reg. 44,170 (Dep’t Commerce Aug. 19, 1993) (countervailing duty order).

413. *Id.* at 1265.

414. As explained in the Federal Circuit’s opinion, the Commerce Department applied a definition of “flat-rolled” based on the HTSUS, which defines flat-rolled steel products as products that have been “further worked [beyond] . . . primary hot-rolling.” *Id.* at 1267 (citing HTSUS, Notes 1(k) and 1(j)).

415. *Id.* at 1266.

416. *Id.* at 1269 (citing, *inter alia*, *Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995) (pointing out that while the Commerce Department may not change the scope of its antidumping orders, it has substantial freedom to interpret and clarify the coverage of those orders)).

417. *Id.* at 1269-70.

418. *Id.* at 1270.

merchandise covered by the orders, and second, what weight to accord to the German producer's sales brochure describing the profile slabs.⁴¹⁹ On the first issue, the court found that Novosteel had failed to establish error in the Commerce Department's or lower court's definition of that term;⁴²⁰ on the second, it found that descriptions of the product and production process set forth in the producer's sales brochure "provide the requisite substantial evidence" in support of the scope ruling.⁴²¹

Judge Dyk dissented from the majority opinion, explaining that while appellant's briefs were "awash" in frivolous arguments, the "single meritorious argument" has been lost.⁴²² This single meritorious argument, he further explained, was Novosteel's argument with respect to "further working" of the profile slabs.⁴²³ According to Judge Dyk, the Commerce Department's analysis on this point was speculative and "necessarily fails."⁴²⁴ Judge Dyk further expressed his view that the record was undeveloped with respect to any "further working" that the profile slabs might have undergone, and that this gap in the record should not be seen as proof of ambiguity in the coverage of the scope, but as warranting a remand for further investigation of this point.⁴²⁵

The dispute before the Federal Circuit in *Xerox Corp. v. United States*⁴²⁶ involved a ministerial error by Customs in administering the scope of the antidumping duty order on certain photocopier belts from Japan.⁴²⁷ Xerox filed a protest with Customs following Customs' levy of a 93.16 percent antidumping duty on certain belts imported by Xerox, pursuant to 19 U.S.C. § 1514(a)(2), contending that its merchandise was clearly outside the scope of the antidumping duty order.⁴²⁸ Customs denied the protest, and Xerox appealed to the

419. *Id.* at 1270-72.

420. *Id.* at 1271-72.

421. *See id.* at 1272-73 (noting that the scope ruling did not turn on the sales brochure, but that the brochure provided the Commerce Department with a basis for deciding to conduct a Diversified Products analysis pursuant to 19 C.F.R. § 351.225(k)(2)).

422. *Id.* at 1274 (Dyk, J., dissenting).

423. *Id.*

424. *Id.* at 1276.

425. *Id.* at 1276-77 (admonishing the majority not to uphold a situation where the Commerce Department failed to perform the required factual investigation and subsequently declared the scope to be ambiguous).

426. 289 F.3d 792 (Fed. Cir. 2002).

427. *See* Industrial Belts and Components and Parts Thereof, whether Cured or Uncured, from Japan, 54 Fed. Reg. 25,314 (Dep't Commerce June 14, 1989) (antidumping duty order) (describing the scope as covering "industrial belts used for power transmission . . . and containing textile fiber (including glass fiber) or steel wire, cord or strand").

428. *Xerox*, 289 F.3d at 793.

Court of International Trade pursuant to 28 U.S.C. § 1581(a).⁴²⁹ The court dismissed Xerox's suit for lack of subject matter jurisdiction, holding that Xerox should have sought a scope determination from the Commerce Department, and then it could have appealed pursuant to 28 U.S.C. § 1581(c).⁴³⁰ Reviewing the lower court's decision *de novo*,⁴³¹ the Federal Circuit reversed.⁴³² The court first explained that, under well-settled law, the appropriate remedy *where the scope is unclear* is to seek a scope ruling from the Commerce Department.⁴³³ However, where, as in this case, the merchandise at issue is "facially outside" of the pertinent scope, a scope ruling is unnecessary, and the power to correct the error lies within Customs' ministerial authority.⁴³⁴ The court also clarified that "misapplication of the order by Customs is properly the subject of a protest under 19 U.S.C. § 1514(a)(2)."⁴³⁵

The Federal Circuit again reversed the Court of International Trade in *Duferco Steel, Inc. v. United States*,⁴³⁶ a case arising out of a Commerce Department scope ruling that certain steel floor plate with "patterns in relief" imported by Duferco was covered by the antidumping and countervailing duty orders on cut-to-length carbon steel plate from Belgium.⁴³⁷ The relevant scope language included "flat-rolled products of nonrectangular cross-section where such cross-section is achieved subsequent to the rolling process," and clarified that "[o]nly those products whose nonrectangular cross-sections are achieved subsequent to the rolling process are included within the scope of the investigations."⁴³⁸ In its scope ruling, the Commerce Department stated that the existence of patterns in relief did not alter the rectangularity of the product, and further supported its conclusion based on evidence of petitioner's intent from the early stages of the investigations.⁴³⁹ The Court of International Trade

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.* at 795 (citing *Sandvik Steel Co. v. United States*, 164 F.3d 596 (Fed. Cir. 1998) and *Fujitsu Steel Co. v. United States*, 957 F. Supp. 245 (Ct. Int'l Trade 1997)).

434. *Id.* at 792.

435. *Id.*

436. 296 F.3d 1087 (Fed. Cir. 2002).

437. See *Certain Cut-to-Length Carbon Steel Plate from Belgium*, 58 Fed. Reg. 37,083 (Dep't Commerce July 9, 1993) (final antidumping determination) and *Certain Steel Products from Belgium*, 58 Fed. Reg. 37,273 (Dep't Commerce July 9, 1993) (final countervailing duty determination).

438. *Duferco*, 296 F.3d at 1095 (quoting Appendix I to final antidumping and countervailing determinations, setting forth scope descriptions).

439. *Id.* at 1094.

affirmed the scope ruling, and Duferco appealed.⁴⁴⁰ Beginning by confirming the considerable deference owed the Commerce Department in ascertaining the scope of antidumping and countervailing duty orders,⁴⁴¹ the Federal Circuit defined the issue as “an issue of first impression—whether the scope orders can be interpreted to cover subject merchandise even if there is no language in the orders that includes or can be reasonably interpreted to include the merchandise.”⁴⁴² The answer, implied in the court’s construction of the issue, was no.⁴⁴³ In reaching this answer, the Federal Circuit first examined the Court of International Trade’s characterization of the § 351.225(k)(1) scope analysis framework, finding it to be “exactly backwards.”⁴⁴⁴ Rather than begin with an evaluation of petitioner’s intent, any scope analysis should look primarily to the Commerce Department’s final determination, which “reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order.”⁴⁴⁵ While citing its earlier guidance in *Novosteel* that scope language must necessarily be in general terms,⁴⁴⁶ the court explained that review of the petition and agency pronouncements during the investigations “cannot substitute for language in the order itself.”⁴⁴⁷ Therefore, because the scope ruling at issue did not explain how the antidumping and countervailing duty orders themselves could be read to include the patterned floor plate at issue, the scope ruling constituted an invalid expansion of the scope as provided in the orders.⁴⁴⁸

2. *The right to sue*

The jurisdictional scheme defining judicial review of final agency determinations under the trade remedy laws is broad, providing in 19 U.S.C. § 1516a, that any “interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International

440. *Id.*

441. *Id.* at 1094-95 (citing *Ericsson*, 60 F.3d at 782 and *Eckstrom*, 254 F.3d at 1072) (noting that Commerce may not interpret an order so as to modify its scope or in any other manner contrary to its terms).

442. *Id.* at 1095.

443. *Id.* at 1096.

444. *Id.*

445. *Id.*

446. *Id.* at 1096-1097 (citing *Novosteel*, 284 F.3d at 1271).

447. *Id.* at 1097.

448. *See id.* at 1097-98 (emphasizing the importance of the language in the order in construing its scope).

Trade.”⁴⁴⁹ This provision was the subject of one dispute that reached the Federal Circuit during the last three years.

In *JCM, Ltd. v. United States*,⁴⁵⁰ the Federal Circuit held that § 1516a could not be circumvented by an interested party—JCM—that had failed to exhaust its administrative remedies before the Commerce Department.⁴⁵¹ During the antidumping investigation of pasta from Italy, certain Italian producers and exporters and certain U.S. importers challenged the Department’s extension of provisional measures following the preliminary antidumping determination.⁴⁵² In one of these challenges, the Court of International Trade held that the extension was unlawful and ordered a refund of cash deposits, with interest, of applicable entries.⁴⁵³ Following that decision, JCM, which had not participated in the previous challenges to the extension of provisional measures, filed suit also seeking a refund, asserting jurisdiction pursuant to 28 U.S.C. § 1581(i), the residual jurisdiction provision.⁴⁵⁴ Agreeing with the Government that JCM could have, but did not, participate in the administrative proceeding and the challenge under § 1581(c), the Court of International Trade dismissed JCM’s suit for lack of jurisdiction.⁴⁵⁵ JCM subsequently appealed.⁴⁵⁶ Reviewing the lower court’s analysis on a *de novo* basis,⁴⁵⁷ the Federal Circuit explained that, because Congress has set out an administrative process for the resolution of antidumping disputes, failure of a claimant to follow this process precludes it from obtaining review of the resulting antidumping determination in the Court of International Trade.⁴⁵⁸ The court further explained that 1581(i)

449. This provision is cross-referenced in the Court of International Trade’s jurisdictional provisions, with 28 U.S.C. § 1581(c) providing that the Court of International Trade “shall have exclusive jurisdiction of any civil action commenced under § 516A of the Tariff Act of 1930,” and § 1581(i) providing that that subsection “shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable . . . by the Court of International Trade under § 516A(a) of the Tariff Act of 1930.”

450. *JCM, Ltd. v. United States*, 210 F.3d 1357 (Fed. Cir. 2000).

451. *Id.* at 1360.

452. *See id.* at 1358 (challenging Commerce’s authority to impose such an extension). Pursuant to 19 U.S.C. § 1673b(d), provisional measures, i.e., security required on subject imports following a preliminary determination of dumping, may only remain in effect for four months—unless exporters representing a significant portion of exports of the subject merchandise request an extension. *Id.* The determination at issue here is Certain Pasta from Italy, 61 Fed. Reg. 30,326 (Dep’t Commerce June 3, 1996) (final antidumping determination).

453. *See F.lli De Cecco Di Filippo Fara San Martino S.p.A. v. United States*, 21 C.I.T. 1130 (Ct. Int’l Trade 1997).

454. *JCM*, 210 F.3d at 1358.

455. *Id.* at 1359.

456. *Id.*

457. *Id.*

458. *Id.*

jurisdiction is not available if the plaintiff could use other subsections under 1581, unless the remedy under those subsections would be “manifestly inadequate.”⁴⁵⁹ JCM failed to make such a showing and, additionally, the court rejected JCM’s contention that the Commerce Department denied it “party to the proceeding” status when it did not select JCM as a respondent in the antidumping investigation.⁴⁶⁰ As the court explained, by limiting the number of respondents, the Commerce Department did not preclude any interested parties from participation through written submissions, and in fact had obtained written submissions from other interested parties that, like JCM, had not been chosen to participate as respondents.⁴⁶¹ The court ruled against JCM’s argument that it should be allowed to share in the relief given to those who did participate in the proceeding before the agency and, additionally, JCM’s failure to do so denied subject matter jurisdiction to the Court of International Trade.⁴⁶²

3. *Interaction of trade remedy and customs laws*

During the last three years, the Federal Circuit twice considered cases presenting conflicts arising from the interaction of the trade remedy laws with Customs’ procedures for liquidating entries of imported merchandise, and in both instances affirmed the disposition of the Court of International Trade.

*International Trading Co. v. United States*⁴⁶³ involved the interaction of the antidumping law with the “deemed liquidation” statute, 19 U.S.C. § 1504(d), which requires Customs to liquidate entries suspended due to antidumping measures “within 6 months after receiving notice of the removal [of suspension] from the Department of Commerce.”⁴⁶⁴ Section 1504(d) also provides that any entry not liquidated within this timeframe “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.”⁴⁶⁵ In this case, Customs did not liquidate the entries at issue (entered at an antidumping duty deposit rate of less than three percent but assessed with antidumping duties of over forty-two percent) within the six-

459. *Id.* (quoting *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992)).

460. *See id.* at 1360 (holding that JCM failed to pursue its claim via the congressionally established path).

461. *See id.* (noting that had JCM participated in the administrative proceeding, it would have been entitled to judicial review under 28 U.S.C. § 1581(c)).

462. *Id.*

463. 281 F.3d 1268 (Fed. Cir. 2002).

464. 19 U.S.C. § 1504(d) (2000). *See Int’l Trading*, 281 F.3d at 1270-71.

465. 19 U.S.C. § 1504(d).

month period because it did not receive timely, definitive liquidation instructions from the Commerce Department.⁴⁶⁶ International Trading Company (“ITC”), the importer of the merchandise at issue—shop towels from Bangladesh—challenged Customs’ liquidation at the higher antidumping assessment rate as a violation of § 1504(d).⁴⁶⁷ The Court of International Trade agreed with ITC’s contention that Customs should have liquidated the entries at the deposit rate.⁴⁶⁸ The U.S. Government appealed this decision, arguing that removal of suspension of liquidation, for purposes of § 1504(d), occurs only when the Commerce Department instructs Customs to liquidate—however long after completion of an administrative review that may be.⁴⁶⁹ The Federal Circuit affirmed the lower court’s decision, rejecting the government’s arguments and holding that publication of the final results of administrative review in the *Federal Register* triggers the six-month period.⁴⁷⁰ Notably, in reaching its decision, the Federal Circuit declined to defer to a series of Customs rulings setting forth Customs’ view that the six-month liquidation period commences upon receipt of liquidation instructions from the Commerce Department.⁴⁷¹

*Fujitsu General America, Inc. v. United States*⁴⁷² also involved the liquidation of entries subject to antidumping duties—in this case, color televisions from Japan—and in particular three protests by Fujitsu challenging Customs’ assessment of interest on antidumping duty liability.⁴⁷³ At issue were entries that Fujitsu made between

466. *Id.* at 1270 (noting that Commerce explicitly instructed Customs not to liquidate any entries until it received liquidation instructions). Pursuant to 19 U.S.C. § 1675(a)(1), the Commerce Department establishes definitive antidumping and countervailing duties on a retrospective basis in so-called administrative reviews, and publishes the final results of review in the *Federal Register*.

467. *Int’l Trading Co.*, 281 F.3d at 1271 (asserting that the appropriate deposit rate was 2.72%).

468. *Id.* at 1277.

469. *Id.* at 1273 (basing its assertion on the ministerial nature of Customs’ liquidation of antidumping duties).

470. *Id.* at 1275 (reasoning that “the date of publication provides an unambiguous and public starting point for the six-month liquidation period”). The court further noted that keying the liquidation requirement off of publication in the *Federal Register* “does not give the government the ability to postpone indefinitely the removal of suspension of liquidation (and thus the date by which liquidation must be completed) as would be the case if the six-month liquidation period did not begin to run until Commerce sent a message to Customs advising of the removal of suspension of liquidation.” *Id.*

471. *Id.* at 1274 n.2 (citing *Mead Corp. v. United States*, 533 U.S. 218 (2001)) (explaining that the Supreme Court has established that such rulings are not entitled to deference but rather are entitled to weight “to the extent that they are carefully considered, consistent, and persuasive”).

472. 283 F.3d 1364 (Fed. Cir. 2002).

473. *Id.* at 1367.

March 20, 1986 and March 11, 1988, with respect to which the Commerce Department, at the conclusion of extensive litigation, on September 16, 1997, published a final antidumping duty rate of 26.17% *ad valorem*.⁴⁷⁴ Customs liquidated the entries in installments over the next six months.⁴⁷⁵ Fujitsu subsequently filed three protests.⁴⁷⁶ The first two protests, filed on the same day, challenged Customs' assessment of interest in connection with the liquidation of entries in late 1997.⁴⁷⁷ Fujitsu also argued, in supplemental submissions, that the entries should be deemed liquidated at the much lower rates asserted at the time of entry, over a decade earlier.⁴⁷⁸ Fujitsu's third protest advanced similar assertions with respect to liquidation of entries in February 1998, but unlike the first two protests, the supplemental deemed liquidation claim was filed within ninety days of the protested liquidation.⁴⁷⁹ Customs denied all three protests, and Fujitsu appealed the denials to the Court of International Trade.⁴⁸⁰ That court upheld Customs' denial of the protests, and held, with respect to the first two protests, that it lacked jurisdiction to entertain the deemed liquidation claims because they had not been timely raised.⁴⁸¹ With respect to the third protest, the court held that, while the deemed liquidation claim had been timely raised, Customs had properly liquidated the entries within six months of the Commerce Department's notice of removal of suspension of liquidation, as required by § 1504(d).⁴⁸²

Fujitsu appealed to the Federal Circuit.⁴⁸³ The first issue it considered, with respect to the second protest, was whether the lower court had jurisdiction over the deemed liquidation claim pursuant to 28 U.S.C. § 1581(a), on the theory that Fujitsu had presented a "new ground" in support of the original protest that triggered one of the exceptions to the ninety-day filing requirement of 19 U.S.C. § 1514(c)(3).⁴⁸⁴ The Federal Circuit rejected Fujitsu's "new ground"

474. *Id.* at 1368-69. See 62 Fed. Reg. 48,592 (Dep't Commerce Sept. 16, 1997) (publishing notice of the *Fujitsu* decision).

475. *Fujitsu*, 283 F.3d at 1368-69.

476. *Id.* at 1369.

477. *Id.*

478. *Id.*

479. *Id.* at 1369-70.

480. *Id.* at 1369-70.

481. *Id.* at 1370.

482. *Id.* at 1370. See *Fujitsu Gen. Am., Inc. v. United States*, 110 F. Supp. 2d 1061 (Ct. Int'l Trade 2000) (rejecting Fujitsu's claim on the merits).

483. *Fujitsu*, 283 F.3d at 1370.

484. *Id.* at 1372 (noting that a party may assert "new grounds" in support of an objection at any time prior to the disposition of the protest in accordance with § 1515).

argument, holding that the underlying supplemental Customs filing setting forth the deemed liquidation claim did not qualify as a “new ground” in support of Fujitsu’s interest claim because it involved “different Customs decisions for purposes of § 1514.”⁴⁸⁵ The court explained that the statute differentiates between charge or exaction decisions, such as the interest assessments in this case, and liquidation decisions.⁴⁸⁶ Accordingly, the lower court correctly found that it lacked jurisdiction to hear Fujitsu’s claim based on the second protest.⁴⁸⁷ The Federal Circuit next turned to Fujitsu’s alternative argument that the Court of International Trade had jurisdiction over the deemed liquidation claims relating to the first and second protests pursuant to the residual jurisdiction provision, 28 U.S.C. § 1581(i).⁴⁸⁸ The court rejected this argument as well, noting that Fujitsu could have invoked jurisdiction pursuant to subsection 1581(a) if it had timely filed its protests, as demonstrated by the fact that it had successfully done so in its third protest.⁴⁸⁹ Finally, the Federal Circuit considered Fujitsu’s deemed liquidation claims relating to the entries covered by the third protest.⁴⁹⁰ As framed by the court, the issue before it was “[w]hen, as a matter of law, did Customs receive notice of the removal of the suspension of liquidation?”⁴⁹¹ According to Fujitsu, Customs received this notice on July 3, 1996, the date of issuance of the final judicial decision in the litigation concerning the amount of antidumping duties owed on the 1986-88 entries.⁴⁹² Citing its decision in *International Trading Co.* discussed above, the Federal Circuit held that the rationale applied equally here.⁴⁹³ Accordingly, it concluded that Customs received notice of the removal of suspension of liquidation on September 16,

485. *Id.* at 1372-73 (citing *New Zealand Lamb Co. v. United States*, 40 F.3d 377 (Fed. Cir. 1994)).

