

2012

2011 International Trade Law Decisions of the Federal Circuit

Gregory J. Spak

Forrest R. Hansen
forrest.hansen@american.edu

Daniel J. Hickman

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aulr>



Part of the [Courts Commons](#)

Recommended Citation

Spak, Gregory J., Forrest R. Hansen, and Daniel J. Hickman. "2011 International Trade Law Decisions of the Federal Circuit." American University Law Review 61, no.4 (2012): 1105-1150.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

2011 International Trade Law Decisions of the Federal Circuit

Keywords

International Trade Law

2011 INTERNATIONAL TRADE LAW DECISIONS OF THE FEDERAL CIRCUIT*

GREGORY J. SPAK**

FORREST R. HANSEN***

DANIEL J. HICKMAN****

TABLE OF CONTENTS

Introduction.....	1106
I. Jurisdiction of the U.S. Court of International Trade.....	1107
II. U.S. Customs Laws.....	1112
III. Antidumping and Countervailing Duties.....	1121
A. Department of Commerce.....	1122
B. International Trade Commission.....	1139
IV. International Trade Commission: Section 337 Cases.....	1142
Conclusion.....	1147
Addendum.....	1148

* The views expressed in this Article are those of the authors and do not represent the views of White & Case LLP. The authors would like to thank James LaMontagne and Jay Campbell for their invaluable assistance in the preparation of this Article. The authors also express thanks to the *American University Law Review* staff for their impeccable editing, insightful comments and overall professionalism throughout the editing process.

** Gregory J. Spak is a partner in the International Trade practice group of White & Case LLP. Mr. Spak received his J.D. from *Georgetown University Law Center*, *cum laude*, in 1987 and a BSFS from the *Georgetown University School of Foreign Service*, *magna cum laude*, in 1984. He has been a member of the bar for the Court of Appeals for the Federal Circuit since 1990.

*** Forrest R. Hansen is an associate at White & Case LLP. Mr. Hansen received his J.D. from *American University, Washington College of Law*, *cum laude*, in 2007 and a BA from *Brigham Young University* in 2003.

**** Daniel J. Hickman is an associate at White & Case LLP. Mr. Hickman received his J.D. from the *University of Virginia*, Order of the Coif, in 2010 and a BS from *Cornell University*, with honors and distinction, in 2007.

INTRODUCTION

The United States Court of Appeals for the Federal Circuit occupies a unique position among the thirteen federal courts of appeals. Hearing cases nationwide, the Federal Circuit exercises jurisdiction over specific subject matters, including international trade, government contracts, patents, trademarks, certain money claims against the United States government, federal personnel, veterans benefits, and public safety officers' benefits claims.¹ The Federal Circuit is frequently called upon to review decisions from the United States Court of International Trade, the United States Court of Federal Claims, the United States Court of Appeals for Veterans Claims, and federal district courts.²

This Article provides a summary of the international trade cases appealed to the Federal Circuit from the United States Court of International Trade (CIT) and the United States International Trade Commission (ITC or Commission) during 2011. Twenty-four precedential decisions were issued, addressing United States Customs Laws, Trade Remedy Laws, and other international trade issues. Of the twenty-one precedential decisions arising from the CIT, the Federal Circuit affirmed nine and reversed or vacated eleven.³ Six of the cases involved challenges to tariff classifications; three cases involved questions about the scope of the CIT's jurisdiction; one case involved jurisdictional issues in filing certificates of origin; four cases involved challenges to Commerce's authority to impose duties; five cases involved challenges to Commerce's methods of calculating duties, including its controversial practice of zeroing; and one case involved review of proceedings tainted by material fraud. Of the three precedential opinions arising from ITC decisions pursuant to

1. See *Court Jurisdiction*, U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/the-court/court-jurisdiction.html> (last visited Apr. 9, 2012) (listing some of the subject areas over which the Court of Appeals for the Federal Circuit has jurisdiction).

2. Established on October 1, 1982 under Article III of the Constitution, the United States Court of Appeals for the Federal Circuit "was formed by the merger of the United States Court of Customs and Patent Appeals and the appellate division of the United States Court of Claims. The court is located in the Howard T. Markey National Courts Building on historic Lafayette Square in Washington, D.C." *Id.* See generally U.S. CONST. art. III, § 1 (providing for the creation of "inferior courts" by Congress); 28 U.S.C. § 1295(a) (2006) (providing that the Court of Appeals for the Federal Circuit maintains exclusive jurisdiction over appeals from specific federal courts of first instance).

3. One precedential opinion concerned a denial of a panel rehearing and hearing en banc in which Judges Reyna, Newman, and O'Malley respectfully dissented from the denial. See *Papierfabrik August Koehler AG v. United States*, 646 F.3d 904 (Fed. Cir. 2011) (per curiam); see also *infra* Part III.B.

Section 337 of the Tariff Act of 1930, two ITC decisions were affirmed and one was vacated.⁴

This Article is divided into four sections: jurisdiction of the U.S. Court of International Trade, U.S. customs laws, antidumping and countervailing duties, and ITC section 337 cases. The cases involve the three federal agencies that often appear as parties before the Federal Circuit and CIT in trade disputes: United States Customs and Border Protection (Customs), the United States Department of Commerce (Commerce), and the ITC.

I. JURISDICTION OF THE U.S. COURT OF INTERNATIONAL TRADE

The CIT is charged with exclusive jurisdiction to review a variety of trade-related issues pursuant to 28 U.S.C. § 1581. In particular, § 1581(i) provides for jurisdiction over any civil action commenced against the United States that arises out of any law providing for tariffs, duties, fees, or other taxes on the importation of merchandise.⁵ Although the residual jurisdictional provision of § 1581(i) grants broad jurisdiction to the CIT, the Federal Circuit has limited its scope by only allowing it to be invoked when jurisdiction is unavailable under another subsection.⁶

In *Hartford Fire Insurance Co. v. United States*,⁷ the CIT dismissed a suit for lack of jurisdiction, holding that a surety was barred from suing to challenge its liability because it failed to timely file an administrative protest under 19 U.S.C. § 1514 and therefore could not bring suit under the residual jurisdiction provision of 28 U.S.C. § 1581(i).⁸ On appeal, the Federal Circuit questioned the CIT's determination that the surety's failure to comply with the protest period under 19 U.S.C. § 1514 barred jurisdiction under 28 U.S.C. § 1581(i) because the surety did not learn of the protest until after the statutory window had closed.⁹

In this case, Sunline Business Solutions (Sunline) used a surety bond from the Hartford Fire Insurance Company (Hartford) to import frozen cooked crawfish from the People's Republic of

4. For a table of precedential opinions issued in 2011, see the Addendum to this Article, which lists the case name, agency involved and the Federal Circuit's ruling.

5. 28 U.S.C. § 1581(i) (2006).

6. See *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006) (stating that jurisdiction under § 1581(i) may not be invoked if jurisdiction is also available under § 1581(a)).

7. 648 F.3d 1371 (Fed. Cir. 2011).

8. *Id.* at 1373-74.

9. *Id.* at 1372.