486. *Id.* at 1372.

487. *Id.* at 1373 (holding that Fujitsu failed to file its deemed liquidation claim in a timely manner and that the claim did not constitute a “new ground” in support of the challenge to the assessment of interest in Protest 2).

488. *Id.* at 1373-74.

489. *Id.* at 1374.

490. *Id.* at 1376.

491. *Id.* at 1379.

492. *Id.* The court explained:

If, as Fujitsu argues, notice was received on July 3, 1996, when Fujitsu General issued, Fujitsu wins. The reason is that more than six months passed before Customs liquidated the entries on February 27, 1998. If, as the Court of International Trade held, notice was received on September 16, 1997, when Commerce published notice of the removal in the Federal Register, the government wins. The reason is that Customs liquidated the entries within six months of that date, on February 27, 1998.

Id.

493. *Id.* at 1381.

1997, the date of publication in the *Federal Register* of the Commerce Department's notice of the conclusion of the litigation concerning the 1986-88 entries.⁴⁹⁴

4. *Antidumping duty methodologies*

The majority of the trade remedy law cases before the Federal Circuit in the last three years involved fine points of statutory construction guiding the measurement of antidumping margins.⁴⁹⁵ While the Commerce Department's discretion is broadest in this area (the courts often referring to it as the "master" of the antidumping law),⁴⁹⁶ its discretion is not boundless and courts have, in many instances, reversed its determinations on appeal.⁴⁹⁷ Also, in many of these cases—as in the other areas of international trade jurisprudence reviewed in this Article—the Federal Circuit frequently reversed the Court of International Trade.⁴⁹⁸ Given the often substantial impact of these cases on the duty liability of importers, these cases highlight the uncertainties and pitfalls that can be associated with the movement of goods across the U.S. border.

a. *Product comparisons*

Because most antidumping cases involve ranges of related products (e.g., cold-rolled carbon steel products within certain size parameters and quality ranges) rather than fungible commodities (e.g., crude oil), a threshold question in antidumping analysis is how to define product categories for purposes of comparing a U.S. price (i.e., the export price or constructed export price) with a normal value. Moreover, in many cases, products sold by foreign exporters in the

494. *Id.* at 1382 (explaining that the publication of notice of *Fujitsu* constituted "the first notification that Commerce had removed the suspension of liquidation").

495. *See, e.g.,* *Timken Co. v. United States*, 166 F. Supp. 2d 608 (Ct. Int'l Trade 2001) (determining whether Commerce correctly interpreted the provisions of the antidumping statute applicable to non-market economy exporters as allowing it to use Indonesian import statistics as a substitute value for raw material costs of steel paid by Chinese producers).

496. *See, e.g.,* *Daewoo Elecs. Co., Ltd. v. Int'l Union of Elec., Electrical, Tech., Salaried & Mach. Workers*, 6 F.3d 1511, 1516 (Fed. Cir. 1993) (recognizing the International Trade Administration of the Department of Commerce as the "master" of the antidumping law).

497. *See, e.g.,* *Duferco*, 296 F.3d at 1098 (reversing Commerce's determination regarding antidumping and countervailing duty orders on the ground that it impermissibly modified the orders to include products beyond the intended scope).

498. *See, e.g.,* *Eckstrom*, 254 F.3d at 1076 (reversing Court of International Trade decision on the ground that cast stainless steel butt-weld pipe fittings were outside antidumping order's scope); *U.S. Steel Group v. United States*, 225 F.3d 1284, 1292 (Fed. Cir. 2000) (reversing Court of International Trade ruling that Commerce's interpretation of antidumping statute to include movement expenses as part of total expenses in the constructed export price profit calculation was unreasonable).

United States differ significantly from products sold by the same companies at home or in other export markets; sometimes, the product alleged to be dumped in the U.S. market is produced exclusively for export to the United States. Accordingly, one problem arising regularly is the definition of the “foreign like product,” i.e., the product or products sold in the foreign comparison market and providing the basis for normal value. The antidumping statute provides a definition of “foreign like product” at 19 U.S.C. § 1677(16), which establishes a three-level hierarchy for the identification of the foreign like product, ranging from the specific (“identical in physical characteristics”) to the general (“of the same general class or kind”).⁴⁹⁹ During the last three years, two cases involving the definition of the foreign like product reached the Federal Circuit, and in both, the court affirmed the original agency determination.⁵⁰⁰

In *Pesquera Mares Australes Ltd. v. United States*,⁵⁰¹ the Federal Circuit affirmed the lower court’s holding concerning two product comparison issues in the antidumping investigation of salmon from Chile.⁵⁰² First, the court found that the Commerce Department had reasonably interpreted the phrase “identical in physical characteristics” for purposes of 19 U.S.C. § 1677(16)(A) by reference to commercial practices,⁵⁰³ and second, that the Commerce Department had properly compared the Chilean exporter’s U.S. sales of “premium” grade salmon to Japanese sales of “premium” and “super-premium” salmon.⁵⁰⁴ The Federal Circuit discussed at length the applicable standard of review, and specifically whether the court should apply *Chevron* principles to the Commerce Department’s administrative rulings—even though no formally promulgated regulations were at issue—or whether it should apply a less deferential standard consistent with the Supreme Court’s recent

499. 19 U.S.C. § 1677(16) (1999).

500. Cases involving the interaction of the foreign-like product provision with the statute’s prescribed methodologies for calculating constructed value, as arose in *SKF USA Inc. v. United States*, 263 F.3d 1369 (Fed. Cir. 2001), are discussed below. See discussion *infra* notes 494-514 and accompanying text.

501. 266 F.3d 1372 (Fed. Cir. 2001).

502. *Id.* at 1374. See Fresh Atlantic Salmon from Chile, 63 Fed. Reg. 31,411 (Dep’t Commerce June 9, 1998) (final antidumping determination).

503. *Id.* at 1376. Section 1677(16)(A) provides that the foreign like product may be identified on the basis of “other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.” 19 U.S.C. § 1677(16)(A).

504. *Id.* The antidumping law permits the Commerce Department to base normal value on third-country sales (i.e., sales in countries other than the exporting country) in the absence of satisfactory sales data in the exporting country. See 19 U.S.C. § 1677b(a)(1)(B)(ii) (1999).

decision in *Mead*.⁵⁰⁵ Citing a variety of factors, including the *Mead* holding that antidumping determinations are “adjudications that produce . . . rulings for which deference [under *Chevron*] is claimed,”⁵⁰⁶ and its recent holding in *American Silicon Technologies*, the court concluded that *Chevron* deference continued to be warranted, following *Mead*, with respect to antidumping proceedings.⁵⁰⁷

The Federal Circuit then turned to the question of statutory interpretation—the meaning of “identical in physical characteristics” for purposes of 19 U.S.C. § 1677(16)(A).⁵⁰⁸ Reviewing a variety of dictionary definitions, the court found that some dictionaries define “identical” as requiring *exact* identity, and others as providing, more broadly, for *near* identity; this, the court noted, left “the question of which of the two common usages was intended by Congress: exactly the same or the same with minor differences?”⁵⁰⁹ Given this ambiguity, the Federal Circuit reasoned that *Chevron* required deference to the Commerce Department’s interpretation, which permitted “identical” treatment of products having minor differences in physical characteristics.⁵¹⁰ The Federal Circuit also found the Commerce Department’s inclusion of both “premium” and “super-premium” salmon in its antidumping analysis to be supported by substantial evidence.⁵¹¹ In reviewing the evidence relied upon by the Commerce Department in rejecting its preliminary determination to treat the “super-premium” salmon as a distinct product,⁵¹² the Federal Circuit noted, in particular, the fact that other exporters to the Japanese market (from Norway, Scotland, Canada, and the United States) did not distinguish between “premium” and “super-premium” grades.⁵¹³

The Federal Circuit again affirmed the Court of International Trade in *Mitsubishi Heavy Industries, Ltd. v. United States*,⁵¹⁴ a case brought by Japanese producers of Large Newspaper Printing Presses

505. See *Pesquera*, 266 F.3d at 1379-82.

506. *Id.* at 1382 (citing *Mead*, 121 S. Ct. at 2171).

507. *Id.* (citing *Am. Silicon Techs. v. United States*, 261 F.3d 1371 (Fed. Cir. 2001)).

508. 19 U.S.C. § 1677(16)(A) (1999).

509. *Id.* at 1382-83.

510. *Id.* at 1383-84.

511. *Id.* at 1384.

512. *Id.* As explained by the court, in its preliminary antidumping determination, “Commerce compared the prices charged by Mares Australes for premium salmon in the United States only to the prices charged for premium salmon in Japan.” *Id.* at 1377. The Commerce Department did not include the higher-priced “super-premium” salmon sold in Japan in the foreign like product until its final determination. *Id.*

513. *Id.* at 1384-85.

514. 275 F.3d 1056 (Fed. Cir. 2001).

“LNPPs”) who contended that LNPPs sold in Japan could not reasonably be compared to LNPPs sold in the United States for purposes of calculating an antidumping rate.⁵¹⁵ The Court of International Trade rejected this contention, affirming the underlying agency determination as supported by substantial evidence.⁵¹⁶ Citing the statutorily prescribed standard of review,⁵¹⁷ the Federal Circuit noted that Japanese appellants had “chosen a course with a high barrier to reversal” given the jurisprudence defining substantial evidence.⁵¹⁸ The Federal Circuit rejected appellants’ argument that the Commerce Department had failed to properly weigh the record evidence concerning the many differences between LNPPs sold in Japan and those sold in the U.S. market. The court acknowledged that LNPPs are custom-made, and that each individual LNPP contains a unique combination of features, but stressed that, due to the “long list of shared features,” the Commerce Department could reasonably compare the Japanese and U.S. models.⁵¹⁹ The court concluded that, while the appellants would draw different inferences from the evidence of differences between individual LNPPs, it did not mean that the Commerce Department’s conclusion warranted reversal under the substantial evidence standard.⁵²⁰

The Federal Circuit then turned to appellants’ claim that the Commerce Department had misinterpreted 19 U.S.C. § 1677(16), defining “foreign like product.”⁵²¹ More specifically, it considered that it was inconsistent for the Commerce Department to rely on this provision to reject actual Japanese market prices in favor of constructed value, on the one hand, and, on the other, to use actual Japanese market sales as the basis for the profit component of the constructed value calculation.⁵²² The court, however, determined that

515. *Id.* at 1059. Appellants objected in particular to the Commerce Department’s use, pursuant to 19 U.S.C. § 1677b(e)(2)(A), of Japanese home market LNPP profits in the constructed value calculation used to determine normal value. *Id.*

516. *Id.* at 1060. *See* Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan, 61 Fed. Reg. 38139 (Dep’t Commerce July 23, 1996), amended 61 Fed. Reg. 46621 (Dep’t Commerce Sept. 4, 1996) (antidumping duty order and amended final antidumping determination).

517. *Mitsubishi*, 275 F.3d at 1060 (citing 19 U.S.C. § 1516a(b)(1)(B)(i) (1999)).

518. *Id.* (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951), *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001)).

519. *Id.* at 1061. The Federal Circuit asked, with respect to one LNPP for which the record contained a product brochure, “[t]he critical point is, given that individual differences exist from order to order, can the custom-made merchandise from Japan and the United States be reasonably compared?” *Id.* at 1062. The court answered in the affirmative—“not perfectly, not identically, but reasonably.” *Id.*

520. *Id.* (citing *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)).

521. *Id.* at 1063-64.

522. *Id.*

this issue was “not ripe for decision,” as appellants had failed to show evidence of an inconsistent interpretation of the statute, and that appellants were “chasing a phantom inconsistency in this case.”⁵²³ As explained by the court, review of the Commerce Department’s determination revealed that it “certainly did not decide that the home market LNPPs, in general, could not be a foreign like product,” and thus that there was no inconsistent application of § 1677(16).⁵²⁴

b. Calculation issues

A series of trade remedy law cases before the Federal Circuit during the last three years involved the calculation of normal value and U.S. price (i.e., export price or constructed export price), the real “nuts and bolts” of the antidumping law. Many of these cases arose out of disputes about the interpretation of statutory amendments introduced by the URAA. As in other areas of Federal Circuit international trade jurisprudence, this area experienced a high rate of reversal of the Court of International Trade.

As explained above, the URAA amendments base U.S. price on either export price or constructed export price. Certain adjustments to the U.S. starting price are required to reach both export price and constructed export price, while certain additional adjustments—typically reflecting the activities of affiliated U.S. importers, including profit—apply only to a constructed export price calculation. In *U.S. Steel Group v. United States*,⁵²⁵ the Federal Circuit examined the profit element of constructed export price (“CEP profit”), i.e., the deduction for profit associated with the activities of affiliated U.S. importers. More specifically, the court examined whether the statutory formula for determining CEP profit (“total actual profit” times the ratio of “total U.S. expenses” to “total expenses”) included, as part of the total expenses denominator, foreign exporters’ movement expenses.⁵²⁶ In an administrative review of AG der Dillinger Hüttenwerke’s duty liability under the antidumping duty order on carbon steel plate from Germany, the Commerce Department, consistent with its policy, interpreted 19 U.S.C. § 1677a(f)(2)(C) to include movement expenses as part of “total expenses.”⁵²⁷ The Court of International Trade agreed with domestic

523. *Id.* at 1064.

524. *Id.* at 1065.

525. 225 F.3d 1284 (Fed. Cir. 2000).

526. *Id.* at 1285. See 19 U.S.C. § 1677a(f) (1999).

527. *Id.* See Certain Cut-to-Length Carbon Steel Plate from Germany, 62 Fed. Reg.

producers' challenge to the Commerce Department's inclusion of movement expenses in total expenses, and reversed.⁵²⁸ The Government appealed.

Applying a *Chevron* analysis, the Federal Circuit reversed the lower court's judgment, finding that it had failed to accord sufficient deference to the Department's reasonable interpretation of a statutory ambiguity.⁵²⁹ Finding, first, that the statute defines "total expenses" in a "complex, ambiguous manner,"⁵³⁰ the Federal Circuit turned to a "'holistic' review of the relevant provisions,"⁵³¹ and concluded that they equated "total expenses" with "all expenses."⁵³² The court further reasoned that there was no basis for the "symmetry" argument advanced by domestic parties and embraced by the Court of International Trade, i.e., that the express exclusion of movement expenses from the "total U.S. expenses" numerator mandated exclusion of movement expenses from the "total expenses" denominator.⁵³³ On this point, the court concluded that "the definitions in the Act themselves undercut symmetrical treatment of 'total U.S. expenses' and 'total expenses.'"⁵³⁴ The court also found the Department's interpretation to comport with commercial reality and basic accounting principles, and noted that, if movement expenses were to be excluded from the "total expenses" denominator, that would "unduly skew the U.S. profit computation against importers because the computation would exclude their heaviest expense category, leaving them with a disproportionately high dumping margin."⁵³⁵

Judge Lourie dissented from the panel majority's opinion, arguing that there is no ambiguity in § 1677a(f)(2)(C) because "all expenses" is modified by the phrase "with respect to the production and sale," a clear indication, in his view, that Congress intended movement expenses to be excluded from "all expenses."⁵³⁶ Judge Lourie further reasoned that the structure of the statute, and in particular the definition of "total U.S. expenses" in § 1677a(f)(2)(B), support a

18,390 (Dep't Commerce Apr. 15, 1997) (final admin. review).

528. *Id.* at 1286.

529. *Id.* at 1289.

530. *Id.*

531. *Id.* (citing *Vectra Fitness, Inc. v. TNWK Corp.*, 162 F.3d 1379, 1383 (Fed. Cir. 1998)).

532. *Id.*

533. *Id.*

534. *Id.*

535. *Id.* at 1291.

536. *Id.* at 1292 (Lourie, J., dissenting).

parallel reading of the numerator and denominator in which both exclude movement expenses.⁵³⁷

*AK Steel Corporation v. United States*⁵³⁸ involved both sides of the dumping analysis—the determination of U.S. price and normal value—and again resulted in reversal of the lower court's decision. The issues arose in the Commerce Department's second administrative review of the antidumping duty order on cold-rolled and corrosion-resistant steel products from Korea, and with respect to several Korean producers, including Pohang Iron & Steel Co., Ltd. ("POSCO") and certain of its affiliates.⁵³⁹ In that review, and over the objections of the U.S. petitioning industry, the Commerce Department classified the Korean producers' U.S. sales as export price (rather than constructed export price) sales pursuant to 19 U.S.C. § 1677a(a)-(b)⁵⁴⁰ and its longstanding methodology for distinguishing between the two types of sales, the so-called *PQ* test. Under this test, developed prior to the URAA, the Commerce Department classified sales made by U.S. affiliates of foreign producers as export price sales if three criteria were met: (1) the subject merchandise was shipped directly from the producer to the unaffiliated U.S. buyer; (2) direct shipment from the producer to the unaffiliated U.S. buyer was the customary channel for sales of the merchandise at issue; and (3) the U.S. affiliate acted merely as a "paper-pusher," or processor of sales-related documentation.⁵⁴¹ The

537. *Id.*

538. 226 F.3d 1361 (Fed. Cir. 2000).

539. *See* Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 62 Fed. Reg. 18,404 (Dep't Commerce Apr. 15, 1997) (final admin. review).

540. Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 62 Fed. Reg. at 18,434. 19 U.S.C. § 1677a(a) defines "export price" as:

the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c) of this section.

Section 1677a(b) defines "constructed export price" as:

the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d) of this section.

Thus, export price sales are sales made prior to importation and *outside* of the United States; constructed export price sales are sales made either prior to or following importation, but only *inside* the United States.

541. Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 62 Fed. Reg. at 18,432. The Commerce Department developed the *PQ* three-part test in 1987, on remand from the Court of International Trade in *PQ Corp. v. United States*, 652 F. Supp. 724, 733-35 (Ct. Int'l Trade 1987). *See AK Steel*, 226 F.3d at

Department also, and again over the objections of the U.S. industry, determined to “collapse” POSCO and its affiliates, thereby treating them as a single entity for purposes of its antidumping analysis.⁵⁴² Based on this collapsing determination, the Department did not apply 19 U.S.C. § 1677b(f)(2) and (3), the so-called “fair-value” and “major-input” provisions—used to revalue certain transactions between affiliated parties for purposes of establishing normal value—to transactions among POSCO and its affiliates.⁵⁴³ On appeal, the Court of International Trade sustained these aspects of the Commerce Department’s determination.⁵⁴⁴ On further appeal to the Federal Circuit, U.S. producers raised two legal issues: whether the *PQ* test represents a reasonable interpretation of the URAA’s definitions of export price and constructed export price, and whether the Commerce Department has the discretion under the statute not to apply the fair-value and major-input provisions to transactions between affiliated producers that have been collapsed.⁵⁴⁵

Applying a *de novo* standard of review and the *Chevron* two-step analysis,⁵⁴⁶ the Federal Circuit rejected the *PQ* test, but affirmed the Department’s interpretation of the fair-value and major-input provisions.⁵⁴⁷ The issue before the Federal Circuit was “whether a sale to a U.S. purchaser can be properly classified as a sale by the producer/exporter, and thus an EP sale, even if the sales contract is between the U.S. purchaser and a U.S. affiliate of the producer/exporter and is executed in the United States.”⁵⁴⁸ The Federal Circuit answered in the negative, agreeing with the U.S. petitioners that such a scenario, allowed by the *PQ* test, was in fact precluded by the URAA’s definitions of export price and constructed

1365.

542. Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 62 Fed. Reg. at 18,430.

543. Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 62 Fed. Reg. at 18,430. Pursuant to § 1677b(f)(2), the fair-value provision, the Department is authorized to revalue, based on market conditions, any transaction between affiliated persons. Where the transaction involves a major input, § 1677b(f)(3) authorizes the Department to revalue the transaction based on the higher of market value or cost of production. These provisions apply to the determination of cost of production (§ 1677b(b)) and constructed value (§ 1677b(e)).

544. See *AK Steel Corp. v. United States*, 34 F. Supp. 2d 756 (Ct. Int’l Trade 1998).

545. *AK Steel*, 226 F.3d at 1363-64.

546. *Id.* at 1366 (citing *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994), *Suramerica de Aleaciones Laminadas v. United States*, 966 F.2d 660, 665 & n.5 (Fed. Cir. 1992), *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

547. *Id.* at 1364.

548. *Id.* at 1368.

export price.⁵⁴⁹ Turning to the statutory language, the court reasoned that, when read without reference to the pre-URAA U.S. price definitions, “the plain meaning of the language enacted by Congress in 1994 focuses on where the sale takes place and whether the foreign producer or exporter and the U.S. importer are affiliated, making these two factors dispositive of the choice between the two classifications.”⁵⁵⁰ The court further reasoned that, when read together, the export price and constructed export price definitions made clear that the key distinction drawn by the statute is the geographic “locus of the transaction.”⁵⁵¹ This geographic distinction, the court explained, meant that the statute precludes what the *PQ* test allows, i.e., classification of U.S. sales made through U.S. affiliates—sales made “in the United States” for purposes of the statute—as export price sales.⁵⁵² In rejecting the *PQ* test, the Federal Circuit explained that “Commerce does not require a cumbersome test, examining the activities of the affiliate, to determine whether or not the U.S. affiliate is a seller, when the answer to that question is plain from the face of the contracts governing the sales in question.”⁵⁵³

The Federal Circuit also rejected the Korean producers’ arguments that the SAA evinced Congress’s intent that the *PQ* test continue to apply in distinguishing between export price and constructed export price sales.⁵⁵⁴ The court found that: (1) the *PQ* test “is hardly consistent with the pre-1994 statute, read as a whole,” as well as even earlier versions of the antidumping law;⁵⁵⁵ (2) the Federal Circuit has never endorsed the *PQ* test;⁵⁵⁶ (3) the Court of International Trade has only affirmed the test in scenarios involving constructed export price, rather than export price, sales;⁵⁵⁷ and (4) there is no other indication in the legislative history that Congress intended to endorse the *PQ* test and the amendments to the statute suggest that it did not.⁵⁵⁸

Turning to the Commerce Department’s application of the fair-value and major-input provisions, the Federal Circuit emphasized

549. *Id.* at 1364.

550. *Id.* at 1369.

551. *Id.*

552. *Id.* at 1370.

553. *Id.* at 1372.

554. *Id.*

555. *Id.* at 1373.

556. *Id.*

557. *Id.* (citing *Mitsubishi Heavy Indus., Ltd. v. United States*, 15 F. Supp. 2d 807, 815 (Ct. Int’l Trade 1998)).

558. *Id.* at 1374.

that, given the uncontested decision of the Department to “collapse” POSCO and affiliated producers, the only issue for review was whether the Department had discretion not to apply these provisions as between these companies.⁵⁵⁹ The court accepted the Department’s defense that “a decision to treat affiliated parties as a single entity necessitates that transactions among the parties also be valued based on the group as a whole.”⁵⁶⁰ Noting that both the fair-value and the major-input provision only apply to transfers between “persons,” the court reasoned that once the Commerce Department has properly determined to treat affiliated parties as a single person, it need not apply these provisions.⁵⁶¹ The court also noted favorably the consistency between this methodology and the Department’s practice of not applying these provisions between divisions of the same company, as well as that the statute would not have required application of the fair-value and major-input provisions even if POSCO and its affiliates had not been collapsed.⁵⁶²

The Federal Circuit considered additional U.S. starting price adjustment issues in *Micron Technology, Inc. v. United States*,⁵⁶³ and again disagreed with the Court of International Trade’s interpretation of the statute as amended by the URAA.⁵⁶⁴ The case involved two aspects of the adjustments required under 19 U.S.C. § 1677a(d) for constructed export price sales: the types of expenses covered by subsection (d)(1)(D)’s reference to “any selling expenses not deducted under subparagraph (A), (B), or (C),” and the statutory provision, 19 U.S.C. § 1677b(a)(1)(B)(i), requiring the Commerce Department to establish normal value “at the same level of trade as the export price or constructed export price.”⁵⁶⁵ The issues arose in the second administrative review of the antidumping duty order on dynamic random access memory semiconductors (“DRAMs”) from Korea,⁵⁶⁶ and in the context of sales made by LG Semicon Co., the Korean producer, and its affiliated U.S. importer, LG Semicon America, Inc.⁵⁶⁷ On the first issue, the Commerce Department

559. *Id.* at 1375.

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

561. *Id.* at 1376.

562. *Id.* (citing *Certain Forged Steel Crankshafts from the United Kingdom*, 61 Fed. Reg. 54,613, 54,614 (Dep’t Commerce Oct. 26, 1996)).

563. 243 F.3d 1301 (Fed. Cir. 2001).

564. *Id.* at 1314-16.

565. *Id.* at 1304-05.

566. *See* *Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea*, 62 Fed. Reg. 965, 968 (Jan. 7, 1997) (final admin. review).

567. *Micron Technology, Inc.*, 243 F.3d at 1306.

determined not to include in its constructed export price adjustments under § 1677a(d)(1)(D) certain indirect selling expenses incurred by LG Semicon in Korea that were not directly related to sales to unaffiliated U.S. purchasers.⁵⁶⁸ Micron appealed, and the Court of International Trade affirmed the Department's methodology.⁵⁶⁹ On the second issue, the Commerce Department, also applying its policy at the time, conducted its level-of-trade analysis *after* adjusting the U.S. price to obtain the constructed export price.⁵⁷⁰ As a consequence, the Department compared LG Semicon's Korean sales to adjusted U.S. sales, determining that the former represented a more advanced level of trade than the latter, and accounting for this disparity by allowing LG Semicon a "constructed export price offset" to normal value.⁵⁷¹ Micron also appealed this issue. The Court of International Trade agreed with Micron, and rejected the Department's methodology.⁵⁷² Micron appealed the first issue to the Federal Circuit, and LG Semicon cross-appealed as to the second.⁵⁷³

Applying *de novo* review and *Chevron* principles,⁵⁷⁴ the Federal Circuit rejected Micron's arguments that the statute and legislative history clearly mandate the deduction of *all* (rather than just U.S.) selling expenses related to constructed export price sales.⁵⁷⁵ The Federal Circuit first construed the phrase in § 1677a(d)(1) requiring the deduction of "any selling expenses not deducted under subparagraph (A), (B), or (C)," and framed the question before it as the following: "While we agree that the word 'any' necessarily

568. Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea, 62 Fed. Reg. at 967 (explaining that these indirect selling expenses did "not result from or bear relationship to selling activities in the United States"). As explained by the Federal Circuit, its record did not contain a detailed description of the indirect selling expenses at issue, but they appeared to include "the rents on LG Semicon's sales offices incurred in Korea, the salaries for LG Semicon's salesmen incurred in Korea, and certain inventory carrying costs." *Micron*, 243 F.3d at 1306. Micron contended that all these selling expenses should be included in the section 1677a(d)(1)(D) adjustments to the constructed export price. *Id.* at 1307.

569. *Micron Tech., Inc. v. United States*, 40 F. Supp. 2d 481, 485 (Ct. Int'l Trade 1999).

570. Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea, 62 Fed. Reg. at 966.

571. Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea, 62 Fed. Reg. at 966.

572. *Micron*, 40 F. Supp. 2d at 481.

573. *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1307 (Fed. Cir. 2001).

574. *Id.* at 1308 (Fed. Cir. 2001). The Federal Circuit emphasized that it reviews issues of statutory construction "without deference." *Id.* (quoting *U.S. Steel Group v. United States*, 225 F.3d at 1286).

575. *Id.* at 1309-10.

includes ‘all,’ the real question here is ‘all of what?’⁵⁷⁶ The court then applied the statutory construction rule of *ejusdem generis* which, it reasoned, supported the conclusion that Congress intended subsection D to encompass the same types of expenses as included in subsections A, B, and C—i.e., expenses incurred in the United States.⁵⁷⁷ Thus, to the extent subsection (D) was ambiguous, the Commerce Department’s interpretation was reasonable.⁵⁷⁸

The Federal Circuit next rejected Micron’s argument that, as revealed by the URAA’s legislative history, Congress intended the pre-URAA treatment of indirect selling expenses—in Micron’s view, capturing all expenses—to continue.⁵⁷⁹ As the court explained, the legislative history did not show that Congress intended the Commerce Department’s treatment of indirect selling expenses to remain the same; rather, Congress, if anything, continued an “existing ambiguity.”⁵⁸⁰ Moreover, in rejecting Micron’s argument, the Federal Circuit emphasized that Congress cannot be presumed to have intended to “freeze an administrative interpretation of a statute;” such an approach would violate *Chevron’s* recognition of the power of administrative agencies to change their interpretations of the statutes they are charged with administering.⁵⁸¹

Finally, the Federal Circuit rejected Micron’s argument that deduction of all indirect selling expenses would serve the statute’s purpose of preventing the false characterization by foreign producers

576. *Id.* at 1308.

577. *Id.* (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994) (“Under the rule of *ejusdem generis*, which means ‘of the same kind,’ where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified.”)).

578. *Id.* at 1309. The Federal Circuit further explained that the Commerce Department’s construction of subsection 1677a(d)(1) was strongly supported by 19 U.S.C. § 1677a(f), providing for the deduction in determining the constructed export price of U.S. profit. *Id.* The court stated, “subsection (f) assumes that the expenses at issue are indeed those expenses arising specifically out of the sale of the subject merchandise in the United States.” *Id.* The Federal Circuit also noted the SAA’s instruction that the profit deduction applies only to profit amounts “allocable to selling, distribution and further manufacturing activities in the United States.” *Id.*

579. *Id.* at 1309.

580. *Id.* at 1310. Notably, the court rejected Micron’s contention that Congress should have been aware, when it enacted the URAA, of a Court of International Trade decision supposedly supporting Micron’s interpretation of the Commerce Department’s pre-URAA practice with respect to indirect selling expenses. *See id.* at 1310-11 (citing *Silver Reed Am., Inc. v. United States*, 683 F. Supp. 1393 (Ct. Int’l Trade 1988) (“We are unwilling to apply the presumption relied upon by Micron when there is no evidence that Congress’ attention was directed to the decision in *Silver Reed* when the statute was re-enacted.”)).

581. *Id.* at 1312 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).

of their selling expenses.⁵⁸² In response, the court noted that the Commerce Department did indeed sometimes include in its constructed export price deductions certain indirect selling expenses incurred outside of the United States but with some nexus to the activities of the U.S. importer and reseller.⁵⁸³ The court concluded that Micron's interpretation of § 1677a(d)(1) "makes no sense in terms of the statutory purpose."⁵⁸⁴ This purpose, the court noted, was served in this case by deducting only those expenses incurred by LG Semicon in connection with sales, through its U.S. affiliate, to unaffiliated U.S. purchasers.⁵⁸⁵

The Federal Circuit reversed the Court of International Trade on the second issue—whether to undertake the level of trade analysis before or after the constructed export price deductions enumerated in § 1677a(d).⁵⁸⁶ The Federal Circuit reasoned that the statutory scheme clearly contemplated the level of trade analysis to be performed at the level most closely corresponding to the export price.⁵⁸⁷ Any deductions required to "construct" an export price, thus, were required to be made *before* the level of trade analysis.⁵⁸⁸ Relying heavily on the SAA, the court concluded that

Congress' intent is clear: when making a level of trade comparison for EP sales, Commerce is to use the 'starting price,' i.e., the unadjusted price. In contrast, when making a level of trade comparison for CEP sales, Commerce is to use the 'constructed' price, i.e., the price that reflects the deductions made pursuant to § 1677a(d).⁵⁸⁹

The Federal Circuit also dismissed Micron's concern that, under the Commerce Department's methodology, in virtually every case there would be either a level of trade adjustment to normal value or a constructed export price offset to normal value.⁵⁹⁰ The court noted that the Department had specifically explained in promulgating its

582. *Id.* at 1312-13.

583. *Id.* at 1313 (citing *Certain Stainless Steel Wire Rods from France*, 61 Fed. Reg. 47,874, 47,881-82 (Sept. 11, 1996) (final admin. review)).

584. *Id.* The court described it as making an apples-to-apples comparison between U.S. price and normal value by "adjusting CEP so that it is at the same level of trade as EP and then making a comparison to normal value." *Id.*

585. *Id.* at 1313-14.

586. *Id.* at 1314-15.

587. *Id.* at 1314.

588. *Id.* The court explained that, while the Commerce Department's methodology resulted in a comparison of an *adjusted* constructed export price with an *adjusted* normal value, this seemingly asymmetric comparison is consistent with the statutory purpose to determine if an adjustment to normal value (the constructed export price offset) is warranted. *Id.*

589. *Id.* at 1315.

590. *Id.* at 1314.

regulations that the constructed export price offset would not be automatic,⁵⁹¹ and that in several antidumping investigations involving constructed export price sales, the Department's methodology did not result in either a level of trade adjustment or a constructed export price offset.⁵⁹²

In *SKF USA Inc. v. United States*,⁵⁹³ the Federal Circuit considered the authority of the reviewing court to remand an antidumping calculation issue to the Commerce Department in light of the Department's claim that it had erred in its underlying determination.⁵⁹⁴ The specific calculation issue involved the treatment of the exporting company's general and administrative ("G&A") expenses as a component of constructed value, for purposes of 19 U.S.C. § 1677b(e)(1)(B), in an administrative review of the antidumping duty order on antifriction bearings ("AFBs") from Germany.⁵⁹⁵ During the administrative proceeding, the German respondent and its affiliated U.S. importer had argued that the G&A expense calculation should not have taken into account a loss related to the sale of a Korean subsidiary, but the Commerce Department disagreed and included these expenses in the G&A calculation.⁵⁹⁶ On appeal, however, rather than defend its G&A calculation, the Commerce Department argued that the calculation should not have reflected the loss associated with the sale of the Korean subsidiary, and it sought a remand for recalculation.⁵⁹⁷ The Court of International Trade rejected the remand request, affirming the G&A calculation.⁵⁹⁸ The Federal Circuit reversed. Noting first that the Federal Circuit had acknowledged "Commerce's special expertise"⁵⁹⁹

591. *Id.* at 1316.

592. *Id.* (citing Fresh Kiwifruit from New Zealand, 64 Fed. Reg. 36,844, 36,845-46 (July 8, 1999) (prelim. admin. review)).

593. 254 F.3d 1022 (Fed. Cir. 2001).

594. *Id.* at 1025.

595. See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom, 61 Fed. Reg. 66,472 (Dec. 17, 1996) (final admin. reviews and partial term. of admin. reviews). Because this administrative review was initiated prior to the effective date of the URAA amendments, the Commerce Department applied the pre-URAA antidumping law.

596. Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom, 61 Fed. Reg. at 66,497.

597. See *SKF*, 254 F.3d at 1026.

598. *SKF USA, Inc. v. United States*, 77 F. Supp. 2d 1335, 1345-46 (Ct. Int'l Trade 1999). The Court of International Trade held that it could not "rely on the post-hoc position advanced by Commerce in its brief as the basis to uphold or overturn its administrative action." *Id.* at 1345 n.3.

599. *SKF*, 254 F.3d at 1027 (quoting *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1394 (Fed.Cir. 1997)).

in administering the antidumping law, and that “factual determinations” were owed considerable deference,⁶⁰⁰ the court went on to review the various scenarios in which a remand to the agency may be appropriate under the applicable standard of review. In surveying the law applicable to remand requests based on agency claims that the underlying determination is incorrect, the Federal Circuit distinguished between “step one” *Chevron* issues and “step two” *Chevron* issues. With respect to the former, where “the agency is either compelled or forbidden by the governing statute to reach a different result,” it is up to the reviewing court to decide the statutory issue and whether a remand is warranted.⁶⁰¹ With respect to the latter, as applied in this case given the broad discretion delegated to the Commerce Department under the statute to calculate G&A expenses, “a remand to the agency is required, absent the most unusual circumstances verging on bad faith.”⁶⁰² The Federal Circuit concluded that, because there was no evidence of the agency acting in bad faith in seeking the remand, it was required to return the issue to the Commerce Department for recalculation.⁶⁰³

In *Koenig & Bauer-Albert AG v. United States*,⁶⁰⁴ the Federal Circuit again considered the distinction between export price and constructed export price sales, as well as the proper calculation of constructed value. On the first issue, the German producer of the subject LNPPs, and its affiliated U.S. importer, argued that the Commerce Department had erred in treating its two U.S. sales during the period of investigation as constructed export price sales.⁶⁰⁵ The Court of International Trade sustained the agency determination.⁶⁰⁶ However, the lower court decision was made before the Federal Circuit’s decision in *AK Steel*, which invalidated the longstanding *PQ*

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

601. *Id.* at 1029 (citing *Lamprecht v. FCC*, 958 F.2d 382, 385 (D.C. Cir. 1992)).

602. *Id.* at 1030 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). The court also cited its earlier holding that “any assumption that Congress intended to freeze an administrative interpretation of a statute, which was unknown to Congress, would be entirely contrary to the concept of *Chevron*—which assumes and approves the ability of administrative agencies to change their interpretation.” *Id.* (citing *Micron*, 243 F.3d at 1312).

603. *Id.* Notably, the Federal Circuit did not include in its analysis a discussion of finality of agency decision-making as a factor weighing against a remand under the circumstances.

604. 259 F.3d 1341 (Fed. Cir. 2001).