China.¹⁰ Customs sought to obtain payment from Hartford when Sunline failed to pay antidumping duties levied on the transaction.¹¹ Pursuant to 19 U.S.C. § 1514, Hartford had 90 days from the demand of payment against its bonds to file an administrative protest, and it failed to meet the deadline.¹² Several months after the deadline, Hartford learned that Customs commenced an investigation into Sunline more than a month before Hartford began issuing surety bonds to Sunline.¹³ Since Hartford missed its opportunity for § 1514 jurisdiction, it filed suit under 28 U.S.C. § 1581(i), claiming that Customs' failure to disclose the investigation to Hartford prior to its issuance of the surety bond constituted a material misrepresentation, thus making the bonds voidable.¹⁴

The CIT held that it lacked subject matter jurisdiction under the residual jurisdiction provision of § 1581(i) because Hartford's surety claims fell within the scope of § 1514(c)(3) and Hartford failed to timely file a protest as required under the provision.¹⁵ Hartford argued that it did not learn of the basis of the cause of action until after the protest period expired, but the CIT held that Hartford "could and should have reasonably known of the existence of its present claims" within the window of time to protest.¹⁶

The Federal Circuit disagreed, holding that Hartford could not have discovered the potential protest grounds through the exercise of routine due diligence by the end of the protest period.¹⁷ The Federal Circuit instead determined that if the grounds for administrative protest were not known and could not have reasonably been known until after the § 1514 protest period expired, § 1581(i) was an appropriate jurisdictional basis for bringing suit; consequently, the Federal Circuit reversed and remanded the case.¹⁸

In *Hitachi Home Electronics (America), Inc. v. United States*,¹⁹ the Federal Circuit affirmed the CIT's determination that it lacked jurisdiction.²⁰ Hitachi filed a protest with Customs when it was

10. *Id.*; 19 C.F.R. § 142.4 (2011) requires importers to post security bonds to cover potential fines.

11. *Hartford Fire Ins.*, 648 F.3d at 1373.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 1374.

16. *Hartford Fire Ins. Co. v. United States*, 679 F. Supp. 2d 1362, 1368 (Ct. Int'l Trade 2009), *rev'd*, 648 F.3d 1371 (Fed. Cir. 2011).

17. *Hartford Fire Ins.*, 648 F.3d at 1375.

18. *Id.* at 1374 (citing *Chevron U.S.A., Inc. v. United States*, 923 F.2d 830, 834 (Fed. Cir. 1991)).

19. 661 F.3d 1343 (Fed. Cir. 2011).

20. *Id.* at 1344.

charged a duty of 5.0% ad valorem on plasma flat panel televisions made or assembled in Mexico and imported to the United States, claiming that the items should be duty-free under the North American Free Trade Agreement.²¹ Under 19 U.S.C. § 1515(a), Customs is required to allow or deny protests within two years of filing.²² After Customs failed to respond within the two-year window, Hitachi filed an action in the CIT and asserted jurisdiction under 28 U.S.C. § 1581(a),²³ arguing for constructive denial or allowance of the protest after expiration of § 1515(a)'s two-year window. Alternatively, Hitachi asserted jurisdiction under the residual jurisdiction provision of § 1581(i).²⁴ The CIT dismissed the action for lack of jurisdiction, "interpreting § 1515(a) to impose neither automatic allowance nor automatic denial of a protest, and concluding that jurisdiction was therefore not proper."²⁵ Hitachi timely appealed.²⁶

As a matter of first impression, the Federal Circuit held that Customs' failure to act on a protest within the two-year statutory period of § 1515(a) does not establish automatic allowance or denial of a protest.²⁷ The court noted that the Supreme Court has held that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."²⁸ The Federal Circuit has also refrained from imposing consequences for non-compliance with statutory deadlines in the absence of express statutory guidance.²⁹ The Federal Circuit further noted that § 1515(a)'s lack of consequences provided a stark contrast to the explicit consequence of § 1515(b).³⁰ Section 1515(b) authorizes a request for accelerated disposition of a protest; if Customs fails to allow or deny the protest within 30 days of receipt of the request, the protest will be deemed denied.³¹ Hitachi failed to avail itself of § 1515(b) to force a Customs decision.³² As Customs had neither allowed nor denied

21. *Id.* See generally North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) (providing rules used to determine whether goods are eligible for preferential NAFTA treatment).

22. 19 U.S.C. § 1515(a) (2006).

23. *Hitachi Home Elecs.*, 661 F.3d at 1344.

24. *Id.* at 1345.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)).

29. *Id.* at 1347 (citing *Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563 (Fed. Cir. 1989)).

30. *Id.* at 1348-49.

31. 19 U.S.C. § 1515(b) (2006).

32. See *Hitachi Home Elecs.*, 661 F.3d at 1344 (stating that Hitachi only contended

Hitachi's protest, the Federal Circuit concluded that jurisdiction under 28 U.S.C. § 1581(a) was unavailable.³³ The Federal Circuit held that jurisdiction under § 1581(i) was unavailable as well because the residual jurisdiction of § 1581(i) can only be invoked when the other provisions of § 1581 do not provide jurisdiction,³⁴ and Hitachi could have obtained jurisdiction under § 1581(a) by requesting accelerated disposition and obtaining a default denial after 30 days of Customs inaction pursuant to § 1515(b).³⁵

In *Almond Bros. Lumber Co. v. United States*,³⁶ domestic producers of softwood lumber who were not members of the Coalition for Fair Lumber (Coalition) filed an action in the CIT alleging that the U.S. Trade Representative (USTR) failed to meet its obligations under 19 U.S.C. § 2411 when it entered into a Softwood Lumber Agreement (SLA) with Canada, providing for the distribution of returned duties only to Coalition members.³⁷ Section 2411 authorizes the USTR to enter into binding agreements with foreign countries to remedy unfair trade practices, but requires the USTR to protect the interests of the entire affected domestic industry.³⁸

The government argued that the CIT lacked jurisdiction because the agreement was negotiated pursuant to the broad authority to act on behalf of the president under 19 U.S.C. § 2171(c)(1)(C), not § 2411.³⁹ While § 2411 gives rise to CIT jurisdiction under 28 U.S.C. § 1581(i), § 2171 does not allow for CIT review.⁴⁰

The CIT dismissed the complaint for lack of subject matter jurisdiction, holding that there was insufficient evidence to conclude that the SLA was a product of § 2411 negotiations because the USTR failed to comply with its procedural requirements.⁴¹ The CIT determined that the USTR entered into the SLA under its more general authority to act on behalf of the President, under § 2171; therefore, the court lacked jurisdiction.⁴²

The Federal Circuit reversed the CIT and held that there was

that its protest was denied under § 1515(a)).

33. *Id.* at 1350.

34. *Id.* (citing *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)).

35. *Id.*

36. 651 F.3d 1343 (Fed. Cir. 2011).

37. *Id.* at 1348.

38. 19 U.S.C. § 2411(c)(4) (2006).

39. *Almond Bros.*, 651 F.3d at 1350.

40. *Id.* (citing *Conoco, Inc. v. U.S. Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1586 (Fed. Cir. 1994)) (emphasizing that 28 U.S.C. § 1581(i) grants the CIT broad residual jurisdiction over matters relating to imports).

41. *Id.* at 1348.