605. See Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany, 61 Fed. Reg. 38,166 (July 23, 1996).

606. *Koenig & Bauer-Albert AG v. United States*, 15 F. Supp. 2d 384 (Ct. Int’l Trade 1998).

test for classifying U.S. sales as export price or constructed export price. Accordingly, the Federal Circuit granted the request of the Government and appellants for a remand for the Commerce Department to reconsider classification of the U.S. sales in light of the *AK Steel* test.⁶⁰⁷ The Federal Circuit further instructed that the Commerce Department should reconsider the proper treatment of certain U.S. LNPP installation expenses and, more specifically, determine whether they are movement expenses under 19 U.S.C. § 1677a(c)(2)(A) (deducted from the U.S. starting price regardless of how the U.S. sales are classified) or “further manufacturing” expenses under 19 U.S.C. § 1677a(d)(2) (deducted from the starting price *only* if the U.S. sales are classified as constructed export price sales).⁶⁰⁸

The Federal Circuit also considered appellants’ argument that, in its constructed value calculations, the Commerce Department should have excluded one of the German producer’s home market sales as being outside “the ordinary course of trade,” for purposes of 19 U.S.C. §§ 1677b(e) and 1677(15), because that sale carried a substantially higher profit margin than the other sales included in the constructed value calculation. The Federal Circuit disagreed, and upheld the lower court’s affirmance of the Commerce Department on this issue. The Federal Circuit reasoned that, given “permissive language” in the SAA underscoring the Department’s broad latitude in determining when sales are outside the ordinary course of trade, it was reasonable for the Department to conclude that the higher profit margin on the single sale for which appellants sought exclusion did not require exclusion of that sale from the constructed value calculation.⁶⁰⁹

In *American Silicon Technologies v. United States*,⁶¹⁰ the Federal Circuit upheld the lower court in affirming the Commerce Department’s treatment of a Brazilian producer’s depreciation expenses—a component of constructed value—in an administrative review of the antidumping duty order on silicon metal from Brazil.⁶¹¹ The statutory provision at the heart of the case, 19 U.S.C. § 1677b(f)(1)(A),

607. *Koenig*, 259 F.3d at 1344.

608. *Id.*

609. *Id.* at 1345. As the court noted, the SAA “provides several exemplary types of sales that could be outside the ordinary course of trade, including ‘sales with abnormally high profits.’ . . . [h]owever, the SAA only states that Commerce ‘may’ or ‘could’ consider such sales to be outside the ordinary course of trade.” *Id.*

610. 261 F.3d 1371 (Fed. Cir. 2001).

611. *Am. Silicon Techs. v. United States*, 2000 WL 278290 (Ct. Int’l Trade Mar. 9, 2000). The final results of the administrative review at issue in this case are published at *Silicon Metal from Brazil*, 63 Fed. Reg. 6,899 (Feb. 11, 1998) (final admin. review).

requires costs, including depreciation costs, to “normally be calculated based on the records of the exporter or producer of the merchandise.”⁶¹² Such costs, however, may be rejected where they do not “reasonably reflect the costs associated with the production and sale of the merchandise.”⁶¹³ According to the U.S. petitioners, appellants in this case, the Commerce Department had erred in accepting the Brazilian producer’s five-year, straight-line depreciation methodology because the actual useful life of the industrial assets at issue was at least twenty years.⁶¹⁴ Accordingly, the Brazilian producer’s depreciation methodology did not reflect its true cost of producing silicon metal, and should be rejected as mandated by § 1677b(f)(1)(A).⁶¹⁵ Appellants also urged the Federal Circuit to take account of a recent decision of the Court of International Trade in which that court had decided, with respect to a different Brazilian producer of silicon metal, that a five-year depreciation methodology was contrary to law. Accordingly, appellants argued, the doctrine of intra-court comity required the same result to be reached in this case.⁶¹⁶ The Federal Circuit disagreed. Noting that an administrative determination can be supported by substantial evidence, even if it is possible to draw a different conclusion from the record evidence.⁶¹⁷ Also noting that neither the statute nor the SAA dictated a particular depreciation methodology,⁶¹⁸ the Federal Circuit found that the record made clear that the Brazilian producer’s depreciation methodology was consistent with both Brazilian GAAP and Brazilian income tax law.⁶¹⁹ Invoking a heightened standard of deference with respect to “determinations of the agency that turn on complex economic and accounting inquiries,”⁶²⁰ the court held “that determining whether a depreciation practice comports with Brazilian GAAP is one such complex economic and accounting inquiry, as is

612. *Am. Silicon*, 261 F.3d at 1376.

613. 19 U.S.C. § 1677b(f)(1)(A) (1999). As the court explained, constructed value, as a general matter, comprises a respondent’s general expenses, including overhead. *Am. Silicon*, 261 F.3d at 1376 (citing 19 U.S.C. § 1677b(e) (1999) and *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1059 (Fed. Cir. 1992)). Overhead, in turn, includes depreciation. Further, “[i]f depreciation is not included in production costs, the CV is lowered, thereby lowering the minimum price level at which imported goods may be sold without incurring antidumping duties, i.e., lowering the dumping margin calculations.” *Id.*

614. *Id.* at 1378-79.

615. *Id.*

616. *Id.* at 1379.

617. *Id.* at 1376 (citing *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996)).

618. *Id.* at 1378 (citing 19 U.S.C. § 1677b(f)(1)(A) (1999)).

619. *Id.* at 1379.

620. *Id.* at 1380 (citing *Fujitsu*, 88 F.3d at 1044).

determining whether reported costs reconcile to financial statements, particularly where monetary corrections are involved.”⁶²¹ The court also rejected the argument based on intra-court comity, noting that it was not clear that the facts and issues of the two cases were identical, and that the court was compelled to assume that the lower court judge in this case “through her independent analysis found the issues not to be identical or was convinced that her brother judge was wrong.”⁶²²

*SKF USA Inc. v. United States*⁶²³ involved a different aspect of constructed value—the profit component of constructed value, as defined in 19 U.S.C. § 1677b(e)(2), and its relationship to the foreign like product provision, 19 U.S.C. § 1677(16).⁶²⁴ In this installment of the heavily litigated AFBs proceeding⁶²⁵ the specific question before the Federal Circuit was whether the Commerce Department may define “foreign like product” to include only identical AFBs (or AFBs from the same “family” grouping) in making its price-based comparisons; but then define “foreign like product” to include aggregate data for multiple AFB “families” in calculating constructed value.⁶²⁶ In the reviews at issue, the Commerce Department sought first to conduct price-based comparisons, pursuant to § 1677b(a)(1)(B)(i),⁶²⁷ defining the foreign like product as including only identical AFBs, or AFBs from the same family grouping.⁶²⁸ Employing this narrow definition of the foreign like product, the Department found no “usable sales” and turned to constructed value.⁶²⁹ In calculating constructed value, however, the

621. *Id.* at 1380-81.

622. *Id.* at 1381.

623. 263 F.3d 1369 (Fed. Cir. 2001).

624. *Id.* at 1379-81 (Fed. Cir. 2001).

625. The issue before the court arose in two related administrative reviews of the AFBs order: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, 63 Fed. Reg. 33,320 (June 18, 1999) (final admin. review) and Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom, 64 Fed. Reg. 35,590 (July 1, 1999) (final admin. review).

626. *SKF*, 263 F.3d at 1372.

627. This provision directs the Commerce Department to determine normal value in the first instance on “the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price.” 19 U.S.C. § 1677b(a)(1)(B) (1999).

628. *SKF*, 263 F.3d 1375.

629. See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, 63 Fed. Reg. 6512-03, 6516 (Feb. 9, 1998) (prelim. review); Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from

Department used a different definition of the foreign like product, aggregating “all foreign like products,” i.e., AFBs from multiple family groupings, purportedly in keeping with § 1677b(e)(2)(A).⁶³⁰ The foreign AFB producers challenged the Department’s methodology before the Court of International Trade, contending that § 1677(16) obligated the Department to attempt to use “identical” or “like” merchandise in the constructed value profit calculation before turning to aggregated data.⁶³¹ The Court of International Trade disagreed, affirming the Department’s methodology.⁶³²

On appeal brought by the foreign AFBs producers, the Federal Circuit reversed.⁶³³ Reviewing the lower court’s decision *de novo*,⁶³⁴ and emphasizing the Department’s “special expertise” in administering the antidumping law,⁶³⁵ the Federal Circuit began its analysis by focusing on the “source of the confusion”—the relationship between § 1677(16), defining “foreign like product,” and the constructed value provisions at § 1677b(e), also employing that term.⁶³⁶ As the court noted, § 1677(16) appeared to apply only to Part II of Subtitle IV (“Imposition of Antidumping Duties”), while § 1677b(e) was part of Part IV of Subtitle IV (“General Provisions”).⁶³⁷ However, “its reference to part II was obviously designed to require that Commerce use the definition in making the part IV calculation

France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, 64 Fed. Reg. 8790-04, 8795 (Feb. 23, 1999) (prelim. review).

630. See 63 Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, 63 Fed. Reg. at 33,333; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom, 64 Fed. Reg. at 35,610. Section 1677b(e)(2)(A) provides for the determination of constructed value based on “the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country.” 19 U.S.C.A. § 1677b(e)(2)(A) (1999). The methodology set forth in § 1677b(e)(2)(A) is the preferred methodology; where the required data are not available, the statute provides three alternate methodologies, set forth at subsections 1677b(e)(2)(B)(i)-(iii). 19 U.S.C.A. § 1677b(e)(2)(B)(i)-(iii).

631. *SKF*, 263 F.3d at 1377.

632. *Id.* at 1371.

633. *Id.* at 1372.

634. *Id.* at 1378.

635. *Id.* (quoting *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1394 (Fed. Cir. 1997)).

636. *Id.* at 1379.

637. 19 U.S.C.A. § 1677(16) (1999). The chapeau to § 1677(16) provides that the definition of foreign like product relates to “a determination for the purposes of part II of this subtitle” *Id.*

for purposes of part II.”⁶³⁸ The Federal Circuit then proceeded to address appellants’ statutory construction arguments. While dismissing their arguments that the statute precludes aggregation of more than one product into the “foreign like product” under the circumstances,⁶³⁹ the Federal Circuit did find persuasive the argument that, when Congress uses a technical term in more than one part of a statutory scheme, it is intended to carry the same meaning in each instance.⁶⁴⁰ The court concluded that the Commerce Department, in defending its varying interpretations of the term, had failed to rebut the presumption “that Congress intended that the term have the same meaning in each of the pertinent sections or subsections of the statute. . . .”⁶⁴¹ Dismissing the Government’s *Chevron*-based arguments in defense of its determination, the Federal Circuit cited broader administrative law jurisprudence and concluded “it is well-established that ‘an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.’”⁶⁴² In remanding for reconsideration, the Federal Circuit further reasoned that while the antidumping statute is “highly complex and often confusing,”⁶⁴³ that fact only increases the burden on the Commerce Department to make sense of its provisions.⁶⁴⁴ The court was careful not to direct the agency to adopt identical interpretations of “foreign like product” in the different parts of the statute where it applied, suggesting that this case might present one of the rare scenarios in which perfect identity of interpretations within the same statutory scheme was not warranted.⁶⁴⁵ The court left this analysis for the agency on remand.

*Thai Pineapple Canning Industry Corp. v. United States*⁶⁴⁶ presented two issues—the methodology for determining cost of production and constructed value in an environment of rising costs, and whether the Department properly computed a single assessment rate for the entire period of review.⁶⁴⁷ The Federal Circuit reversed the lower

638. *SKF*, 263 F.3d at 1379.

639. *Id.* at 1380. As the court explained, § 1677(16)(C) does permit aggregation, because it “makes clear that Commerce may use aggregate data relating to merchandise that is ‘of the same general class or kind as the subject merchandise.’” *Id.* at 1380-81.

640. *Id.* (citing, *inter alia*, *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 576 (1995)).

641. *Id.* at 1382.

642. *Id.* (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)).

643. *Id.*

644. *Id.* at 1382-83. The court posited, “[t]he more complex the statute, the greater the obligation on the agency to explain its position with clarity.” *Id.* at 1383.

645. *Id.* at 1383 (citing *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992)).

646. 273 F.3d 1077 (Fed. Cir. 2001).

647. *Id.* at 1079.

court on the first issue, and affirmed on the second.⁶⁴⁸ In its first administrative review of the antidumping duty order on canned pineapple from Thailand, the Commerce Department found the Thai home market for the foreign like product to be too small for the determination of normal value, and turned instead to the Thai producer's sales in Germany.⁶⁴⁹ The Department further found that some of these third-country sales were made at prices below the cost of production and used constructed value for these sales as the basis for normal value, calculating a single average cost of production for the entire period of review.⁶⁵⁰ The Thai producer objected to this methodology, arguing that the Department should, due to rising pineapple costs over the period of review, calculate separate costs of production based on the company's fiscal calendar, and also account for the long lag time between production and sale.⁶⁵¹ The Department did not alter its cost methodology, and the Thai producer appealed to the Court of International Trade.⁶⁵² That court required the Commerce Department to recalculate cost of production, taking into account the two fiscal periods overlapping with the period of review, but it did not—as urged by the Thai company—require the Department to base the cost of production on merchandise sold (rather than produced) during the applicable period.⁶⁵³ The Court of International Trade also sustained the Department's decision to calculate a single assessment rate for the entire period of review, rather than two rates, i.e., one for the so-called “cap period” preceding the final injury determination, and one for the remainder of the period of review.⁶⁵⁴ An appeal to the Federal Circuit followed.

648. *Id.*

649. *See* Canned Pineapple Fruit from Thailand, 62 Fed. Reg. 42,487, 42,488 (Aug. 7, 1997) (prelim. results and partial term. review).

650. Canned Pineapple Fruit from Thailand, 62 Fed. Reg. at 42,491. Pursuant to 19 U.S.C. § 1677b(b)(3), the Commerce Department determines cost of production by summing the cost of materials, fabrication, containers, coverings, and other processing costs, and selling, general, and administrative expenses. 19 U.S.C. § 1677b(b)(3) (1999).

651. *See* Canned Pineapple Fruit from Thailand, 63 Fed. Reg. 7,392, 7,399 (Feb. 13, 1998) (final admin. review).

652. *Thai Pineapple*, 273 F.3d at 1081.

653. *See* Thai Pineapple Canning Indus. Corp. v. United States, 1999 WL 288772 (Ct. Int'l Trade May 5, 1999) (“*Thai Pineapple I*”) and Thai Pineapple Canning Indus. Corp. v. United States, 2000 WL 174986 (Ct. Int'l Trade Feb. 10, 2000) (“*Thai Pineapple II*”).

654. Entries of merchandise between the Commerce Department's preliminary antidumping determination and the International Trade Commission's affirmative injury determination are, pursuant to 19 U.S.C. § 1673f(a), subject to an assessment “cap.” 19 U.S.C. § 1673f(a) (1999). Specifically, if the deposit of the preliminary estimated duty during this period is higher than the amount ultimately required by

Applying the lower court's standard of review,⁶⁵⁵ the court addressed the Thai producer's contention that its dumping margin was distorted by the Commerce Department's refusal to address the delay between production and sale.⁶⁵⁶ The Federal Circuit rejected the argument that the statute itself required closer matching of sales with costs, finding that the statute did not dictate any particular methodology in this regard.⁶⁵⁷ However, turning to the question of whether the Department's interpretation was reasonable, the Federal Circuit identified a series of instances in which the Commerce Department had, in fact, adjusted its methodology to better match production costs with prices.⁶⁵⁸ Accordingly, it reasoned, "the standard methodology may not be permissible in all scenarios because Commerce has recognized that certain circumstances warrant exceptions."⁶⁵⁹ Because the Department had departed from its standard methodology in other cases presenting special circumstances, the court reasoned that the Department was required to do so in this case, which presented similar circumstances.⁶⁶⁰ The court remanded for reconsideration, ordering the Court of International Trade to instruct the Commerce Department "to match sales of goods to costs based on the period in which those goods were manufactured, taking into account the inventory period."⁶⁶¹

The Federal Circuit, however, upheld the Court of International Trade's decision affirming the agency's calculation of a single assessment rate for the entire period of review.⁶⁶² The court quickly disposed of the argument that the statutory scheme, read as a whole, requires assessment on an entry-by-entry basis.⁶⁶³ As the court explained, while 19 U.S.C. § 1675(a)(2) requires dumping margins to be determined on an entry-by-entry basis, § 1675(a)(2)(C) provides

the antidumping duty order, the difference is refunded; if, however, the preliminary duty is lower, the difference is disregarded. Accordingly, the preliminary estimated duty functions as a "cap" on the importer's antidumping duty liability for entries made during this period. *Thai Pineapple I*, 1999 WL 288772 at 11.

655. *Thai Pineapple*, 273 F.3d at 1083.

656. As the court explained, the other distortion alleged by the Thai producer—the calculation, notwithstanding rising costs, of a single average cost of production covering the entire period of review—was corrected on remand following the lower court's decision in *Thai Pineapple I*. *Id.* at 1081.

657. *Id.* at 1084 (citing 19 U.S.C. § 1677b(b)(3) (1999)).

658. *Id.* (citing, *inter alia*, Static Random Access Memory Semiconductors from Taiwan, 62 Fed. Reg. 51,422, 51,424 (Oct. 1, 1997) (prelimin. determination) (using quarterly cost reporting periods during periods of significant price declines)).

659. *Id.* at 1084-85.

660. *Id.* at 1085.

661. *Id.*

662. *Id.*

663. *Id.* at 1086.

considerable discretion with respect to the determination of assessment rates, requiring only that calculated dumping margins “shall be the basis” for antidumping duty assessment.⁶⁶⁴

Finally, certain technical aspects of the dumping calculations in the Commerce Department’s AFBs proceedings reached the Federal Circuit in *RHP Bearings Ltd. v. United States*,⁶⁶⁵ and again the court reversed part of the determination before it.⁶⁶⁶ The issues—one involving the “special rule” for calculating constructed export price when substantial value is added to the merchandise by affiliated importers post-importation,⁶⁶⁷ and the other involving the determination of constructed value—arose in the eighth administrative review of the antidumping duty order on AFBs from the United Kingdom.⁶⁶⁸ On the first issue, the Commerce Department, during its administrative review, sought and obtained information from the U.K. producers regarding the value of further processing of their merchandise in the United States prior to resale to unaffiliated customers.⁶⁶⁹ Notwithstanding the substantial value that the Department found was added by the post-importation further processing, it did not apply the special rule to the U.K. producers’ sales.⁶⁷⁰ Over the objections of the U.K. producers, the Department explained in its final results of review that the rule was discretionary, and that it was unnecessary to apply it where, as here, the value added in the United States could be readily calculated.⁶⁷¹

664. *Id.* at 1085.

665. 288 F.3d 1334 (Fed. Cir. 2002).

666. *Id.* at 1347.

667. Pursuant to 19 U.S.C. § 1677a(e), the special rule applies where “the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise.” 19 U.S.C. § 1677a(e) (1999). Where the Commerce Department finds this to be the case, and where the data permit, it must base the constructed export price on either “[t]he price of identical subject merchandise sold by the exporter or producer to an unaffiliated person,” or “[t]he price of other subject merchandise sold by the exporter or producer to an unaffiliated person.” § 1677a(e)(1)-(2). Section 1677a(e) also permits the Department, where the U.S. value added is substantial, to employ “any other reasonable basis” for determining the constructed export price.

As explained by the Federal Circuit, § 1677a(e), unlike § 1677a(d)(2) (requiring the U.S. starting price to be reduced by the cost of any further manufacture or assembly in the United States), “provides for calculating constructed export price without reference to the price at which the further manufactured goods are sold to an unaffiliated purchaser.” *Id.* at 1338.

668. See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, 63 Fed. Reg. 33,320 (June 18, 1999) (final admin. review).

669. See *id.* at 33,345.

670. *Id.* at 33,338.

671. *Id.* at 33,338.

The Court of International Trade affirmed this determination.⁶⁷² On the second issue, the Commerce Department applied the same normal value methodology at issue in *SKF*, discussed above; i.e., it determined it could not, using a narrow definition of the foreign like product (identical AFBs or AFBs within the same family grouping), base normal value on home-market prices; but then, for purposes of establishing constructed value, it applied a broader measure of the foreign like product.⁶⁷³ The Court of International Trade also affirmed this aspect of the Commerce Department's determination.⁶⁷⁴

U.K. producers appealed both issues to the Federal Circuit.