42. *Id.* at 1349 (citing U.S. CONST. art. II, § 2, cl. 2; 19 U.S.C. § 2171(c)(1)(C) (2006)).

proper jurisdiction under § 1581(i) because the SLA was negotiated pursuant to § 2411 authority.⁴³ The Federal Circuit highlighted the lengthy history of the longstanding Canadian softwood dispute—much of which indisputably involved USTR action under the authority of § 2411—and determined that there was ample basis on which to conclude that the SLA, like similar agreements before it, was entered into under the authority of § 2411.⁴⁴ The Federal Circuit held that investigation and negotiation for a prior SLA was sufficient to meet the § 2411 statutory procedural requirements of public notice and an opportunity for response.⁴⁵ According to the court, statutory construction, legislative history, and background statements from the negotiations indicated that § 2411 authorized the USTR to formally enter into the SLA.⁴⁶ Therefore, the Federal Circuit concluded that the suit was within the CIT's § 1581(i) jurisdiction and remanded the case.⁴⁷

In *Ford Motor Co. v. United States*,⁴⁸ the Federal Circuit held that the requirement of a certificate of origin for preferential treatment under the North American Free Trade Agreement (NAFTA) is not jurisdictional.⁴⁹ This case arose out of “Ford’s attempt to claim preferential treatment under NAFTA for certain shipments of automotive parts imported into the United States from Canada . . . between January 1997 and January 1999.”⁵⁰ Under 19 U.S.C. § 1520(d), an importer must file a claim within one year of importation.⁵¹ On June 27, 1997, the time at which the goods entered the United States, Ford did not assert that the goods were eligible for preferential treatment under NAFTA.⁵² Less than a year later, on May 13, 1998, Ford electronically filed a post-entry duty refund claim, but again failed to include the certificates of origin.⁵³ Finally, on November 5, 1998, over a year after the date of importation, Ford filed the certificates of origin.⁵⁴ Customs then denied Ford’s claim for preferential treatment because the certificates were not furnished within one year of importation as

43. *Id.* at 1351.

44. *Id.*

45. *Id.* at 1352–53.

46. *Id.* at 1354.

47. *Id.* at 1351.

48. 635 F.3d 550 (Fed. Cir. 2011).

49. *Id.* at 558.

50. *Id.* at 552.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

required by 19 U.S.C. § 1520(d).⁵⁵ Ford sought review by the CIT.⁵⁶

The CIT dismissed the action for lack of subject-matter jurisdiction, finding that Ford had not filed a valid claim under *Xerox Corp. v. United States*⁵⁷ and *Corrpro Cos. Inc. v. United States*,⁵⁸ which held that “the timely filing of a claim under § 1520(d) was a jurisdictional prerequisite.”⁵⁹ Ford timely appealed.

The Federal Circuit reversed and remanded the action, holding that Ford’s failure to file the certificates of origin within one year of importation did not deprive the CIT of jurisdiction.⁶⁰ The Federal Circuit listed four bases to support its decision: “(1) Ford timely filed notice of its claim; (2) Congress has not clearly labeled § 1520(d)’s timely certificate filing requirement ‘jurisdictional’; (3) § 1520(d) is not a jurisdiction-granting provision; and (4) Customs possesses the authority to waive the certificate filing requirement.”⁶¹ The Federal Circuit left it to the CIT to decide whether Customs was required to accept Ford’s late-filed certificates.⁶²

II. U.S. CUSTOMS LAWS

Customs is an agency within the United States Department of Homeland Security responsible for ensuring “that all imports and exports comply with U.S. laws and regulations.”⁶³ The CIT handles challenges to Customs’ assessment and collection of Customs duties, excise taxes, fees and penalties due on imported merchandise.⁶⁴

55. *Id.*; see also 19 U.S.C. § 1520(d) (2006) (stating that “the Customs Service may . . . reliquidate an entry to refund any excess duties . . . within 1 year after the date of importation”).

56. *Ford Motor Co.*, 635 F.3d at 552.

57. 423 F.3d 1356 (Fed. Cir. 2005).

58. 433 F.3d 1360 (Fed. Cir. 2006).

59. *Ford Motor Co.*, 635 F.3d at 553. The Federal Circuit noted that *Xerox* and *Corrpro* held that “§ 1520(d)’s one year time limitation is jurisdictional insofar as it requires the timely filing of a claim,” but the question presented in *Ford* was “whether submission of a certificate of origin together with the claim is also a jurisdictional requirement,” an issue not addressed in either *Xerox* or *Corrpro*. *Id.* at 554.

60. *Id.* at 557. In addition, the Federal Circuit rejected the government’s contention that, “even assuming the certificate of origin filing requirement is nonjurisdictional, ‘Ford’s claims should still be dismissed for lack of subject matter jurisdiction because there has been no protestable determination.’” *Id.* The Federal Circuit reasoned that “where an importer properly files notice of its § 1520(d) claim with Customs less than one year after entry, Customs renders a protestable decision—for the purposes of 28 U.S.C. § 1581(a)—if it denies the importer’s claim.” *Id.* at 558.

61. *Id.* at 557.

62. *Id.* at 558.

63. *U.S. Customs Service—More Than 200 Years of History*, U.S. CUSTOMS & BORDER PATROL, <http://www.cbp.gov/xp/cgov/about/history/legacy/history2.xml> (last visited Apr. 9, 2012).

64. See *About the Court: Jurisdiction of the Court*, U.S. COURT OF INT’L TRADE,

While appeals from customs decisions potentially include several aspects of Customs law, all of the precedential customs decisions reviewed by the Federal Circuit in 2011 related to tariff classifications. Cases involving disputes about proper tariff classification are fact specific and are only afforded precedential status when the case may have broader implications for other cases.

When reviewing Customs' classifications, the Federal Circuit utilizes the General Rules of Interpretation (GRIs) to interpret the headings of the Harmonized Tariff Schedule of the United States (HTSUS).⁶⁵ The first rule (GRI 1) requires classification according to the common and popular meaning of terms in the headings, subheadings and explanatory notes.⁶⁶ The second rule (GRI 2) requires classification of incomplete or unfinished articles in the heading of the article's essential character.⁶⁷ The third rule (GRI 3) applies when merchandise is prima facie classifiable under two or more headings or subheadings; under such circumstances, the rule requires selection of the most specific description or selection of heading that covers the article's essential character.⁶⁸

*StoreWALL, LLC v. United States*⁶⁹ involved the classification of imported wall panels and locator tabs for storeWALL LLC's organization and storage system.⁷⁰ StoreWALL LLC, an importer of wall panels and HangUp locator tabs manufactured in Taiwan that are used for home organization and storage systems, objected to Customs' decision to classify the panels and tabs under Subheading 3926.90.98 of the HTSUS, a provision for "[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other."⁷¹ StoreWALL urged Customs to "reclassify the panels and tabs under Subheading 9403.70.80, a provision for 'Other furniture and parts thereof: Furniture of plastics: Other'" and 9403.90.50, "a provision for 'Other furniture and parts thereof: Parts: Others: Of rubber or plastics: Other.'"⁷² Subheadings 9403.70.80 and

<http://www.cit.uscourts.gov/AboutTheCourt.html#jurisdiction> (last visited Apr. 9, 2012) (explaining the jurisdiction of the CIT).

65. See *StoreWALL, LLC v. United States*, 644 F.3d 1358, 1362 (Fed. Cir. 2011) (noting that the GRIs "govern classifications under HTSUS").

66. *Id.*

67. See *Home Depot U.S.A., Inc. v. United States*, 491 F.3d 1334, 1336 (Fed. Cir. 2007) (describing the General Rules of Interpretation framework as applied to imported lighting fixtures).

68. *Id.*

69. 644 F.3d 1358 (Fed. Cir. 2011).

70. *Id.* at 1360.