Stressing that its review of issues of statutory construction is "without deference,"⁶⁷⁵ and applying *Chevron*⁶⁷⁶ principles, the Federal Circuit turned first to the U.K. producers' argument that the statute mandates application of the special rule for determining constructed export price under the circumstances because this result is explicitly required by 19 U.S.C. § 1677a(d)(2), which applies *except* where the circumstances identified in § 1677a(e) are present.⁶⁷⁷ Parsing the statute, the court determined that Congress had directly addressed the issue, in that it had left to the agency's discretion to determine when the "triggering circumstances" for application of the special rule are present.⁶⁷⁸ The court also found that the legislative history to the special rule made clear Congress' intent to "ease administrative burden" associated with the calculation of constructed export price, in scenarios complicated by extensive value-added activities of U.S. affiliated importers, by granting to the Commerce Department practical alternatives to the complex task of isolating the value of the

672. See *RHP Bearings, Ltd. v. United States*, 120 F. Supp. 2d 1116 (Ct. Int'l Trade 2000).

673. See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, 63 Fed. Reg. at 33,333.

674. See *RHP*, 120 F. Supp. 2d at 1126-27.

675. *RHP*, 288 F.3d at 1343 (citing *U.S. Steel Group v. United States*, 225 F.3d 1284, 1286 (Fed. Cir. 2000)).

676. See *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (establishing a two step inquiry into administrative interpretation of statutes which first examines the clarity of the statute and, absent clarity, examines whether the administrative construction was reasonable and permissible).

677. *RHP*, 288 F.3d at 1343.

678. *Id.* at 1345. In reaching this conclusion, the Federal Circuit focused on two aspects of § 1677a(e)—first, that the Commerce Department was required to turn to the two types of sales described in the special rule only if it "determines that the use of such sales is appropriate," and second, that the final sentence of the provision empowers the Department to base constructed export price "on any other reasonable basis." *Id.* The court further noted, "[w]e do not think that the language of the statute could present a clearer grant of discretion to Commerce." *Id.*

post-importation activities.⁶⁷⁹ Having determined that Congress had spoken directly to the issue, the court noted that it might have been expected to turn to the question whether the Commerce Department's application of the special rule in this instance was reasonable.⁶⁸⁰ However, the court reasoned, appellants had not raised the reasonableness of the Department's methodology, arguing before the court only that the statute dictated application of the special rule: "[a]ccordingly, as far as the special rule is concerned, the only thing left for us to do is affirm the conclusion of the Court of International Trade."⁶⁸¹ With respect to the constructed value issue, the Federal Circuit vacated the lower court decision based on its recent holding in *SKF*, and remanded for reconsideration in light of that decision.⁶⁸²

c. Non-market economy exporters

The antidumping law provides a distinct methodology for the calculation of normal value for exporters in non-market economy ("NME") countries.⁶⁸³ The Commerce Department presumes that NME producers and exporters operate under the control of the state, and therefore does not determine normal value based on the home market sales of such companies; rather, it constructs normal value based on a "factors of production" methodology,⁶⁸⁴ which identifies surrogate market economy values for the factors in countries at a level of economic development comparable to the NME country.⁶⁸⁵ During the last three years, two cases involving NME issues reached the Federal Circuit—one involving the valuation of certain inputs, or

679. *Id.* (noting that the special rule "establishes a simpler and more effective method for determining export price in situations where an affiliated importer adds value to subject merchandise after importation").

680. *Id.* at 1345-46.

681. *Id.* at 1346.

682. *Id.* (citing *SKF USA Inc. v. United States*, 263 F.3d 1369 (Fed. Cir. 2001)).

683. See 19 U.S.C. § 1677b(c)(1) (1999) (providing that "the administering authority shall determine the normal value of the subject merchandise of the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses.").

684. *Id.*

685. See *id.* (providing further that "valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority"). Subsection (c)(4) further instructs the Commerce Department to "[u]tilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are (A) at a level of economic development comparable to that of the non-market economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4) (1988).

material factors, used by an NME producer,⁶⁸⁶ and the other involving the circumstances pursuant to which resellers of NME-produced merchandise are entitled to their own antidumping duty rates.⁶⁸⁷ The Federal Circuit affirmed the lower court in both cases.

In *Shakeproof Assembly Components, Inc. v. United States*, the petitioner in the investigation of helical spring lock washers from the People's Republic of China ("PRC") challenged the Commerce Department's valuation, and the Court of International Trade's affirmance, of steel wire rod used by the PRC producer in manufacturing the subject merchandise.⁶⁸⁸ The Federal Circuit sustained the lower court's affirmance of the Commerce Department determination.⁶⁸⁹ Applying *Chevron* deference,⁶⁹⁰ and noting that constructing normal value for a producer in a non-market economy country is a "difficult" and "imprecise" process,⁶⁹¹ the Federal Circuit sustained the Commerce Department's methodology for valuing steel wire rod, based on certain actual purchases of steel wire rod made by the PRC producer from a British company.⁶⁹² Shakeproof contended that the Commerce Department should have rejected this methodology because the steel purchases at issue represented only one third of the PRC producer's total purchases of steel wire rod (the remainder having been purchased from PRC suppliers).⁶⁹³ The Federal Circuit rejected this argument, agreeing with the Government that the purchase price of the UK steel constituted the most accurate information to determine the normal value of the domestically obtained steel.⁶⁹⁴

In *Transcom, Inc. v. United States*,⁶⁹⁵ the Federal Circuit again affirmed the Court of International Trade.⁶⁹⁶ This time it affirmed

686. *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376 (Fed. Cir. 2001).

687. *See Transcom, Inc. v. United States*, 294 F.3d 1371 (Fed. Cir. 2000).

688. *Shakeproof*, 268 F.3d at 1378-80.

689. *See id.* at 1383 (agreeing with lower court that Commerce did not abuse its discretion); *see also Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 102 F. Supp. 2d 486 (Ct. Int'l Trade 2000); *Certain Helical Spring Lock Washers from the Peoples Republic of China*, 62 Fed. Reg. 61,794 (Dep't Commerce Nov. 19, 1997) (final results of antidumping duty administrative review) (upholding the use of actual imported steel prices to value steel inputs).

690. *See Shakeproof*, 268 F.3d at 1380-81 (addressing whether Congress has directly spoken to the issue and whether the statutory interpretation is "based on a permissive construction of the statute").

691. *Id.* at 1381 (citing *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999)).

692. *Id.* at 1382-83.

693. *Id.* at 1382.

694. *Id.* at 1383.

695. 294 F.3d 1371 (Fed. Cir. 2002).

696. *See Transcom, Inc. v. United States*, 121 F. Supp. 2d 690, 709 (Ct. Int'l Trade

with respect to a dispute arising out of the Commerce Department's longstanding methodology of applying single, countrywide NME antidumping rates unless individual exporters could demonstrate legal, financial, and economic independence from the NME government.⁶⁹⁷ At issue in *Transcom* was the PRC-wide rate calculated by the Commerce Department in connection with the seventh administrative review of the antidumping duty order on tapered roller bearings ("TRBs") from the PRC.⁶⁹⁸ *Transcom* sought to avoid application of the seventh review rate—calculated on the basis of the best information available ("BIA")—to two of its Hong Kong-based resellers of Chinese TRBs.⁶⁹⁹ *Transcom* argued first, that under the statutory and regulatory scheme in effect at the time of initiation of the seventh review, requesters were required to identify all companies for which review was requested, and second, that the Commerce Department was required to limit any review to the companies identified in the review request.⁷⁰⁰ The Federal Circuit rejected these arguments, emphasizing that neither the statute nor the regulations required this approach.⁷⁰¹ The Federal Circuit next rejected *Transcom's* argument that its resellers had not received adequate notice that their U.S. sales would be affected by the seventh administrative review of the TRBs order.⁷⁰² The court noted that a "reasonably informed party" should be able to comprehend from Commerce's published notice whether the particular entries in which the company has an interest may be affected by the administrative review.⁷⁰³ The court analyzed the Department's initiation notice in

2000) (finding Commerce's determination of antidumping duty rates to be unreasonable under the relevant statutes).

697. *Id.* at 1381 (finding the statute to be silent regarding whether Commerce may presume that parties are entitled to independent treatment). See generally *Sigma Corp. v. United States*, 117 F.3d 1401 (Fed. Cir. 1997) (discussing presumption that a company that fails to establish independence from the NME entity is subject to the country-wide rate, while a company that demonstrates its independence is entitled to an individual rate).

698. See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the Peoples Republic of China*, 62 Fed. Reg. 6,189 (Dep't Commerce Feb. 11, 1997) (final results of antidumping duty administrative review and revocation in part of antidumping duty order) (finding that non-PRC exporters of merchandise from the PRC will be subject to the cash deposit rate applicable to the PRC supplier).

699. *Transcom*, 294 F.3d at 1376. Under the pre-URAA antidumping law, Commerce was authorized to resort to BIA when a party "refused or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation." 19 U.S.C. § 1677e(c) (1988).

700. *Id.* at 1377.

701. *Id.* at 1377-78 (citing 19 U.S.C. § 1675(a) (1988) and 19 C.F.R. § 353.22, provisions that have been superseded).

702. *Id.* at 1379.

703. *Id.* at 1378 (quoting *Transcom, Inc. v. United States*, 182 F.3d 876, 882-83 (Fed. Cir. 1999)).

this case and found that, notwithstanding certain ambiguities in the notice, it clearly announced that all exporters of TRBs from the PRC were subject, in the first instance, to the review.⁷⁰⁴ The Federal Circuit further identified specific steps that Transcom's resellers could have taken to protect themselves from the possible adverse effects of unfavorable final results of review.⁷⁰⁵ Finally, the court rejected Transcom's argument in the alternative that, even if the Commerce Department had properly subjected all exporters to the review, its resort to BIA was improper.⁷⁰⁶ As reasoned by the court, Transcom's contentions in this respect lacked merit because they proceeded from the assumption that its resellers' PRC producers were independent of the PRC-wide entity, "when in fact the NME presumption begins with the assumption that the producers are part of the NME entity until they prove otherwise."⁷⁰⁷

d. Determinations on the basis of the "facts available"

Antidumping and countervailing duty investigations are complicated and fact-intensive, and usually entail the submission of multiple rounds of questionnaires completed by respondents. However, respondents sometimes do not—or cannot—provide requested information, leaving gaps in the investigative record. The statute, at 19 U.S.C. § 1677e, addresses the problem by authorizing the Department to fill such gaps with the "facts available."⁷⁰⁸ The statute also authorizes the Department to employ adverse inferences in selecting from the facts available—but only if it finds that the party has not acted "to the best of its ability" to comply with the information request.⁷⁰⁹ The statute also imposes on the Commerce Department the obligation to corroborate any secondary information (i.e., information not obtained from the respondents) used as facts available.⁷¹⁰ During the last three years, two cases involving the limits

704. *Id.* at 1378.

705. *Id.* at 1379. As the court explained, Transcom could have protected itself by making sure that its Chinese suppliers proved their entitlement to separate rates by participating in the review, or Transcom could have made sure that its Hong Kong resellers verified their entitlement to intermediate country rates under 19 U.S.C. § 1677b(f). *Id.*

706. *Id.* at 1380-81.

707. *Id.* at 1381.

708. See 19 U.S.C. § 1677e(a) (2000) (providing that when necessary information is not available the administering authority should use the facts available when reaching a determination under this subtitle).

709. *Id.* § 1677e(b).

710. See § 1677e(c) (requiring that if the administering authority must rely on secondary information instead of information received directly from a party in an investigation or review, the administering authority should attempt to corroborate that information with other, independent sources "reasonably at [its] disposal").

of the Commerce Department's authority to employ facts available came before the Federal Circuit, and in both instances the court affirmed the lower court.⁷¹¹

In *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*,⁷¹² the Federal Circuit affirmed the Court of International Trade's decision requiring the Commerce Department to reset an adverse facts available rate found for De Cecco in the antidumping duty investigation of pasta from Italy.⁷¹³ The Commerce Department, in its original antidumping determination, found that De Cecco had not cooperated with the investigation, and, based on information supplied in the underlying petition, imposed on it an adverse rate of 46.67%.⁷¹⁴ De Cecco challenged this determination in the Court of International Trade, which remanded the determination and ultimately affirmed the Department's use of a lower rate, 24.31%, as had been calculated and verified for another respondent.⁷¹⁵ The Government appealed, and the Federal Circuit reviewed the lower court decision pursuant to the substantial evidence standard.⁷¹⁶ First, the Federal Circuit affirmed the Court of International Trade's outright rejection of the 46.67% rate originally applied to De Cecco.⁷¹⁷ The court found that there had been substantial evidence before the lower court discrediting that rate, and that to permit Commerce to impose such a high punitive rate, which has been discredited by Commerce's own investigation, would exceed the agency's already broad discretion.⁷¹⁸ The Federal Circuit then turned to the lower court's suggestion that the Commerce Department use the lower rate of 24.31%—the highest verified margin for another pasta producer.⁷¹⁹ The Federal Circuit rejected the Government's contention that the lower court had ordered the Commerce Department to apply this rate, finding the remand imposed no limit

711. See, e.g., *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027 (Fed. Cir. 2000); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330 (Fed. Cir. 2002).

712. *F.lli De Cecco*, 216 F.3d 1027.

713. See *id.* at 1035 (finding that the Court of International Trade did not impose on Commerce a required rate simply by suggesting a rate that would withstand judicial scrutiny).

714. See *Certain Pasta from Italy*, 61 Fed. Reg. 30,326 (Dep't Commerce June 17, 1996) (final determination).

715. See *Borden, Inc. et al. v. United States*, 1998 WL 895890 (Ct. Int'l Trade Dec. 16, 1998) (holding that, pursuant to CIT Rule 54(b), there was no reason to delay entering a separate judgement concerning DeCecco's claim).

716. *F.lli De Cecco*, 216 F.3d at 1031 (providing that the court would uphold Commerce's determination unless there was a finding of insufficient evidence).

717. See *id.* at 1033 (establishing that the rate was uncorroborated by Commerce).

718. *Id.* at 1033.

719. *Id.*

on Commerce.⁷²⁰ However, the Federal Circuit also held that, even if the Court of International Trade had specifically ordered use of the 24.31% rate, such an order would have been within the court's authority because the facts of the case so clearly showed that De Cecco's actual antidumping margin would have been even lower.⁷²¹ The court further emphasized that the corroboration requirement of § 1677e(c) demonstrated that Congress intended any adverse facts available rates to be reasonable and grounded in reality.⁷²²

In *Ta Chen Stainless Steel Pipe, Inc. v. United States*,⁷²³ the Federal Circuit again affirmed the Court of International Trade's holding concerning the limits of the Commerce Department's authority to apply adverse facts available.⁷²⁴ The case involved the third administrative review of the antidumping duty order on welded stainless steel pipe from Taiwan⁷²⁵—the first of the reviews initiated under the URAA provisions—and, specifically, the Commerce Department's determination, on remand, to apply an adverse facts available rate to Ta Chen in light of its failure to supply information about sales through a U.S. distributor, Sun Stainless, Inc.⁷²⁶ The Department found, based on the expanded affiliation provisions of the URAA,⁷²⁷ that Ta Chen and Sun were affiliated for a portion of the period covered by the third review.⁷²⁸ The Department applied an adverse facts available rate of 30.95% to Ta Chen, based on data

720. *Id.* Judge Schall issued a separate opinion on this point, concurring in part and dissenting in part. *Id.* at 1035-37. In his view, the Court of International Trade had set a ceiling on the adverse facts available rate that the Commerce Department was allowed to use in setting De Cecco's rate and, in doing so, had erred as a matter of law by improperly limiting the agency's discretion on remand. *Id.* As Judge Schall explained, he would have remanded to the Commerce Department with instructions to set a rate lower than 46.67%, but without specifying which rate to apply. *Id.* at 1036-37.

721. *Id.* at 1034. The court reasoned that De Cecco was considered a high-end producer and "the other high-end producers, Delverde and De Matteis, received dumping margins of only 2.80 percent and 0.67 percent (de minimis) respectively." *Id.* When compared to low-end producers who had higher dumping margins, those averaged 16.71%. *Id.* The maximum of the "low-end rates was 24.31 percent; the 'all-others' rate was 12.09 percent;" therefore, "applying the highest low-end producer rate to high-end producer De Cecco [was], in itself, an adverse inference." *Id.*

722. *Id.*

723. 298 F.3d 1330 (Fed. Cir. 2002).

724. *Id.* at 1340.

725. See Certain Welded Stainless Steel Pipe from Taiwan, 62 Fed. Reg. 37,543 (Dep't Commerce July 14, 1997) (final admin. review).

726. See *Ta Chen*, 298 F.3d at 1334 (noting further that pursuant to 19 U.S.C. § 1677m(d), Commerce should have provided adequate notice to Ta Chen regarding the requirement to furnish Sun's sales data for the United States).

727. See 19 U.S.C. § 1677(33) (2000) (defining individuals that shall be considered "affiliated" or "affiliated persons.>").

728. *Ta Chen*, 298 F.3d at 1333.

derived from Ta Chen's own sales during the third review period.⁷²⁹ The Court of International Trade affirmed the Department's remand determination,⁷³⁰ and Ta Chen appealed.

Ta Chen raised three claims before the Federal Circuit related to the Commerce Department's imposition of adverse facts available and the Federal Circuit rejected each.⁷³¹ First, Ta Chen argued that the record of the third review did not contain substantial evidence of affiliation with Sun.⁷³² The Federal Circuit, however, found that Ta Chen had the burden to create an accurate record,⁷³³ and that it had been on notice since the first administrative review that information pertaining to its relationship with Sun might be requested, such that it could have taken steps to preserve relevant records.⁷³⁴ Second, Ta Chen argued that the Court of International Trade had impermissibly affirmed the third review final results on grounds other than those relied upon by the Commerce Department, but the Federal Circuit held that the reasoning of the Court of International Trade was consistent with the grounds invoked by Commerce.⁷³⁵ Third, Ta Chen argued that the Commerce Department had violated 19 U.S.C. § 1677m by failing to notify it of deficiencies in the record while those deficiencies could have been addressed.⁷³⁶ The Federal Circuit, however, held that where, as here, a party informs the Commerce Department that it will not provide the requested information, the Department is under no obligation to provide subsequent deficiency notices.⁷³⁷ As explained by the court, § 1677m applies only when a "response to a request" is insufficient, and an absolute failure to respond is not a "response" for purposes of the statute.⁷³⁸ Finally, the Federal Circuit upheld the Court of International Trade's decision affirming the 30.95% adverse facts

729. *Id.* at 1334.

730. *Ta Chen Stainless Steel Pipe v. United States*, 2000 WL 1225799 (Ct. Int'l Trade Aug. 25, 2000).

731. *Ta Chen*, 298 F.3d at 1336-41.

732. *Id.* at 1336.

733. *See id.* (citing *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993) (explaining that the burden of production belongs to the party in possession of the required information)).

734. *Id.* (explaining that Ta Chen assumed the risk that Commerce would need the sales data alleged to be evidence of dumping activity when Sun was sold without preserving the records of sale).

735. *Id.* at 1337.

736. *Id.* at 1337-38.

737. *Id.* at 1338.

738. *Id.* at 1338. 19 U.S.C. § 1677m(d) provides that if Commerce finds a response to an information request is deficient in that it does not address the request, Commerce must inform the party submitting the response and provide that person with an opportunity to correct the deficiency within the time limits established for the completion of investigations and reviews. *Id.*

available margin found by the Commerce Department, reasoning that, unlike the situation before the court in *De Cecco*, this rate was corroborated by actual Ta Chen sales data.⁷³⁹

Judge Gajarsa issued a strong and lengthy dissent from the majority opinion, arguing in essence that the Court of International Trade and the panel majority had expected too much of Ta Chen and Sun.⁷⁴⁰ As he explained, Ta Chen could not reasonably have been expected to know that the Commerce Department might in the future request U.S. sales information based on a finding of affiliation with Sun.⁷⁴¹ Judge Gajarsa concluded that, if Commerce would like to require all importers to keep sales records from any U.S. distributor that might someday be deemed an affiliate, it must create a regulation pursuant to statutory authority.⁷⁴²

e. Duty absorption

The URAA also amended U.S. antidumping law to provide for so-called “duty absorption inquiries,” pursuant to which the Commerce Department is authorized to determine whether foreign producers and exporters subject to antidumping duties are “absorbing” the cost of antidumping duties through affiliated U.S. importers and resellers, rather than passing this cost along to U.S. purchasers in the form of higher prices. Specifically, pursuant to 19 U.S.C. § 1675(a)(4), the Commerce Department must, if requested in administrative reviews initiated two or four years following the imposition of an antidumping duty order, “determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter.”⁷⁴³ If the Commerce Department finds that duty absorption

739. *Id.* at 1339 (citing *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, at 1032 (Fed. Cir. 2000)).

740. *Id.* at 1340-50 (Gajarsa, J., dissenting).

741. *Id.* Judge Gajarsa observed, among other things, that during the third administrative review, Commerce did not make clear to Ta Chen that under the new statutory definition, Sun would be considered an affiliate, or even a potential affiliate. *Id.* at 1344. Gajarsa went on to explain that “[a]lthough I agree with the panel majority and the CIT that substantial evidence supports Commerce’s determination that Sun and Ta Chen were affiliated within the meaning of § 1677(33)(G) for the early part of the third review period, I do not agree that any statutory or regulatory authority authorizes the imposition of an adverse inference against Ta Chen for Ta Chen’s failure to predict that Commerce would reach this determination.” *Id.* at 1343-44.

742. *Id.* at 1349.

743. 19 U.S.C. § 1675(a)(4) (1999). See *FAG Italia S.P.A. v. United States*, 291 F.3d 806 (Fed. Cir. 2002) (explaining that the purpose of this provision is “to ensure that foreign exporters identified by Commerce as dumping goods in the United

has occurred, it is instructed by § 1675(a)(4) to notify the U.S. International Trade Commission, which in turn is required to take such a finding into account in conducting the required five-year, or “sunset,” review of the antidumping order pursuant to 19 U.S.C. § 1675(c).⁷⁴⁴ In the two duty absorption cases that reached the Federal Circuit in the last three years, the court affirmed the Court of International Trade in overturning the Commerce Department’s interpretation of the duty absorption statute.

In *FAG Italia*,⁷⁴⁵ the Federal Circuit considered the legality of the Commerce Department’s policy with respect to duty absorption inquiries for so-called “transition orders,” i.e., antidumping duty orders that entered into effect before January 1, 1995, the effective date of the URAA.⁷⁴⁶ Pursuant to its policy at the time, and as reflected in its regulation promulgated in 1997 to implement § 1675(a)(4), the Commerce Department conducted duty absorption inquiries for post-URAA orders, as well as for transition orders,⁷⁴⁷ even though the statutory authority to conduct duty absorption inquiries does not, on its face, apply to transition orders.⁷⁴⁸ At issue in *FAG*

States do not undermine the purpose of the antidumping laws by ‘absorbing’ the duty rather than passing the duty on to United States purchasers in the form of higher prices”). In such circumstances, dumping continues despite the assessment of the duty, and, as a result, “the remedial effect of an antidumping order may be undermined” *Id.* at 809 (citing Joint Report of the Committee on Finance, Committee on Agriculture, Nutrition, and Forestry, Committee on Governmental Affairs of the United States Senate to accompany S. 2467, S. REP. NO. 103-412, at 44 (1994)).

744. See *FAG Italia*, 291 F.3d at 810 (“[t]he consequence of a finding of duty absorption by Commerce is that the anti-dumping order is less likely to be revoked as a result of a sunset review.”). U.S. antidumping law as amended by the URAA requires orders to be revoked five years after their imposition unless the Commerce Department determines that revocation “would be likely to lead to continuation or recurrence of dumping” and the U.S. International Trade Commission determines that revocation “would be likely to lead to . . . material injury.” See 19 U.S.C. § 1675(c)(1) (1999).

745. *FAG Italia*, 291 F.3d at 806.

746. 19 U.S.C. § 1675(c)(6)(C) (1999) (defining “transition order” as “an antidumping duty order . . . which is in effect on the date the WTO Agreement enters into force with respect to the United States,” i.e., January 1, 1995).

747. See *FAG Italia*, 291 F.3d at 811-12 (citing 19 C.F.R. § 351.213(j) (1998)); see also § 351.213(j)(2) (“For transition orders defined in § 751(c)(6) of the Act, the Secretary will apply (j)(1) of this section to any administrative review initiated in 1996 or 1998.”).

748. In response to the Commerce Department’s proposed duty absorption regulation, one commentator questioned the applicability of the regulation to transition orders. Preamble to Proposed 19 C.F.R. § 351.213, 62 Fed. Reg. 27296, 27317 (May 19, 1997). The Commerce Department responded as follows: “Under § 751(c)(6)(D) of the Act, the Department is to treat transition orders, such as the 1993 orders in question, as being issued on January 1, 1995. Therefore, paragraph (j)(2) properly permits absorption inquiries for transition orders to be requested in any administrative review initiated in 1996 or 1998, because these are the second and fourth years after the date on which transition orders are deemed to be issued.” *Id.*

Italia was the transition order on AFBs from Italy, which had been imposed in 1989.⁷⁴⁹ In its seventh administrative review of this order, initiated in 1996, the Department conducted a duty absorption inquiry and found that two Italian producers and exporters of subject AFBs had engaged in duty absorption.⁷⁵⁰ The Court of International Trade determined that the Department lacked statutory authority to conduct duty absorption inquiries for transition orders,⁷⁵¹ and the Government appealed.

In articulating its standard of review, the Federal Circuit stated that it would review this issue of statutory interpretation without deference, except to the extent that deference might be warranted under *Chevron*.⁷⁵² The court then turned to § 1675(a)(4), noting that the authority to conduct duty absorption inquiries was expressly limited to reviews “initiated two years or four years after the publication of an antidumping duty order” (i.e., 1991 and 1993 for the AFBs order), and that the provision deeming transition orders to be issued on January 1, 1995 operated, on its face, only with respect to sunset reviews.⁷⁵³ The court rejected the Government’s arguments that the Commerce Department was authorized to conduct two and four-year reviews of transition orders based on the absence in the statute of an express prohibition to do so, noting that “Commerce seriously misunderstands its role under *Chevron*.”⁷⁵⁴ The court went on to stress that, notwithstanding the Commerce Department’s view that application of the duty absorption statute was consistent with the overall statutory scheme, “the absence of a statutory prohibition cannot be the source of agency authority.”⁷⁵⁵

at 27318.

749. See Ball Bearings and Cylindrical Roller Bearings, and Parts Thereof, from Italy, 54 Fed. Reg. 20,903 (Dep’t Commerce, May 15, 1989).

750. See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France et al., 62 Fed. Reg. 31,566 (Dep’t Commerce, June 19, 1997) (preliminary admin. review) and Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France et al., 62 Fed. Reg. 54,043 (Dep’t Commerce, Oct. 17, 1997) (final admin. review).

751. See *FAG Italia S.P.A. v. United States*, 2000 WL 978462 (Ct. Int’l Trade Ju. 13, 2000).

752. *FAG Italia*, 291 F.3d at 814.

753. *Id.* at 814. The court observed that “[t]here is no provision creating a ‘treated as’ date for transition orders for purposes of subsection (a), the subsection governing duty absorption inquiries.” *Id.*

754. *Id.* at 815 (“Commerce can identify no ambiguities in the statute, nor any statutory ‘gaps’ that Commerce is entitled to fill.”).

755. *Id.* at 816 (citing *So. Cal. Edison Co. v. Fed. Energy Regulatory Comm’n*, 195 F.3d 17 (D.C. Cir. 1999)). The court explained that “the statutory silence as to Commerce’s power to initiate duty absorption inquiries for transition orders does not give Commerce authority to conduct such inquiries. The fact that Commerce is empowered to take action in certain limited situations does not mean that

Judge Michel concurred in part and dissented in part, concluding that Congress did intend to provide to the Commerce Department authority to conduct the requested duty absorption inquiry.⁷⁵⁶ Explaining, among other things, that “[w]e read statutes not in isolation but as a whole,”⁷⁵⁷ and that “where our construction involves multiple statutory sections that were enacted simultaneously as part of the same Act, ‘the duty to harmonize them is particularly acute,’”⁷⁵⁸ Judge Michel reasoned that the various statutory provisions connecting sunset review procedures with the authorization for duty absorption inquiries could be reconciled by reading the statute to authorize duty absorption inquiries in reviews of *all* orders, including transition orders.⁷⁵⁹

Duty absorption also arose in *NTN Bearing Corporation*, but the Court of International Trade had already held that the Commerce Department had no authority under the statute to conduct a duty absorption inquiry for the transition order at issue,⁷⁶⁰ and so the Federal Circuit merely referenced its earlier decision on this point in *FAG Italia*, and affirmed.⁷⁶¹

f. Assessment

While calculation of an antidumping rate typically is already complex, actual assessment of the rate with respect to individual entries of merchandise can present additional complexity.⁷⁶² During the last three years, in addition to the assessment issue that arose in *Thai Pineapple*, the Federal Circuit was presented with one case—*Koyo Seiko Co. v. United States*—involving the Commerce Department’s assessment regulation, 19 C.F.R. § 351.212(b)(1), and specifically whether this regulation constituted a reasonable interpretation of the antidumping statute.⁷⁶³ Section 351.212(b)(1) provides, in pertinent

Commerce enjoys such power in other instances.” *Id.* at 817.

756. *Id.* at 822.

757. *Id.* at 820 (citing *United States v. Morton*, 467 U.S. 822 (1984)).

758. *Id.* (quoting *U.S. West Comm., Inc. v. Hamilton*, 224 F.3d 1049, 1053 (9th Cir. 2000)).

759. *Id.* at 821.

760. See *NTN Bearing Corp. of Am. v. United States*, 104 F. Supp. 2d 110, 157-58 (Ct. Int’l Trade 2000) (ordering annulment of the Department’s duty absorption findings).

761. *NTN Bearing Corp. of Am. v. United States*, 295 F.3d 1263 (Fed. Cir. 2002).

762. See, e.g., *Koyo Seiko Co. v. United States*, 258 F.3d 1340 (Fed. Cir. 2001) (explaining the wide range of numbers that can occur when calculating the assessment rate by linking it to specific entries of imported merchandise, but ultimately upholding Commerce’s use of entered value of imported merchandise in the assessment calculation).

763. *Id.* at 1341-42. See 19 U.S.C. § 1675(a)(2)(C) (Supp. 2002) (providing that “the determination . . . shall be the basis for the assessment of countervailing or

part, that the Department will “calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes.”⁷⁶⁴ As explained by the court, “the assessment rate is calculated ‘as a percentage of entered value’ of the subject merchandise sold in the United States during the review period.”⁷⁶⁵ Such a methodology is required because a respondent’s sales and imports are not the same during any particular review period—and in fact may be significantly different.⁷⁶⁶ Koyo Seiko challenged the Department’s assessment regulation before the Court of International Trade,⁷⁶⁷ which upheld the regulation and the Department’s assessment methodology.⁷⁶⁸ This appeal followed.

Koyo argued before the Federal Circuit in *Koyo Seiko* that because the numerator of the Commerce Department’s assessment formula is based on sales values (i.e., the difference between home market and United States sales values), the denominator must also be based on sales values.⁷⁶⁹ Beginning its *Chevron* analysis with the express language of the statute, the Federal Circuit noted at the outset that nothing in the statute required Koyo’s methodology or invalidated the Department’s methodology.⁷⁷⁰ The Federal Circuit acknowledged that Koyo’s preferred methodology appeared logical, but explained that its burden was to show that the Department’s regulation was arbitrary or otherwise unreasonable; and it failed to do so.⁷⁷¹ The

antidumping duties on entries of merchandise”).

764. 19 C.F.R. § 351.212(b)(1) (2000). As explained by the Federal Circuit, “entered value” is typically defined as being “equal to the invoice value of the subject merchandise less freight, insurance premium costs, and other non-dutiable charges.” *Koyo Seiko*, 258 F.3d at 1243 n.3 (quoting *Koyo Seiko Co. v. United States*, 110 F. Supp. 2d at 934, 938 (Ct. Int’l Trade 2000)).

765. See *Koyo Seiko*, 258 F.3d at 1343 (citing *Torrington Co. v. United States*, 44 F.3d 1572, 1576 (Fed. Cir. 1995)).

766. *Id.* at 1342.

767. The underlying administrative determination is the Commerce Department’s final results of the 1996-97 administrative review of the antidumping order on Tapered Roller Bearings from Japan. See *Tapered Roller Bearings and Parts Thereof, Finishing and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan*, 63 Fed. Reg. 63,875 (Dep’t of Commerce Nov. 17, 1998). In this determination, the Department explained that, “[i]n accordance with 19 C.F.R. 351.212(b)(1), we will calculate importer-specific *ad valorem* assessment rates for the merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the [period of review] to the total customs value of the sales used to calculate those duties [i.e., the entered value].” *Id.* at 63,875. This rate will be assessed uniformly on all entries each importer made during the period of review. *Id.*

768. *Koyo Seiko*, 110 F. Supp. 2d at 943.

769. *Id.* at 1346.

770. *Koyo Seiko*, 258 F.3d at 1346.

771. *Id.* at 1347.

court reasoned that if, alternatively, the Department's methodology were to be applied to a base of constructed export price sales, such a methodology would be unreasonable "since an accurate assessment rate using sales figures would recover the dumping margin, and no more and no less."⁷⁷² However, it further reasoned, the assessment rate is not applied to a respondent's sales during the period of review but, as required by 19 U.S.C. § 1675(a), to its customs entries during this period.⁷⁷³ The court also noted that "since the assessment rate is applied to entries and not to sales, there is at least a certain symmetry in using entered value as the denominator."⁷⁷⁴ Finally, the court posited that Koyo's strongest argument might have been that the Commerce Department's assessment methodology is unreasonable because the Department uses a different methodology for cash deposits; however, it concluded that the statute does not require assessment rates and cash deposit rates to be calculated in the same manner.⁷⁷⁵

5. *Countervailing duty methodologies*

During the three years under review, the Federal Circuit issued a single published decision concerning the calculation of countervailing duties, *Delverde, SrL v. United States*,⁷⁷⁶ and reversed the Court of International Trade on one of the most hotly disputed countervailing duty issues of recent years—whether subsidies benefiting a firm's productive assets can "pass through" to new owners of those assets when they are sold in an arm's-length transaction.⁷⁷⁷ *Delverde*, a respondent in the Commerce Department's countervailing duty investigation of Pasta From Italy, had purchased certain assets prior to initiation of the Department's investigation from an unrelated company that had previously received subsidies from the Italian government.⁷⁷⁸ Applying its standard methodology, the Commerce Department quantified a "pass through" benefit amount representing a residuum of the subsidies to

772. *Id.* at 1348.

773. *Id.*

774. *Id.*

775. *See id.* (citing *Torrington Co. v. United States*, 44 F.3d 1572, 1578 (Fed. Cir. 1995)).

776. 202 F.3d 1360 (Fed. Cir. 2000) (rehearing granted with modification June 20, 2000; rehearing *en banc* denied June 20, 2000, reported at 2000 U.S. App. LEXIS 15215).

777. *Delverde*, 202 F.3d at 1369-70 (vacating the Court of International Trade's decision and instructing that court to remand the case for the Department to determine if *Delverde* received a subsidy).

778. *Id.* at 1362 (describing *Delverde's* assets from the purchase as including a pasta factory, related products assets, name, and trademark rights).

the previous owner of the assets and imputed that benefit amount to Delverde.⁷⁷⁹ Delverde challenged the Department's methodology, and the Court of International Trade eventually affirmed, on remand.⁷⁸⁰ Delverde appealed to the Federal Circuit.

At the core of the Federal Circuit's analysis was the "Change of Ownership" provision added by the URAA, 19 U.S.C. § 1677(5)(F).⁷⁸¹ Section 1677(5)(F) provides that "[a] change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by an administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change of ownership is accomplished through an arm's length transaction."⁷⁸² Reviewing this provision, its statutory context, and the legislative history, the Federal Circuit concluded that the meaning of the statute was clear, such that it was not necessary to defer to the Department's interpretation under *Chevron*, but to determine if the Department's interpretation was in accordance with the statute.⁷⁸³ Because the statute barred the operation of a pass-through presumption, while the Department had "conclusively presumed that Delverde received a subsidy from the Italian government," the court struck down the Department's interpretation.⁷⁸⁴ The court also distinguished the facts of the case at bar from the "privatization" cases⁷⁸⁵ in which courts had reviewed a series of government divestitures of industrial assets, and whether those transactions had endowed the new owners of the assets with countervailable benefits.⁷⁸⁶

779. *Id.* (citing Certain Pasta from Italy, 61 Fed. Reg. 30,288 (Dep't of Commerce June 14, 1996) (final affirmative countervailing duty determination)).

780. *Delverde, SrL v. United States*, 24 F. Supp. 2d 314 (Ct. Int'l Trade 1998).

781. 19 U.S.C. § 1677(5)(F) (2000).

782. *Id.*

783. *Delverde*, 202 F.3d at 1367.

784. *Id.* The court found that the Department had applied a *per se* rule in that it had deemed the facts and circumstances surrounding the sale to be irrelevant, and that it had not identified any evidence that Delverde received a financial contribution and benefit for purposes of 19 U.S.C. § 1677(5)(D) and (E). *Id.* As summarized by the court, "[n]owhere following its methodology did Commerce determine whether Delverde directly or indirectly received a financial contribution and benefit from one of the acts enumerated." *Id.*

785. *See, e.g., Saerstahl AG v. United States*, 78 F.3d 1539 (Fed. Cir. 1996) ("Saerstahl II") (finding reasonable Commerce's determination that subsidies were not extinguished by privatization through arm's-length sale, but could be partially repaid by the purchase price); *British Steel PLC v. United States*, 127 F.3d 1471 (Fed. Cir. 1997) (holding that Commerce developed "reasonable interpretation of countervailing duty statute to account for repayment of prior subsidies during privatization of government owned entity").

786. *See generally Delverde*, 202 F.3d at 1369-70 (analyzing related Federal Circuit precedent and distinguishing it from the case at bar).