71. *Id.*

72. *Id.*

9403.90.50 are duty-free classifications that apply to "unit furniture" and "parts" of unit furniture.⁷³

Customs refused to reclassify the panels and tabs and storeWALL consequently commenced an action in the CIT, arguing that its wall panels and locator tabs "are either 'unit furniture' or 'parts' of 'unit furniture' covered under Heading 9403."⁷⁴ Relying on the Explanatory Notes from Heading 9403 and GRI 1, the CIT nonetheless upheld Customs' classifications, finding that the panels and locator tabs were excluded from the definition of "unit furniture" under "the rack exclusion" for Heading 9403, which excludes "other wall fixtures such as coat, hat and similar racks, key racks, clothes brush hangers, and newspaper racks."⁷⁵ StoreWALL appealed to the Federal Circuit.⁷⁶

The Federal Circuit reversed, noting that the CIT "appropriately looked to the Explanatory Notes for clarification and in doing so properly defined 'unit furniture'" under GRI 1, but misconstrued "the rack exclusion."⁷⁷ Unlike a coat rack—which "will always be just a coat rack"—the Federal Circuit reasoned that that "the end user has the option with the storeWALL system to add or subtract accessories," such as shelving, cupboards, and baskets; in addition, the end user could even remove all the hooks.⁷⁸ As a result, the Federal Circuit concluded that the "versatility and adaptability" of the storeWALL system, which included panels and locator tabs, removed it from "the rack exclusion" and warranted classification as parts of unit furniture under HTSUS 9403.09.50.⁷⁹

In *Dell Products LP v. United States*,⁸⁰ the Federal Circuit determined that spare laptop batteries that were offered for sale individually, but packaged with laptop computers for shipment, were "other storage batteries" under the HTSUS Subheading 8507.80.80 and thus subject to a duty rate of 3.4 percent.⁸¹ Dell Products LP (Dell) manufactured and sold secondary batteries for use with laptop computers, which provided "an additional power source that allows extended operation

73. *Id.*

74. *Id.*

75. *Id.* at 1361–62.

76. *Id.* at 1361.

77. *Id.* at 1363–64.

78. *Id.* at 1364.

79. *Id.*

80. 642 F.3d 1055 (Fed. Cir. 2011).

81. *Id.* at 1056, 1061.

of the computer without an external power supply.”⁸² In this case, secondary batteries were admitted separately from laptop computers into Dell’s Foreign Trade Sub-Zone (FTZ)⁸³ in Nashville, Tennessee, and placed into a box with a laptop computer.³⁴ Dell attempted to classify the secondary batteries as “portable digital automatic data processing [“ADP”] machines,” the classification for laptop computers under HTSUS Subheading 8471.30.00.⁸⁵ Customs determined, however, that “the secondary batteries were not ‘put up in sets for retail sale’ with the laptop computers” under GRI 3(b) and that “the secondary batteries therefore should be classified separately” from the laptops.⁸⁶

Dell objected and filed an action in the CIT.⁸⁷ The CIT upheld Customs’ determination and found that the batteries were “not offered or displayed *together* for retail sale with the computer—the computer [was] offered together with a power cord and primary battery, and the secondary batteries [were] offered individually.” Thus, the secondary batteries were not “‘put up together’ with other components of the retail set.”⁸⁸ On appeal to the Federal Circuit, Dell challenged the CIT’s determination under GRI 3(b), arguing that the CIT erred in finding that the secondary batteries were not “goods put up in sets for retail sale.”⁸⁹ Dell argued that “Customs cannot consider the manner in which its products were offered for sale because the only point in time relevant to tariff classification is

82. *Id.* at 1056. A laptop’s primary and secondary battery “cannot be used at the same time; once the primary battery dies, it is removed and replaced with a secondary battery.” *Id.*

83. “An FTZ is an area that is geographically within the United States but is considered outside of the United States for customs purposes.” *Id.* at 1056 n.1 (citing *BMW Mfg. Corp. v. United States*, 241 F.3d 1357, 1359 n.1 (Fed. Cir. 2001)). Goods may be manipulated or manufactured within an FTZ into another item with a different tariff classification before entry into the United States. See 19 U.S.C. § 81c(a) (2006) (listing the actions that may be taken to manipulate goods within FTZs prior to their final classification).

84. *Dell Prods. LP*, 642 F.3d at 1056.

85. *Id.*

86. *Id.* at 1057. GRI 3(b) states: “Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale . . . shall be classified as if they consisted of material or component which gives them their essential character, insofar as this criterion is applicable.” U.S. INT’L TRADE COMM’N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES 1 (2011), available at <http://www.usitc.gov/publications/docs/tata/hts/bychapter/1100gn.pdf>.

87. *Dell Prods. LP v. United States*, 714 F. Supp. 2d 1252 (Ct. Int’l Trade 2010), *aff’d*, 642 F.3d 1055 (Fed. Cir. 2011).

88. *Dell Prods. LP*, 642 F.3d at 1057 (emphasis in original).

89. *Id.* at 1057–58 (quoting U.S. INT’L TRADE COMM’N, *supra* note 86, at 1 (listing the General Rules of Interpretation, including GRI 3(b))).

the time of entry into the United States.”⁹⁰ The Federal Circuit found this argument without merit because, “[i]n many instances, goods are offered for sale before they enter the United States for customs purposes, meaning that Customs must inquire into the manner in which the goods were presented for purchase to customers.”⁹¹ Dell further argued that “goods packaged together for shipment should be treated in the same way as goods packaged together for sale, as long as those goods are packaged together upon entry into the United States.”⁹² The Federal Circuit disagreed, reasoning:

If distinct articles are put up in sets for retail sale, GRI 3(b) provides that those articles are classified collectively according to the material or component that gives them their essential character. If the same articles are not put up in sets for retail sale, GRI 1 provides that each article will be classified separately “according to the terms of the [HTSUS] headings and any relevant section or chapter notes.”⁹³

Thus, the Federal Circuit concluded that the judgment of the CIT classifying Dell’s secondary batteries as “other storage batteries” comported with GRI 3(b) and affirmed the CIT’s decision.⁹⁴

*BenQ America Corp. v. United States*⁹⁵ involved the tariff classification of Dell liquid crystal display (LCD) monitors imported by BenQ America Corporation (BenQ) from China in 2004.⁹⁶ The LCD monitors were equipped with five different types of connectors for receiving data: “(1) a 15-pin D-sub analog video connector; (2) a DVI-D digital video connector; (3) an S-video connector; (4) a composite connector; and (5) USB ports.”⁹⁷ BenQ entered the monitors under HTSUS Heading 8471.60.45 (part of Section XVI of the HTSUS), a duty-free provision for “[a]utomatic data processing [ADP] machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data.”⁹⁸ Customs classified and reliquidated the monitors, however, under HTSUS Subheading 8528.21.70 (a part of Section XVI of the HTSUS), and assessed duties on the monitors at the 5% rate called for under that subheading.⁹⁹

90. *Id.* at 1058.

91. *Id.* at 1059.

92. *Id.*

93. *Id.*

94. *Id.* at 1060–61.

95. 646 F.3d 1371 (Fed. Cir. 2011).

96. *Id.* at 1373.

97. *Id.*

98. *Id.*

99. *Id.* at 1374.

Subheading 8528.21.70 provides for “reception apparatus for television . . . video monitors and video projectors.”¹⁰⁰

BenQ protested the reclassification and ultimately filed an action in the CIT, arguing that “the principal function of the Dell monitors is to serve as a monitor for a computer or an automatic data processing machine,” thus qualifying BenQ’s monitors for classification under HTSUS Subheading 8471.60.45, based on a “principal function” analysis under Note 3 to HTSUS Section XVI.¹⁰¹ Note 3 of Section XVI provided that,

[u]nless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.¹⁰²

The CIT disagreed with BenQ and upheld the Government’s classification based on Note 5(E) to Chapter 84 of the HTSUS and the Explanatory Notes to Heading 8471.¹⁰³ Note 5(E) to Chapter 84 of HTSUS provides, in pertinent part: “[m]achines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.”¹⁰⁴ As the Dell monitors in question were capable of connection to a video source for use as video monitors, the CIT determined that the monitors could perform a specific function other than data processing and thus could not be classified under heading 8471, but instead should have been classified under Heading 8528.¹⁰⁵ The CIT did not look at Chapter 84, Note 5(B) because it concluded that Note 5(E) and the Explanatory Note to heading 8471 were applicable.¹⁰⁶ Note 5(B) lists three features that, if present, require that a unit be regarded as a part of a complete automatic data processing system under heading 8471.¹⁰⁷

100. *Id.*

101. *Id.*

102. *Id.* (quoting U.S. Int’l Trade Comm’n, Harmonized Tariff Schedule of the United States ch. 84 § XVI n.3 (2012), available at <http://www.usitc.gov/publications/docs/tata/hts/bychapter/1200c84.pdf>).