As the court noted:

[T]here are significant differences between privatization and private-to-private sales. The government has different concerns from those of a private seller. Unlike a private seller who seeks the highest market price for its assets, the government may have other goals, such as employment, national defense, and political concerns, which may affect the terms of a privatization transaction.⁷⁸⁷

In concluding its discussion, the court also noted that a WTO dispute settlement panel had recently found the same methodology, as applied in the privatization context, to be inconsistent with U.S. obligations under the WTO Subsidies and Countervailing Measures Agreement.⁷⁸⁸ However, the court dismissed the relevance of that panel ruling to its analysis in this case.⁷⁸⁹ The court remanded to the Court of International Trade, ordering it to instruct the Commerce Department to determine, based on the specific facts and circumstances surrounding the Delverde transaction, whether that company had indirectly received a financial contribution and benefit through the transaction and if it did not, to recalculate Delverde's countervailing duties without regard to subsidies bestowed on the previous owner of the assets.⁷⁹⁰

B. *U.S. International Trade Commission*

Finally, during the last three years, three decisions of the U.S. International Trade Commission reached the Federal Circuit. Under U.S. trade remedy law, antidumping and countervailing duties may be imposed only if the Commission finds, following an investigation as prescribed by law, that the imports under investigation (or subject imports) cause material injury, or threaten to cause material injury, to the U.S. industry seeking relief.⁷⁹¹ However, notwithstanding the

787. *Id.* at 1369.

788. *See id.* at 1369 (citing WTO Dispute Panel Report on United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, No. WT/DS138/R, at 39-50 (Dec. 23, 1999)) (finding that the privatization of a government-owned company in an arm's-length, fair market value transaction extinguishes any pre-privatization subsidies, such that the new owner of the company does not benefit from the previously bestowed subsidies).

789. *Id.* (explaining that the court did not consider the relevance of the WTO panel decision, except to say the decision was not inconsistent with the current decision, since Commerce's methodology was invalid under the Tariff Act).

790. *Id.* at 1369-70.

791. *See* 19 U.S.C. §§ 1671(a), 1673 (1999). Current U.S. law recognizes one exception to the general requirement that duties may be imposed only upon a finding by the Commission of injury or threat of injury. Specifically, with respect to countervailing duties only, the requirement applies only "in the case of merchandise

considerable commercial implications of Commission injury determinations—affirmative injury determinations allow antidumping and countervailing duties to stand, while negative injury determinations preclude their imposition—they are appealed far less frequently than antidumping and countervailing duty determinations of the Commerce Department.⁷⁹² In the three cases discussed below, the Federal Circuit applied the same level of rigorous review as seen in its review of other trade remedy cases—resulting in two affirmances of the Court of International Trade, and one reversal.⁷⁹³

In *Goss Graphics Systems, Inc. v. United States*,⁷⁹⁴ the Federal Circuit quickly disposed of a challenge brought by German and Japanese producers of Lareg Newspaper Printing Presses (“LNPP”s) to two aspects of the Commission’s determination involving this merchandise.⁷⁹⁵ The producers contended, first, that the Commission had improperly “cumulated” German and Japanese imports in assessing the effects of the imports on the U.S. industry pursuant to 19 U.S.C. § 1677(7)(G)(i) and (H)⁷⁹⁶ and, second, that the

imported from a Subsidies Agreement country.” 19 U.S.C. § 1671(a)(2) (1999). U.S. law defines a “Subsidies Agreement country” as: (1) any Member of the WTO; (2) any country with respect to which the United States has assumed obligations “substantially equivalent” to obligations under the WTO SCM Agreement; and (3) any country with respect to which the President of the United States has made certain enumerated findings. 19 U.S.C. § 1671(b) (1999).

At the heart of the Commission’s analysis is a statutorily mandated three-part test, which requires the Commission, in an injury investigation, to consider: (1) the volume of imports of the subject merchandise; (2) the effect of subject imports on U.S. prices; and (3) the impact of subject imports on the U.S. industry seeking relief. *See* 19 U.S.C. § 1677(7)(B) (1999).

792. The fact that appeals of Commission determinations are infrequent when compared to appeals of Commerce Department determinations may reflect, in part, the sense that appeals are unlikely to lead to reversal of the challenged determination. For example, even if the reviewing court finds certain aspects of a Commission determination to be unlawful, a remand determination correcting the error or errors can reach the same result as the underlying, challenged determination.

793. The standard of review prescribed by statute requires the reviewing court to “hold unlawful” a determination that is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i) (1996). In applying this standard (the same standard applied by the Court of International Trade), the Federal Circuit does not defer to the lower court. Nevertheless, in one of the decisions discussed the Federal Circuit cited an earlier decision holding that, in performing its review, it “will not ignore the informed opinion of the Court of International Trade.” *See* *Taiwan Semiconductor Indus. Ass’n v. United States*, 266 F.3d 1339 (Fed. Cir. 2001) (quoting *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994)).

794. 216 F.3d 1357 (Fed. Cir. 2000).

795. *Id.* at 1359.

796. Section 1677(7)(G)(i), which applies to material injury, and § 1677(7)(H), which applies to threat of material injury, both provide, with respect to petitions filed on the same day, for cumulative assessment of the “volume and price effects of imports of the subject merchandise . . . if such imports compete with each other and

Commission's threat-of-injury determination was unsupported by record evidence.⁷⁹⁷ Applying the substantial evidence standard of review,⁷⁹⁸ the Federal Circuit upheld the Court of International Trade's affirmance of the Commission's determination on both counts.⁷⁹⁹ On the cumulation issue, the Federal Circuit stated at the outset of its analysis that the Commission enjoys considerable flexibility in determining whether there is overlapping competition between subject imports and the domestic like product for purposes of § 1677(7)(G) and (H), and hence that cumulation is warranted.⁸⁰⁰ The court reviewed the various factors that the Commission had examined,⁸⁰¹ and noted that the challenge was based on purported misapplication of only one of these factors, i.e., that the German and Japanese LNPPs competed directly with each other in the final stage of the bidding process.⁸⁰² The court rejected this argument, agreeing with the Commission that "no single indicator for weighing competitive overlap is dispositive," and that the record as a whole provided "sufficient evidence of overlap in the end-use market to justify cumulation."⁸⁰³ In its review of the Commission's threat determination, the Federal Circuit emphasized that, under § 1677(7)(F), "[a]n affirmative finding of threat of material injury requires substantial evidence on the entire record that the domestic industry faces a real threat of imminent material injury from the subject imports."⁸⁰⁴ The court also stressed that, pursuant to § 1677(7)(F)(ii), a threat determination requires findings of both a "temporal relationship" and a "causal connection" between the

with domestic like products in the United States market." In other words, in certain injury investigations involving imports from more than one country, the Commission does not examine the effects of the imports on the U.S. industry on a country-by-country basis, but considers the effects on an aggregated, or cumulative, basis. 19 U.S.C. 1677(7)(G)(i), (7)(H) (1996).

797. *Goss*, 216 F.3d 1357 (Fed. Cir. 2000).

798. *Id.* at 1361 (citing 19 U.S.C. § 1516a(b)(1)(B)(i) (1999) and *Suramerica de Aleaciones Laminadas v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994)).

799. *See Goss Graphic Sys., Inc. v. United States*, 33 F. Supp. 2d 1082, 1104 (Ct. Int'l Trade 1998); *see also Large Newspaper Printing Press and Components Thereof, Whether Assembled or Unassembled, from Germany and Japan*, Inv. Nos. 731-TA-736 and 737, 61 Fed. Reg. 46824 (Sept. 1996).

800. *Goss*, 216 F.3d at 1361 (citing *Fundicao Tupy, S.A. v. United States*, 859 F.2d 915 (Fed. Cir. 1988)) (stating that, while a *Fundicao* analysis helps identify overlapping competition, "other ways may apply in future cases").

801. *Id.* at 1361-62 (noting that the Commission found that German and Japanese LNPPs: (1) were generally sold through similar channels of trade, (2) occupied the market simultaneously, and (3) were not limited by geographic boundaries within the United States).

802. *Id.* at 1362.

803. *Id.*

804. *Id.* (citing *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994)).

subject imports and the threat of material injury.⁸⁰⁵ The court then found that the Commission had examined all pertinent factors—including all factors required to be examined under § 1677(7)(F)(i), such as the ability of importers to shift future production to the United States, the rate of increase of subject producers' U.S. market penetration, and factors likely to contribute to price suppression and depression—and that the Commission's findings were supported by substantial evidence.⁸⁰⁶

The Federal Circuit's decision in *Taiwan Semiconductor* concluded lengthy litigation involving two remands from the Court of International Trade to the Commission and the ultimate reversal of the Commission's original determination that imports of Taiwanese static random access memory chips ("SRAMs") materially injured the U.S. SRAMs industry.⁸⁰⁷ Based on an antidumping petition filed by Micron Technology, Inc., a U.S. semiconductor producer, the Commission in its original investigation found that imports of Taiwanese SRAMs injured the U.S. industry.⁸⁰⁸ On review, the Court of International Trade neither affirmed nor reversed, but remanded to the Commission for further explanation of the causal nexus between the subject imports and injury to the U.S. industry.⁸⁰⁹ On remand, the Commission again found that subject the imports injured the domestic industry, and on review, the Court of International Trade again held that more explanation was required, and remanded for a second redetermination.⁸¹⁰ In its third decision, the Court of International Trade upheld the Commission's determination.⁸¹¹ Micron appealed. Applying the substantial evidence standard of review—but also noting that the lower court's opinion "deserves due respect"⁸¹²—the Federal Circuit first addressed Micron's claim that the Court of International Trade had improperly

805. *Id.* at 1362 (citing *NEC Corp. v. Dept. of Commerce*, 36 F. Supp. 2d 380, 391 (Ct. Int'l Trade 1998)).

806. *Id.* at 1363. Section 1677(7)(F)(i) enumerates nine factors that the Commission "shall consider, among other relevant factors." 19 U.S.C. § 1677(7)(F)(i) (1999).

807. *Taiwan Semiconductor Indus. Ass'n v. United States*, 266 F.3d 1339 (Fed. Cir. 2001).

808. *Id.* at 1341 (citing *Static Random Access Memory Semiconductors from Taiwan*, 63 Fed. Reg. 8909 (Dept. of Commerce, Feb. 23, 1998)).

809. *See Taiwan Semiconductor Indus. Assoc. v. United States*, 59 F. Supp. 2d 1324 (Ct. Int'l Trade 1999).

810. *See Taiwan Semiconductor Indus. Assoc. v. United States*, 93 F. Supp. 2d 1283 (Ct. Int'l Trade 2000).

811. *See Taiwan Semiconductor Indus. Assoc. v. United States*, 118 F. Supp. 2d 1250 (Ct. Int'l Trade 2000).

812. *Taiwan Semiconductor*, 266 F.3d at 1343-44 (quoting *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994)).

remanded the Commission's initial affirmative injury decision.⁸¹³ The Federal Circuit reviewed the lower court's reasons for seeking additional explanation from the Commission and, citing its decision in *Gerald Metals*, stressed the requirement for the Commission to determine that the subject imports are causing the injury, "not simply contributing to the injury in a tangential or minimal way."⁸¹⁴ The Federal Circuit then turned to the substance of the Commission's second remand determination that the subject imports did not make a material contribution to the injury suffered by the U.S. SRAMs industry. Noting, among other things, that during the time of greatest injury to the U.S. industry, Taiwanese imports tended to be priced higher than U.S.-produced SRAMs, and also that Taiwanese market share had remained relatively constant while non-subject imports, predominantly of Japanese and Korean origin, had increased substantially, the Federal Circuit held that substantial evidence supported the Commission's finding that the Taiwanese imports did not contribute materially to the injury caused by the other factors.⁸¹⁵ The Federal Circuit concluded that "the high volume and low price of Taiwanese SRAMs had some injurious impact on United States industry," but also that substantial evidence before the Commission demonstrated the existence of multiple causes of injury to the U.S. industry other than the Taiwanese imports.⁸¹⁶

In *Allegheny Ludlum Corp. v. United States*,⁸¹⁷ the Federal Circuit vacated and remanded the decision of the Court of International Trade, finding that it had improperly sustained the Commission's analysis with respect to each of the three factors that the Commission must consider under § 1677(B)(i), i.e., the volume of subject imports, the price effects of subject imports, and the impact of subject imports on the domestic industry.⁸¹⁸ In its underlying injury investigation, the

813. *Id.* at 1344. While the court applied the substantial evidence standard of review, stating that it was "stepping into the shoes of the Court of International Trade and duplicating its review," the court also noted that the standard of review applicable to a Court of International Trade request for further information "is a matter of first impression for this court." *Id.* Citing decisions of the Supreme Court and the Court of Appeals for the Third Circuit, the Federal Circuit concluded that a remand for further explanation was within the lower court's discretion, and was reviewable for abuse of discretion. *Id.* (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) and *Marshall v. Lansing*, 839 F.2d 933 (3d Cir. 1988)).

814. *Id.* at 1345 (citing *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 722 (Fed. Cir. 1997)).

815. *Id.* at 1346-47. The Federal Circuit also identified an oversupply caused by industry-wide mis-estimation of demand for certain types of SRAMs in personal computers as a significant factor in the injury experienced by U.S. producers. *Id.*

816. *Id.* at 1347.

817. 287 F.3d 1365 (Fed. Cir. 2002).

818. *Id.* at 1368. *See* 19 U.S.C. § 1677(B)(i) (1999).

Commission determined that the merchandise covered by the petition, coiled stainless steel plate, encompassed two distinct domestic like products—hot-rolled plate and cold-rolled plate—and found injury with respect to the former but not the latter.⁸¹⁹ The Court of International Trade affirmed,⁸²⁰ and Allegheny appealed that portion of the decision affirming the Commission’s finding that the U.S. cold-rolled steel plate industry was not injured by subject imports.⁸²¹ Citing its articulation of the applicable standard of review in *Taiwan Semiconductor*⁸²² and *Gerald Metals*,⁸²³ the Federal Circuit turned first to Allegheny’s contention that the Court of International Trade had improperly affirmed the Commission’s application of § 1677(4)(D)—the so-called “product line provision”⁸²⁴—in analyzing the effect of subject imports on product prices and their impact on the domestic industry.⁸²⁵ Specifically, because of the scarcity of separate data for the very small cold-rolled segment of the stainless steel coiled plate market, the Commission invoked the product line provision and based key portions of its injury analysis on data pertaining not to the narrow cold-rolled sector, but to the entire stainless steel coiled plate market.⁸²⁶

The Federal Circuit agreed with Allegheny, however, that the Commission should have done more in attempting to obtain data specific to the cold-rolled portion of the stainless steel coiled plate market.⁸²⁷ Citing Court of International Trade precedent requiring

819. *Allegheny*, 287 F.3d at 1368. Central to the Commission’s determination of two like products was its finding that the industry producing cold-rolled plate was very small in comparison to the industry producing hot-rolled plate, and that the cold-rolled plate industry served a small, niche market. The court explained that “[a]s cold-rolled plate requires additional processing, it is more costly than hot-rolled plate,” and also that “[o]ver 99.9 percent of domestic steel plate production is hot-rolled plate.” *Id.*

820. *Allegheny Ludlum Corp. v. United States*, 116 F. Supp. 2d 1276 (Ct. Int’l Trade 2000).

821. *Allegheny*, 287 F.3d at 1369.

822. 266 F.3d 1339 (Fed. Cir. 2001).

823. 132 F.3d 716 (Fed. Cir. 1997).

824. The “product line provision” provides as follows:

The effect of dumped imports . . . shall be assessed in relation to the United States production of a domestic like product if available data permit the separate identification of production in terms of such criteria as the production process or the producer’s profits. If the domestic production of the domestic like product has no separate identity in terms of such criteria, then the effect of the dumped imports . . . shall be assessed by the examination of the production of the narrowest group or range of products, which includes a domestic like product, for which the necessary information can be provided.

19 U.S.C. § 1677(4)(D) (1999).

825. *Allegheny*, 287 F.3d at 1370-72.

826. *Id.* at 1370-71.

827. *Id.* at 1375-76.

“the Commission to actively attempt to obtain relevant data before resorting to the product line provision,”⁸²⁸ and noting, among other things, that the Commission (unlike the Commerce Department) has the authority to issue subpoenas in connection with its investigations, the Federal Circuit held that the Commission should have attempted to obtain additional information specific to the cold-rolled sector before resorting to the product line provision.⁸²⁹ The Federal Circuit also found fault in the Commission’s analysis of the effect of subject imports on domestic prices, finding in particular that the Commission had drawn the wrong inference from the decline, during the period of investigation, of the average unit value (“AUV”) of the subject imports,⁸³⁰ and that reliance on AUV data was questionable given that these data were “strongly influenced by a few orders of particular grade or size.”⁸³¹ Finally, the Federal Circuit considered whether the Court of International Trade had properly based its affirmance of the Commission’s finding of no material injury with respect to cold-rolled coiled stainless steel plate on the domestic industry’s apparent lack of interest in the production and sale of this specialized product.⁸³² The Federal Circuit held that the lower court had erred. While it was proper for the Commission to assess economic factors other than those specifically enumerated in the statute, such an analysis “cannot replace the mandatory elements of the analysis [i.e., price, volume, and impact], absent a showing that those elements, in a given case, simply cannot be assessed.”⁸³³ The Federal Circuit further clarified that a reviewing court may uphold a Commission determination containing some errors, but that a determination resting on flawed application of each of the three mandatory statutory factors cannot stand under the substantial evidence standard—particularly where, as here, the Commission has not met its obligation to seek the necessary information.⁸³⁴

828. *Id.* at 1371 (citing *Babcock & Wilcox Co. v. United States*, 521 F. Supp. 479 (Ct. Int’l Trade 1981)).

829. *Id.* at 1372 (citing *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1571 (Fed. Cir. 1990)).

830. *Id.* at 1374. While the Commission had concluded that declining subject import AUVs over the period of investigation did not cause the concurrent domestic price declines (because subject import prices were higher than domestic prices), the Federal Circuit found that “the falling prices of the imported merchandise would seem to support a finding of material injury to domestic producers, despite the fact that the subject imports were priced higher than corresponding domestic like products.” *Id.*

831. *Id.*

832. *Id.* at 1375-76.

833. *Id.* at 1375-76 (citing 19 U.S.C. § 1677(7)(B) (1999)).

834. *Id.* at 1376-77 (citing, inter alia, *Angus Chem. Co. v. United States*, 140 F.3d 1478 (Fed. Cir. 1998)).

III. TRADE AND THE ENVIRONMENT

The recent international trade jurisprudence of the Federal Circuit also reflects—as would be expected given the sweeping nature of the Court of International Trade’s residual jurisdiction under 28 U.S.C. § 1581(i)—initiatives by Congress to restrict or control foreign trade based on environmental considerations.⁸³⁵ As with many of the international trade cases described above, the disputes discussed below played out over many years, were hotly contested, and generated substantial commercial uncertainty prior to final disposition by the Federal Circuit. These cases also present a mixed record of affirmance and reversal of the lower court.

First, in *The Humane Society of the United States v. Clinton*,⁸³⁶ the Federal Circuit affirmed a decision of the Court of International Trade denying relief sought by a coalition of animal protection organizations under the High Seas Driftnet Fisheries Enforcement Act (“Driftnet Act”).⁸³⁷ The Driftnet Act, enacted by the United States in 1992 to implement various U.N. resolutions calling for a global ban on certain driftnet fishing practices, authorizes the United States to take certain actions against foreign countries—in this case, Italy—in response to continued use of large-scale driftnet fishing practices on the high seas.⁸³⁸ The Driftnet Act provides, among other things, that whenever the Secretary of Commerce has reason to believe that vessels or nationals of any nation are conducting large-scale driftnet fishing on the high seas, the Secretary must identify that nation, and notify the President and the offending nation of the identification.⁸³⁹ Upon such notification, the President is obligated to consult with the foreign government “for the purpose of obtaining an agreement that will effect the immediate termination of large-scale driftnet fishing by the nationals or vessels of that nation.”⁸⁴⁰ Unless such consultations are “satisfactorily concluded,” the President must order the Secretary of the Treasury to prohibit importation into the United States of fish and fish products from that country.⁸⁴¹

835. See 28 U.S.C. § 1581(i) (1999).

836. 236 F.3d 1320 (Fed. Cir. 2001).