103. *Id.* at 1374–75.

104. *Id.* at 1375 (quoting U.S. Int’l Trade Comm’n, Harmonized Tariff Schedule of the United States ch. 84-2 § XVI n.5(E) (2012), available at <http://www.usitc.gov/publications/docs/tata/hts/bychapter/1200c84.pdf>).

105. *Id.*

106. *Id.* at 1379.

107. *Id.* at 1378 (explaining that for a unit to be considered part of a complete

BenQ appealed to the Federal Circuit, asserting “that the [CIT] should have determined . . . the ‘principal function’ of the Dell monitors, as required by Section XVI, Note 3, HTSUS.”¹⁰⁸ BenQ urged “that the monitors’ ‘principal function’ [was] serving ‘as an output (display) unit of an ADP system’ and that the monitors thus should be classified in heading 8471 as ‘units’ of ADPs.”¹⁰⁹ The Federal Circuit determined that the appropriate starting place for the analysis in this case was Note 5(B), a “principal use” analysis, and not a “principal function” analysis in accordance with Note 5(E) and the Explanatory Note to Heading 8471.¹¹⁰ Indeed, the Federal Circuit noted that the statutory requirements of Chapter 84, Note 5, “must be met in order for the monitors to be classified under heading 8471.”¹¹¹

The Federal Circuit reasoned that Note 5(B) is specifically directed toward Heading 8471, while Note 3 of Section XVI is a note of general application.¹¹² Moreover, Section XVI, Note 3, is not applicable when “the context otherwise requires,” which the Federal Circuit decided was applicable in this case.¹¹³ Because the CIT did not reach Note 5(B) in its analysis, the Federal Circuit remanded the case so the CIT could conduct a “principal use” analysis under Note 5(B) to determine the correct classification of the Dell monitors.¹¹⁴

In *CamelBak Products, LLC v. United States*,¹¹⁵ the Federal Circuit addressed a question of the proper tariff classification for a back-mounted product with a cargo storage component and a hydration component for “hands-free” hydration.¹¹⁶ In this case, Customs classified the product as a conventional backpack under HTSUS Subheading 4202.92.30 for “travel, sports and similar bags,” which carried a duty rate of 17.8% ad valorem.¹¹⁷ CamelBak Products, LLC (CamelBak) argued that its product was a “composite good” that

automatic data processing system, it must be (1) “solely or principally used in an automatic data processing system,” (2) “connectable to the central processing unit either directly or through one or more other units” and (3) “able to accept or deliver data in a form (codes or signals) which can be used by the system”).

108. *Id.* at 1377.

109. *Id.*

110. *Id.* at 1380.

111. *Id.* at 1378. Because two of the requirements were not at issue, the Federal Circuit focused on Note 5(B)(a), which requires, for a unit to be recognized as a complete system, that the unit be “solely or principally used in an automatic data processing system.” *Id.* at 1378.

112. *Id.* at 1380.

113. *Id.*

114. *Id.* at 1380–81.

115. 649 F.3d 1361 (Fed. Cir. 2011).

116. *Id.* at 1362.

117. *Id.* at 1364.

should be classified under HTSUS Subheading 4202.92.04 for “insulated food and beverage bags . . . whose interior incorporates only a flexible plastic container of a kind for storing and dispensing potable beverages through attached flexible tubing” which carries a duty rate of 7% ad valorem.¹¹⁸ The CIT upheld Customs’ classification by regarding the hydration component as an incidental feature of the backpack.¹¹⁹ On appeal, the Federal Circuit reversed the CIT’s classification determination as clearly erroneous and remanded the case for consideration of the “essential character” of the packs.¹²⁰

The Federal Circuit utilized the GRIs for review of the classification.¹²¹ According to GRI 1, if an imported article is described in whole by a single classification heading (or subheading) or specifically named in an *eo nomine* provision, then that single classification applies and the succeeding GRIs are inoperative.¹²² The Federal Circuit analyzed several factors to determine whether a product with several components was “beyond the reach of [an] *eo nomine* . . . provision” for purposes of GRI 1, including the article’s design, use, function, commercial treatment, and marketing.¹²³

The Federal Circuit held that CamelBak’s product could not be classified *eo nomine* as a conventional backpack since the product’s primary design and use was to provide hands-free hydration, not to provide cargo storage, and the product was sold at a higher price than conventional backpacks and marketed differently.¹²⁴ The Federal Circuit concluded that the hydration component feature was not merely incidental to the cargo component but “provide[d] the article with a unique identity and use that removes them from the scope of the *eo nomine* backpack provision.”¹²⁵ Since the Federal Circuit determined that the good was classifiable under two or more

118. *Id.* at 1363–64.

119. *Id.* at 1366; *see also* CamelBak Prods., LLC v. United States, 704 F. Supp. 2d 1335, 1346 (Ct. Int’l Trade 2010) (reasoning that the added hydration features of the backpack did not impact its classification as a backpack), *rev’d*, 649 F.3d 1361 (Fed. Cir. 2011).

120. *CamelBak Prods.*, 649 F.3d at 1368–70.

121. *Id.* at 1364.

122. *Id.*

123. *Id.* at 1367–68.

124. *Id.* at 1368–69.

125. *Id.* at 1369. The dissent deferred to the CIT’s determination that the improvement of the hydration component on the backpack was not such a fundamental change in the item to remove it from still being classified as a member of the *eo nomine* backpack class. *Id.* at 1370–71 (Bryson, J., dissenting). The dissent questioned the majority’s conclusion that the CIT’s determination was clearly erroneous since evidence of distinct commercial treatment and marketing was mixed. *Id.*

headings or subheadings, GRI 3 required application of the "essential character" test to resolve the proper classification of the composite good. This question of fact was remanded to the CIT for reconsideration.¹²⁶

In *Arko Foods International, Inc. v. United States*,¹²⁷ the Federal Circuit affirmed a CIT holding that mellorine, a frozen dessert similar to ice cream but made with vegetable or animal fat substituted for at least some of the butterfat, was not properly classified as "an article of milk" under HTSUS Subheading 2105.00.40.¹²⁸ The government argued that mellorine should be classified as "an article of milk" because the industry classified it as a dairy product.¹²⁹

The Federal Circuit began with GRI 1 by examining the terms of 2105.00.40 and relevant notes, but found that the terms did not indicate what was required for something to be considered an article of milk.¹³⁰ The court then turned to GRI 3, which explains that goods with several components should be classified based on the "essential character" test.¹³¹ The Federal Circuit determined that "the appropriate definition for an article of milk is a mixture with the 'essential character' of milk."¹³² Ultimately, the Federal Circuit concluded that mellorine lacked the essential character of an article of milk because milk powder is not the most preponderant ingredient by weight or cost; thus, classification of mellorine under Subheading 2105.00.40 was improper.¹³³

In *LeMans Corp. v. United States*,¹³⁴ an importer of motocross jerseys, pants, and motorcycle jackets, filed suit challenging Customs' classification of the items as "wearing apparel" under HTSUS Chapters 61 and 62.¹³⁵ LeMans Corp. (LeMans) contended that the subject merchandise should have been classified as "sports equipment" under HTSUS Chapter 95 because the articles were necessary, useful, appropriate, and specifically designed for sport and because the wearing apparel aspects of the merchandise were only incidental to the merchandises' primary purpose.¹³⁶ The CIT upheld Customs' classification of the goods as "wearing apparel" and the

126. *Id.* at 1365, 1369-70 (majority opinion).

127. 654 F.3d 1361 (Fed. Cir. 2011).

128. *Id.* at 1362-64.

129. *Id.* at 1364.

130. *Id.* at 1364-65.

131. *Id.* at 1365.

132. *Id.*

133. *Id.* at 1365-66.

134. 660 F.3d 1311 (Fed. Cir. 2011).

135. *Id.* at 1313.

136. *Id.* at 1315-16.

Federal Circuit affirmed the determination.¹³⁷

Applying GRI 1, the Federal Circuit held that the CIT correctly applied the dictionary definitions of the terms and that the subject merchandise was properly classified as wearing apparel.¹³⁸ The Federal Circuit noted that apparel can include articles intended for athletic uses, such as “track suits, ski-suits, and swimwear.”¹³⁹ LeMans argued that the dual nature of its merchandise required the application of GRI 3, but the Federal Circuit determined that GRI 3 was inapplicable because the apparel items could not also be considered “sports equipment.”¹⁴⁰ The Federal Circuit relied on Chapter 95’s Explanatory Notes for guidance and support in concluding that “sports equipment” encompasses articles that are “not apparel-like and are almost exclusively protective in nature.”¹⁴¹

III. ANTIDUMPING AND COUNTERVAILING DUTIES

Broadly speaking, trade remedy laws aim to protect domestic industries that are injured by unfair import competition.¹⁴² Enforcement of trade remedy laws is handled principally by Commerce and the ITC.¹⁴³ These agencies are responsible for conducting antidumping and countervailing duty investigations. Antidumping duties are imposed on imported goods that are sold at less than “normal value,” which in the first instance is the price at which the same goods are sold in the home market.¹⁴⁴ Countervailing duties (CVDs) are imposed on important goods that benefit from government subsidies that provide an unfair advantage in the U.S. market.¹⁴⁵ Foreign producers subject to antidumping duties and CVDs often appeal to the CIT; in doing so, they challenge the administrative decisions regarding the level of dumping or subsidies (Commerce), the existence of some form of injury caused

137. *Id.* at 1314, 1322.

138. *Id.* at 1317–18.

139. *Id.* at 1317.

140. *Id.* at 1318.

141. *Id.* at 1320. The Federal Circuit distinguished *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1248, 1253 (Fed. Cir. 2004), which held that ice-hockey pants could be classified as sports equipment, by describing ice-hockey pants as protective equipment similar to pads and guards. *LeMans Corp.*, 660 F.3d at 1319.

142. See generally Tariff Act of 1930, 19 U.S.C. §§ 1202–1681 (2006) (imposing various duties on imported goods).

143. See *Ford Motor Co. v. United States*, 635 F.3d 550, 553 (Fed. Cir. 2011) (noting that the CIT has exclusive jurisdiction over various sections of the Tariff Act of 1930).

144. See 19 U.S.C. § 1673; see also *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1576 (Fed. Cir. 1993) (explaining that the duty is calculated by determining the excess of the foreign market value of the merchandise over its U.S. price).

145. 19 U.S.C. § 1671(a).

by the dumping or subsidies (ITC), or other aspects of the administrative proceeding.

A. *Department of Commerce*

In *SKF USA Inc. v. United States*,¹⁴⁶ the Federal Circuit affirmed Commerce's statutory authority under 19 U.S.C. § 1677b and 19 U.S.C. § 1677(28) to use an unaffiliated supplier's actual costs of production (COP) in calculating constructed value (CV) and to utilize zeroing¹⁴⁷ in connection with Commerce's review of antidumping duty orders on ball bearings and parts.¹⁴⁸ The Federal Circuit vacated the CIT's decision in part and remanded, however, because "Commerce failed to adequately explain its decision to change its methodology" for calculating the CV.¹⁴⁹

SKF and other bearing exporters were subject to an antidumping duty order issued by Commerce with respect to sales of ball bearings.¹⁵⁰ Commerce issued the original antidumping order in 1989.¹⁵¹ Commerce thereafter periodically conducted administrative reviews of the subject imports, determining the dumping margin in part on the basis of SKF's acquisition costs.¹⁵² During the seventeenth review, Commerce, for the first time, required SKF and other exporters "to produce actual COP and CV data from their unaffiliated suppliers when a 'substantial proportion' of the . . . sales were 'sales of merchandise production by unaffiliated suppliers.'"¹⁵³ Since SKF was unable to obtain the data from SKF's unaffiliated supplier, who was also a competitor, Commerce acquired the data directly from the unaffiliated supplier.¹⁵⁴ Commerce also continued

146. 630 F.3d 1365 (Fed. Cir. 2011).

147. Zeroing refers to Commerce's practice of "zeroing" certain negative values when calculating antidumping duties. *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1364-65 (Fed. Cir. 2011). Under the zeroing methodology, only positive dumping margins are aggregated and negative margins are given a value of zero. *Id.* at 1366. For a further discussion of zeroing, see *infra* note 268 and accompanying text.

148. *SKF USA Inc.*, 630 F.3d at 1367-68.

149. *Id.* at 1368.

150. *Id.*

151. *Id.*

152. *Id.*; see 19 U.S.C. § 1675(a)(2)(A) (2006) (establishing the criteria by which the dumping margin will be calculated).

153. *SKF USA Inc.*, 630 F.3d at 1368-69. A dumping violation is determined using the fair value, or "normal value," in the home market where the product is sold. *Id.* at 1368. When Commerce is unable to determine the "normal value," 19 U.S.C. § 1677b(a)(4) requires a calculation of the CV based on the sales price in the home market. *Id.* at 1368. The cost of materials and processing are used in calculating CV. *Id.*; see also 19 U.S.C. § 1677b(e)(1) (enacting special rules for imported merchandise that will increase in value after importation into the U.S.).

154. *SKF USA Inc.*, 630 F.3d at 1369.

to utilize its practice of zeroing to calculate the dumping margins.¹⁵⁵

SKF objected to Commerce "using unaffiliated suppliers' actual cost data to calculate CV," noting that this data would yield a higher COP and CV than acquisition costs, leading to a higher dumping margin, and sought review by the CIT.¹⁵⁶ The CIT affirmed Commerce's authority, holding that, "although the statute does not mandate that Commerce must use actual cost data, it unambiguously allows Commerce to prefer the actual production costs of unaffiliated suppliers of finished subject merchandise over acquisition costs."¹⁵⁷ SKF also argued that Commerce's approach violated due process because "SKF cannot review its unaffiliated supplier's cost data and cannot compel an unaffiliated company to provide such data."¹⁵⁸ But the CIT found that this was "not so substantial as to raise any constitutional concerns," in light of SKF's counsel having had access to the data and a chance to review it.¹⁵⁹ Finally, the CIT found "that zeroing methodology was not impermissible."¹⁶⁰ SKF timely appealed.¹⁶¹

The Federal Circuit affirmed that 19 U.S.C. § 1677b and 19 U.S.C. § 1677(28) "unambiguously allow[] Commerce to prefer the actual production costs of unaffiliated suppliers of finished subject merchandise over acquisition costs."¹⁶² But the court also concluded that Commerce did not provide a reasonable explanation for its change in methodology after sixteen administrative reviews under *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*¹⁶³ The Federal Circuit noted two important concerns raised by SKF that Commerce failed to address. First, Commerce failed to address SKF's concern that it could not change its pricing to avoid dumping because it would have no knowledge of its unaffiliated supplier's actual production costs.¹⁶⁴

155. *Id.* at 1370.