837. *Id.* at 1333. Plaintiffs-appellants were the Humane Society of the United States, Humane Society International, and Defenders of Wildlife. See *id.* at 1321. The Driftnet Act is codified at 16 U.S.C. §§ 1826-1826g (1999).

838. *Humane Soc’y*, 236 F.3d at 1322-23.

839. 16 U.S.C. § 1826a(b)(1)(B) (2000).

840. 16 U.S.C. § 1826a(b) (2000).

841. 16 U.S.C. § 1826a(b)(3)(A)(ii) (2000).

In response to an earlier challenge by the Humane Society,⁸⁴² the Department of Commerce, in March 1996, identified Italy as a nation for which there was reason to believe its nationals or vessels were conducting large-scale driftnet fishing.⁸⁴³ Subsequently, acting through the Department of State, the President entered into consultations with Italy concerning its fishing practices on the high seas, and in July 1996 the two countries finalized an agreement that Italy would end driftnet fishing by its nationals and vessels.⁸⁴⁴ In January 1997, the Secretary of Commerce certified to the President and Congress that Italy had terminated the illegal driftnet fishing practices at issue.⁸⁴⁵ The Humane Society, however, obtained evidence of the continuation of proscribed driftnet fishing practices by Italian vessels in the Mediterranean, and filed suit with the Court of International Trade.⁸⁴⁶ Before that court, the Humane Society sought: a writ of mandamus directing the President to impose sanctions on Italy based on the 1996 identification; an order requiring the Secretary of Commerce to revoke his 1997 certification that Italy had discontinued prohibited driftnet fishing practices; and an order requiring the Secretary of Commerce to re-identify Italy under the Driftnet Act.⁸⁴⁷ The Court of International Trade held for the Government on the first two counts, but for the Humane Society on the third.⁸⁴⁸ The Humane Society appealed the first two aspects of the lower court's decision, and the Federal Circuit affirmed.

After stating that the dispute would be reviewed pursuant to the APA's arbitrary and capricious standard,⁸⁴⁹ the Federal Circuit turned to the threshold question whether the President and other executive

842. See, e.g., *Humane Soc'y of the United States v. Brown*, 901 F. Supp. 338 (Ct. Int'l Trade 1995); *Humane Society of the United States v. Brown*, 920 F. Supp. 178 (Ct. Int'l Trade 1996) (suing Secretaries of Commerce and State to compel enforcement of the Driftnet Act, 16 U.S.C. §§ 1826-1826g).

843. See *Humane Soc'y*, 920 F. Supp. at 195 (stating that "[t]his court is now constrained to conclude that identification of Italy under 16 U.S.C. § 1826(b)(1)(B) has been unlawfully withheld and unreasonably delayed"); see also *Humane Soc'y*, 236 F.3d at 1323 (describing the Secretary of Commerce's recommendation of sanctions against Italy in response to the Court of International Trade's earlier decisions).

844. *Humane Soc'y*, 236 F.3d at 1323.

845. *Id.*

846. *Id.* at 1323-24.

847. *Id.* at 1323.

848. *Humane Soc'y of the United States v. Clinton*, 44 F. Supp. 2d 260, 279 (Ct. Int'l Trade 1999), *aff'd*, 236 F.3d 320 (Fed. Cir. 2001).

849. See 5 U.S.C. § 706 (1996) (instructing the reviewing court to hold unlawful any conclusions found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."). The court explained that it "will apply the standard of review set forth in 5 U.S.C. § 706 to an action instituted pursuant to 28 U.S.C. § 1581(i)." *Humane Soc'y*, 236 F.3d at 1325 (citing *Miami Free Zone Corp. v. Foreign-Trade Zones Bd.*, 136 F.3d 1310, 1312-13 (Fed. Cir. 1998)).

officers were immune from suit due to sovereign immunity.⁸⁵⁰ The answer hinged on the interpretation of the pertinent provisions of 28 U.S.C. § 1581(i), specifically subsection 1581(i)(3), covering “embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health and safety,”⁸⁵¹ and subsection 1581(i)(4), covering “administration and enforcement.”⁸⁵² The Federal Circuit agreed with the Humane Society that the legislative history to the Customs Courts Act of 1980 indicated that § 1581 itself waived sovereign immunity.⁸⁵³ The court also reasoned that statutory provisions and caselaw defining the jurisdiction of the Court of Federal Claims—a court with jurisdiction “complementary” to that of the Court of International Trade—compelled the conclusion that Congress intended § 1581 to waive sovereign immunity.⁸⁵⁴ The court further noted the federal courts’ longstanding recognition of “the standing of organizations such as the Humane Society to bring suits against the Government to implement environmental legislation.”⁸⁵⁵ The Federal Circuit, however, did not agree with the Humane Society’s contentions that the President should have been ordered, by mandamus, to impose sanctions on Italy.⁸⁵⁶ While it held that there was no question that the Humane Society had exhausted all avenues for relief, it also held that the Society had failed to show that the President did not carry out a clear, non-discretionary duty under the Driftnet Act.⁸⁵⁷ The Federal Circuit reasoned that, evidence of continued driftnet fishing by Italian vessels notwithstanding, the “satisfactorily concluded” standard of 16 U.S.C. § 1826a(b)(3)(A) was so broad as essentially to render judicial review of such presidential

850. *See id.* (explaining that the lower court did not address the sovereign immunity issue, finding it unnecessary to do so given its holding on the merits for the U.S. Government, such that the issue before the Federal Circuit was one of first impression).

851. *Id.* at 1326.

852. *Id.*

853. *Id.* at 1327.

854. *See id.* at 1327-28 (explaining unless Congress granted a coextensive waiver of sovereign immunity along with a grant of jurisdiction, that action would give no benefit to the “sovereign’s subjects” and have no consequences to the sovereign).

855. *See id.* at 1328 (citing *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221 (1986)) (explaining that the adverse environmental impact alleged in these types of cases is sufficient to establish these groups suffered an injury).

856. *See id.* (citing *Heckler v. Ringer*, 466 U.S. 602, 616 (1984)) (reviewing the analysis of the lower court as to whether the issuance of a *writ of mandamus* was appropriate, and finding that two requirements must be satisfied: “(1) the plaintiff must have exhausted all avenues for relief; and (2) the defendant must owe the plaintiff a clear non-discretionary duty.”).

857. *See id.* at 1328-30 (holding that the President had acted in good faith and therefore fulfilled his duty).

decision-making infeasible.⁸⁵⁸ In reaching this decision, the court cited a long line of cases emphasizing the deference owed the President in carrying out foreign relations functions: “In these matters, it is generally assumed that Congress does not set out to tie the President’s hands; if it wishes to, it must say so.”⁸⁵⁹

On the second issue—whether the Secretary of Commerce violated the Driftnet Act by certifying in 1997 that Italy had terminated large-scale driftnet fishing—the Federal Circuit again noted the considerable lack of guidance provided by the Act and its legislative history.⁸⁶⁰ After first rejecting the government’s argument that the issue was not justiciable for lack of a live case or controversy,⁸⁶¹ the Federal Circuit turned to a review of the 1997 certification.⁸⁶² Distinguishing between the Secretary’s underlying identification of a nation as engaged in illegal driftnet fishing and any subsequent certification that such a nation has terminated the illegal fishing practices, the Federal Circuit agreed with the lower court that the former determination was focused on the acts of individuals, while the latter was concerned with government action.⁸⁶³ Accordingly, with respect to the latter, individual violations by some Italian vessels would not be sufficient to support the claim that the Secretary’s decision was unreasonable.⁸⁶⁴ On this basis, the Federal Circuit affirmed the lower court’s judgment that the Secretary’s 1997 certification, based on the earlier U.S.-Italy agreement, was not arbitrary or capricious.⁸⁶⁵

858. *Id.* at 1329-30.

859. *Id.* at 1329-30 (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936)).

860. *See id.* at 1330 (emphasizing that the Act does not delineate which factors or evidence should guide the Secretary in his decision, making judicial review difficult).

861. *Id.* at 1331. The Government argued that the issue was moot in light of the Court of International Trade’s order for the Secretary of Commerce to identify Italy, for the second time, as a nation violating the Driftnet Act. *Id.* The Federal Circuit disagreed. *Id.* at 1332. Noting that the propriety of a certification could potentially escape judicial review in the event of subsequent re-identification, the court held that the Act would be better effectuated by not rendering the question of whether the Secretary’s decision was in accord with the law moot because of a later re-identification. *Id.*

862. *See id.* at 1332-33 (reviewing the merits of the Humane Society’s claim that the Secretary’s decision was arbitrary and capricious).

863. *See id.* at 1332 (finding the trial court’s analysis to be a sensible approach to the statutory language).

864. *See id.* (holding that acts by individuals could not be determinative).

865. *Id.* at 1333.

*Turtle Island Restoration Network v. Evans*⁸⁶⁶ also involved a suit brought by a coalition of environmental organizations for judicial enforcement of animal protection laws.⁸⁶⁷ The *Turtle Island* cases represented the culmination of a decade's worth of litigation concerning the interpretation of § 609(b) of Public Law 101-162⁸⁶⁸—characterized by the Federal Circuit as “a long and tortured history, chiefly marked by the Government’s protean efforts to escape the statutory interpretations being imposed upon it.”⁸⁶⁹ At issue in *Turtle Island I* was the U.S. Government interpretation of the certification procedures set forth in guidelines promulgated by the State Department in 1999 to implement § 609(b) certification procedures.⁸⁷⁰ Under the 1999 guidelines, a country could obtain authorization to export shrimp to the U.S. market either by requiring its entire fleet to be equipped with TEDs, or by requiring TEDs only on those vessels harvesting shrimp for the U.S. market.⁸⁷¹ In *Turtle Island’s* view, § 609 required the U.S. Government to ban importation of *all* shrimp from an uncertified country, rather than only those shipments not in accordance with the certification procedures.⁸⁷² In the Court of International Trade opinion at issue here, that court found the 1999 State Department guidelines to be inconsistent with § 609(b) because, as maintained by *Turtle Island*, those guidelines impermissibly allowed the importation of TED-caught shrimp from uncertified countries.⁸⁷³ However, the Court of

866. 284 F.3d 1282 (Fed. Cir. 2002) (“*Turtle Island I*”). See also *Turtle Island Restoration Network v. Evans* 299 F.3d 1373 (Fed. Cir. 2002) (“*Turtle Island II*”) (denying a combined petition for a panel rehearing and a rehearing *en banc*).

867. See *Turtle Island I*, 284 F.3d at 1284 (reviewing restrictions on shrimp harvesting techniques designed to protect sea turtles by requiring foreign shrimp harvesters to use turtle excluder devices (“TEDs”) as a condition of access to the U.S. market). TEDs are designed to prevent sea turtles from being swept into trawl nets—typically by means of a metal grid at the closed end of the net with bars spaced so as to allow shrimp to pass through but to “exclude” turtles by pushing them through escape hatches above or below the grid. *Id.*

868. Section 609(b) is codified at 16 U.S.C. § 1537(b) (2000). In general, subsection (b)(1) prohibits the importation of shrimp or products from shrimp in which harvesting equipment was used that adversely affects certain species of sea turtles except as provided in paragraph (2). *Id.* Subsection (b)(2) sets forth certification procedures to be adopted by a harvesting nation seeking an exception from a subsection (b)(1) prohibition. *Id.*

869. *Turtle Island I*, 284 F.3d at 1287.

870. See *id.* at 1286 (citing Revised Guidelines for the Implementation of § 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36,946 (July 8, 1999)).

871. *Id.*

872. See *id.* (arguing that certification is the only means by which shrimp may be imported into the United States).

873. See *Turtle Island Restoration Network v. Mallett*, 110 F. Supp. 2d 1005 (Ct. Int’l Trade 2000) (holding that the 1999 Guidelines resulted in weakened protections for the sea turtles targeted by § 609).

International Trade did not grant Turtle Island's requested injunctive relief or attorney fees.⁸⁷⁴

Turtle Island I came before the Federal Circuit on cross-appeals—Turtle Island seeking reversal of the Court of International Trade's denial of an injunction and attorney fees, and the Government challenging that court's judgment that the importation of TED-caught shrimp from uncertified countries, permitted by the 1999 guidelines, violates § 609.⁸⁷⁵ The Federal Circuit turned first to the foundational issue in the case—construction of § 609—clarifying that its analysis was a matter of law to be reviewed without deference to the lower court.⁸⁷⁶ Parsing the language of § 609, the court found, based on its plain meaning, that it authorized imports of TED-caught shrimp from uncertified countries, and that its embargo provisions applied on a shipment-specific basis.⁸⁷⁷ The court rejected Turtle Island's contentions that the statutory framework and legislative history compelled the conclusion that § 609 applied only on a nation-by-nation basis.⁸⁷⁸ The court found it telling that Congress had declined to include an express nation-by-nation embargo provision in § 609, when it had done so in a series of comparable statutes.⁸⁷⁹ The court noted in concluding its analysis that, while it respected the plaintiff's cause, Turtle Island's view of the legislative intent of § 609 was simply unfounded.⁸⁸⁰ The court reversed the Court of International Trade's holding that the Government's interpretation of § 609 was in error, and affirmed that court's denial of injunctive relief and attorney fees.⁸⁸¹

874. *See id.* at 1018 (noting that the injunctive relief sought by the plaintiff would be truly extraordinary in this type of case). Additionally, the court held that while plaintiffs clearly prevailed, there was insufficient evidence in the record to support the relief sought by plaintiffs. *Id.*

875. *Turtle Island I*, 284 F.3d at 1284.

876. *Id.* at 1291 (citing *SKF USA Inc. v. United States*, 263 F.3d 1369, at 1378 (2001)).

877. *See id.* at 1292-93 (noting that if the statute intended to make certification the only way these imports could enter the U.S. market, much of the statutory language would be "largely superfluous").

878. *See id.* at 1292-94 (emphasizing that according to the legislative history, the passage of § 609 was not motivated by the need to protect the sea turtle but rather the need to protect the domestic shrimping industry).

879. *See id.* at 1295-96 (citing 16 U.S.C. § 1825(b)(2) (2000) (authorizing nation-by-nation embargoes triggered by foreign restrictions on U.S. fishing vessels); *see also* 16 U.S.C. § 1826(b)(3)(A) (2000) (authorizing nation-by-nation prohibition on imports of fish and fish products from countries employing large-scale driftnet fishing)).

880. *See Turtle Island I*, 284 F.3d at 1297 (holding that the State Department's interpretation of the congressional intent behind § 609 was in fact the proper interpretation).

881. *Id.* at 1297.

Judge Newman dissented from the majority decision, arguing that the decision was an improper departure from the established method of protecting this endangered species.⁸⁸² Judge Newman reviewed extensively the legislative history, concluding that Congress intended to preclude the shipment-by-shipment methodology adopted by the State Department.⁸⁸³ This approach was fully consistent with the desire of Congress to protect the U.S. shrimp industry by requiring shrimpers of any other nation desiring access to the U.S. market to employ TEDs.⁸⁸⁴ Newman emphasized that there is no support in the legislative record for the claim that Congress intended to permit the shipment-by-shipment method.⁸⁸⁵ Judge Newman also stated that the State Department guidelines did not, in his view, survive *Chevron* scrutiny in light of Congress' clearly articulated intent.⁸⁸⁶ Furthermore, looking at earlier WTO decisions cited by the government as supporting the 1999 guidelines, Judge Newman concluded that that WTO panel decisions should not and could not authorize the courts or the Executive Branch "to rewrite the statute."⁸⁸⁷

In *Turtle Island II*, the Federal Circuit rejected Turtle Island's petition for rehearing *en banc*.⁸⁸⁸ However, Judges Gajarsa and Newman dissented from the denial, drawing heavily from Judge Newman's dissenting opinion in *Turtle Island I* and arguing that the majority had mistakenly approved the State Department's 1999 Guidelines, which contravened clear congressional intent.⁸⁸⁹ Arguing

882. See *id.* (Newman, J., dissenting) (arguing that neither political nor diplomatic concerns make it proper for the court to depart from the statute as enacted).

883. See *id.* at 1299-1302 (arguing that Congress recognized only a fleet-wide approach, and not a shipment-by-shipment approach, would effectuate the goals of the legislation).

884. See *id.* at 1300-02 (dissenting from the majority's view that the existence of a commercial purpose for the legislation renders the humanitarian purposes irrelevant). Additionally, Judge Newman argued that the commercial goal of the legislation—protecting the domestic shrimping industry—was in fact disserved by condoning a shipment-by-shipment approach. *Id.* at 1302.

885. See *id.* at 1300 (noting that both the House and Senate reports call for foreign nations to adopt regulations comparable to the United States fleet-wide adoption of TEDs).

886. See *id.* at 1303 (stating that the State Department had attempted to defend the guidelines on policy grounds, but that the court should not evaluate or effectuate political accommodations).

887. See *id.* at 1303-04 (citing, *inter alia*, *Suramerica de Aleaciones Laminadas C. A. v. United States*, 966 F.2d 660, 668 (Fed. Cir. 1992)) (arguing that well established principles dictate when WTO rulings can be relied upon, and here the government's reliance was improper).

888. *Turtle Island Restoration Network v. Evans*, 299 F.3d 1373 (Fed. Cir. 2002) ("*Turtle Island II*").

889. *Id.* at 1374-75 (Gajarsa, J., dissenting) (citing, *inter alia*, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987)) (alleging that the panel majority adopted an

that § 609 was intended to protect sea turtles, as well as serve other commercial needs, the dissenters stated the majority had erred when it held that a shipment-by-shipment approach was supported by the statute.⁸⁹⁰ According to Judges Gajarsa and Newman, § 609(b)(1) plainly banned the importation of shrimp harvested without TEDs unless excepted under the guidelines laid out in § 609(b)(2) or harvested from waters uninhabited by these species of sea turtles.⁸⁹¹ The two judges concluded that the majority decision had “unreasonably construed a statute that was written to protect turtles so as not to protect them.”⁸⁹²

CONCLUSION

When it created the Court of Appeals for the Federal Circuit, Congress observed that the cases before it would be “unusually complex and technical.”⁸⁹³ The international trade jurisprudence of the Federal Circuit over the last three years validates this prediction. The ever-growing volume of international trade, combined with the expanding web of laws, regulations, and practices guiding the flow of commerce across the U.S. border, seem to guarantee that the international trade cases before the court will only grow in number and complexity. Notwithstanding this burden, the Federal Circuit has in recent years performed its job admirably—rigorously and quickly disposing of the complex international trade matters before it, thereby contributing to certainty and predictability in the trading system.

improper and unreasonable statutory interpretation in *Turtle Island I*).

890. *Id.* at 1375 (calling the panel majority’s holding that § 609 did not ban importation from uncertified countries a “fatal error”).

891. *Id.* at 1376 (claiming the statutory language and structure demands this interpretation).

892. *Id.* at 1378.

893. S. REP. NO. 97-275, at 7 (1981).