156. *Id.*

157. *Id.* at 1371.

158. *Id.* at 1372.

159. *Id.*

160. *Id.* at 1370.

161. *Id.*

162. *Id.* at 1371.

163. 463 U.S. 29, 42 (1983). Under *State Farm*, factors to consider when determining whether agency action is arbitrary and capricious are:

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43.

164. *SKF USA Inc.*, 630 F.3d at 1374 (citing 19 C.F.R. § 351.222(b), (d), (e)(1),

Second, "Commerce did not address SKF's concern that Commerce would apply an adverse inference if the unaffiliated supplier failed to provide cost data."¹⁶⁵ As to SKF's due process concerns, the Federal Circuit agreed with the CIT that the fact that SKF's counsel had access to and a chance to review the data militated against any constitutional violation.¹⁶⁶ Lastly, in response to SKF's contention that "Commerce improperly used zeroing in calculating its weighted-average dumping margin because it is prohibited by the [WTO]," the court held that "application of zeroing to administrative reviews is not inconsistent with the statute," and the WTO decisions cited by SKF did not change U.S. law because they had not been implemented by a statutory scheme.¹⁶⁷

In *Sahaviriya Steel Industries Public Co. v. United States*,¹⁶⁸ the CIT initially affirmed the Department of Commerce's decision to reinstate a partially revoked antidumping duty order on certain hot-rolled carbon steel flat products from Thailand, after a proper Changed Circumstances Review (CCR) was conducted in response to allegations of renewed dumping.¹⁶⁹ Sahaviriya Steel Industries (SSI) appealed to the Federal Circuit and argued that Commerce lacked the statutory authority to reinstate a revoked antidumping order and to conduct a CCR review once an order was revoked.¹⁷⁰ In accordance with *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*,¹⁷¹ the CIT deferred to Commerce's statutory interpretation of the agency's authority to conditionally revoke orders under 19 U.S.C. § 1675(d) and to conduct CCR proceedings to review revocations under 19 U.S.C. § 1675(b), and the Federal Circuit affirmed.¹⁷²

Commerce interpreted the revocation "in part" language in § 1675(d) to permit conditional revocation of an order, i.e. revocation subject to reinstatement, if Commerce finds a resumption of

(f) ("[E]xporters and producers who avoid dumping for three consecutive years become eligible to have their antidumping orders revoked.")

165. *Id.*

166. *Id.* at 1372.

167. *Id.* at 1375.

168. 649 F.3d 1371 (Fed. Cir. 2011).

169. *Id.* at 1373.

170. *Id.* at 1374.

171. 467 U.S. 837 (1984). *Chevron* deference requires that the reviewing court of an administrative agency first determine whether Congress has directly spoken to the precise question at issue. *Id.* at 843. Second, if the answer to the first step is yes, the express intent of Congress governs. *Id.* at 843-44. If the answer is no, then the reviewing court must determine whether the agency has rendered an interpretation that is based on a permissible construction of the statute. *Id.* at 843.

172. *Sahaviriya Steel Indus.*, 649 F.3d at 1380-81.

dumping.¹⁷³ SSI argued that once Commerce revokes an order, it cannot be reinstated without a new, formal injury determination.¹⁷⁴ The Federal Circuit disagreed and held that a new injury determination was not required to reinstate a previously revoked antidumping duty order when the revoked party's subject merchandise is included in the original affirmative injury determination.¹⁷⁵ The court noted that requiring a new injury determination would create an unnecessary administrative burden and essentially allow evasion of dumping penalties after refraining for three consecutive years.¹⁷⁶

Commerce interpreted § 1675(b) to provide broad authority to conduct CCRs to address changed circumstances and allow for reconsideration of antidumping duty determinations.¹⁷⁷ SSI argued that, under § 1675(b), Commerce's authority to conduct CCRs was specifically limited to "final determinations resulting in an order[.]" and that the revocation of an antidumping order was not a "final determination resulting in an order."¹⁷⁸ The Federal Circuit was unconvinced and held that a CCR to reinstate could still be considered a review of a "final determination resulting in an order" because the initial order remained valid and in effect and had been reevaluated in light of changed circumstances: namely, SSI's resumption of dumping.¹⁷⁹ Therefore, the Federal Circuit held that Commerce properly conducted a CCR under the express authority of § 1675(b).¹⁸⁰

In *GPX International Tire Corp. v. United States*,¹⁸¹ the Federal Circuit held that current U.S. law prohibits application of CVDs to exports from non-market economies (NMEs).¹⁸² Although Commerce traditionally refused to apply CVDs to exports from NMEs,¹⁸³ in 2007 Commerce determined that CVDs could be imposed on China because it was now possible to identify and measure subsidies

173. *Id.* at 1375 (citing 19 C.F.R. § 351.222(b)(2)(i)(B) (1999)).

174. *Id.*

175. *Id.* at 1378.

176. *Id.* at 1377.

177. *Id.* at 1378.

178. *Id.*

179. *Id.* at 1380.

180. *Id.* at 1380–81.

181. No. 2011-1107, 2011 U.S. App. LEXIS 25069 (Fed. Cir. Dec. 19, 2011).

182. *Id.* at *14.

183. *See* *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1317–18 (Fed. Cir. 1986); *Carbon Steel Wire Rod from Czechoslovakia; Final Negative Countervailing Duty Determination*, 49 Fed. Reg. 19,370 (May 7, 1984) (citing the conceptual and practical difficulty of identifying and determining subsidization in economies in which all costs, prices, and profits are already controlled by the state).

provided to Chinese producers.¹⁸⁴ Following Commerce's change in policy in 2007, U.S. tire manufacturer Titan Tire Co. petitioned for the imposition of CVDs and antidumping duties on certain tires from China, and Commerce conducted an investigation and imposed both antidumping and countervailing duties.¹⁸⁵ Seven complaints subsequently were filed in the CIT to contest Commerce's determinations; these complaints were consolidated by the CIT.¹⁸⁶

The CIT determined that "imposing both antidumping duties and countervailing duties 'could very well result in a double remedy,'" and remanded the action.¹⁸⁷ "On remand, Commerce decided to offset the countervailing duties against the antidumping duties on the same merchandise to avoid this double counting problem."¹⁸⁸ The CIT found Commerce's approach unreasonable because: (1) "it rendered the countervailing duty investigation 'unnecessary because the same remedial price adjustment can be obtained by merely conducting an NME [antidumping] investigation'" and (2) "the offset is 'inconsistent with 19 U.S.C. § 1677a, which lists the specific offsets to export price and constructed export price that are permissible,' and which does not list offsets for countervailing duties based on domestic subsidies."¹⁸⁹ The CIT "again remanded [the case] to Commerce with instructions not to impose countervailing duties."¹⁹⁰ The United States and the U.S. manufacturers favoring the imposition of countervailing duties timely appealed to the Federal Circuit.¹⁹¹

The Federal Circuit affirmed the CIT's judgment, but on a different and much broader ground. The court concluded that Congress "legislatively ratified" Commerce's pre-2007 position that CVDs could not be applied to NME countries when it amended and reenacted the CVD law in the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (URAA).¹⁹² Specifically, the court highlighted that, in 1988, the House of Representatives inserted a provision into the Omnibus Trade and

184. Coated Free Sheet Paper from the People's Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination, 72 Fed. Reg. 17,484 (Apr. 9, 2007).

185. *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732, 734 (Fed. Cir. 2011), *aff'g* 645 F. Supp. 2d 1231, 1235-36 (Ct. Int'l Trade 2009).

186. *Id.* at 736.

187. *Id.*

188. *Id.* at 737.

189. *Id.* (quoting *GPX Int'l Tire Corp. v. United States*, 715 F. Supp. 2d 1337, 1345 (Ct. Int'l Trade 2010)).

190. *Id.*

191. *Id.*

192. *Id.* at 734.

Competitiveness Act that would expressly make CVD law applicable to NMEs, but the provision was rejected by the House-Senate conference committee.¹⁹³ The court found that Congress's rejection was "persuasive evidence" that Congress did not wish to apply CVDs to NME imports.¹⁹⁴ Moreover, the court concluded that Congress again ratified the prevailing Commerce interpretation in the URAA when the legislature reenacted most of the CVD law but proclaimed in the legislative materials that the definition of "subsidy" would not be changed.¹⁹⁵

The court further reasoned that, when Congress amended and reenacted the URAA and the Omnibus Trade and Competitiveness Act of 1988, it was aware of the court's decision in *Georgetown Steel Corp. v. United States*,¹⁹⁶ and thus "ratified the prevailing interpretation."¹⁹⁷ In *Georgetown Steel Corp.*, the court held that 19 U.S.C. § 1671 "does not compel the imposition of countervailing duties to goods from NME countries because the government payments with respect to such goods are not 'bounties or grants,' or 'countervailable subsidies' in the current terminology."¹⁹⁸ Indeed, the court pointed out that a House Committee Report of the Omnibus Trade and Competitiveness Act of 1988 directly cited *Georgetown Steel* and Congress "rejected a statutory provision to supersede it."¹⁹⁹

In concluding its decision, the Federal Circuit left Commerce and (indirectly) Congress with an invitation: "if [Commerce] believes that the law should be changed, the appropriate approach is to seek legislative change."²⁰⁰ The Executive and Legislative branches were quick to take up the challenge with the passage of remedial

193. *Id.* at 740.

194. *Id.* at 741 (internal quotation marks omitted).

195. *Id.* at 743.

196. 801 F.2d 1308 (Fed. Cir. 1986).

197. *GPX Int'l Tire Corp.*, 666 F.3d at 739.

198. *Id.* at 738 (citing *Georgetown Steel*, 801 F.2d at 1314).

199. *Id.* at 742.

200. *Id.* at 745. The legislation expressly allowed Commerce to apply countervailing duty provisions to NMEs such as China and Vietnam. See H.R. 4105 (f)(1), 112th Cong. (2012). Congress applied the legislation retroactively, including all proceedings initiated on or after November 20, 2006. See H.R. 4105 (b)(1). The legislation also addressed the "double counting" issues raised by the Federal Circuit in *GPX International Tire Corp.* and by the WTO in *United States—Definitive Anti-dumping and Countervailing Duties on Certain Products from China* (DS379) (Mar. 11, 2011). In this regard, if Commerce can "reasonably estimate the extent to which the countervailable subsidy . . . has increased the weighted average of the dumping margin," then Commerce will "reduce the antidumping duty by the amount of the increase in the weighted average dumping margin." See H.R. 4105 (f)(1).

legislation, signed by the President, on March 13, 2012, 85 days after the Federal Circuit issued its opinion.²⁰¹

The Federal Circuit addressed the obligation of a court to remand a case to an administrative agency when new evidence indicates that the agency's proceedings were tainted by material fraud in *Home Products International, Inc. v. United States*.²⁰² In this case, the Federal Circuit held that the CIT "abused its discretion in declining to remand" the case to Commerce in connection with an administrative review of an antidumping order covering floor-standing metal-top ironing tables from the People's Republic of China.²⁰³ In the first and second administrative reviews of the antidumping order, Commerce calculated dumping margins of 0.45 percent and 0.34 percent, respectively, for Since Hardware (Guangzhou) Co., Ltd. (Since Hardware), a Chinese exporter of ironing tables.²⁰⁴ The plaintiff, Home Products International, Inc. (Home Products), initiated an action in the CIT challenging Commerce's second administrative review, alleging that "Commerce calculated an improperly low dumping margin."²⁰⁵ While Home Products' challenge was pending, Commerce was conducting its third administrative review of the same antidumping order, when new evidence "indicated Since Hardware had submitted falsified documents to Commerce during the third administrative review."²⁰⁶ It was alleged that Since Hardware submitted falsified certificates of origin to Commerce, which "likely allowed Since Hardware to obtain a decreased dumping margin."²⁰⁷ Specifically, it was alleged that the certificates of origin made it appear that Since Hardware had purchased more than thirty-three percent of the inputs in question from a market economy country, which "qualify[] the entirety of those inputs to be valued based on [a] weighted-average price," rather than a less favorable surrogate market-economy country.²⁰⁸ The certificates contained typographical errors, a different certificate numbering system, a different stamp, and different signatures.²⁰⁹

201. Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112-99, 126 Stat. 265 (2012).

202. 633 F.3d 1369 (Fed. Cir. 2011).

203. *Id.* at 1371.

204. *Id.* at 1371-72.

205. *Id.* at 1372.

206. *See id.* ("Commerce concluded that documents were unreliable and inaccurate.").

207. *Id.* at 1373.

208. *Id.*; *see also id.* at 1372-73 (providing a more detailed discussion of the nature of the alleged falsification).

209. *See id.* at 1373-74.

Thereafter, Commerce concluded its third administrative review, finding that Since Hardware had provided “unreliable and incomplete documentation in support of its claimed purchases of market economy inputs” thereby increasing Since Hardware’s dumping margin.²¹⁰

Home Products moved to amend its complaint in light of the alleged fraud and challenged the second administrative review.²¹¹ In denying the motion, the CIT declined to go beyond the administrative record under review, noting that Commerce had not found a “fraud” in the third administrative review, but simply “unreliable” and “inaccurate” documents.²¹² Next, the CIT concluded that Home Products failed to show that the second administrative review contained any false information.²¹³ The Federal Circuit disagreed with the CIT, holding that “Commerce has inherent authority to reopen a case to consider new evidence that its proceedings were tainted by fraud” and that there is no difference when a fraud is discovered while the agency proceeding is on appeal.²¹⁴ Next, the Federal Circuit concluded that Home Products had presented clear and convincing evidence “that Since Hardware was guilty of fraud in the second administrative review” because Since Hardware’s certificates from the second review contained the same discrepancies as the certificates from the third administrative review, including: “the same typographical errors, different certificate numbering system, different stamp date, and noticeably different signatures.”²¹⁵ The Federal Circuit remanded the case in order to ascertain the views of Commerce as to whether a fraud existed.²¹⁶

In *Zhejiang DunAn Hetian Metal Co. v. United States*,²¹⁷ DunAn, a Chinese producer of front-seating service valves (FSVs), challenged Commerce’s antidumping duty calculation.²¹⁸ Specifically, DunAn challenged: (1) Commerce’s inclusion of data from other countries when calculating the NME surrogate values for raw material inputs; (2) Commerce’s application of an adverse inference regarding missing sales quantity data; and (3) Commerce’s calculation of the

210. See *id.* at 1374 (determining that the dumping margin determines the size of the antidumping duty imposed; the larger the margin, the greater the duty).

211. *Id.* at 1375.

212. *Id.* at 1376.

213. *Id.*

214. *Id.* at 1377.

215. *Id.* at 1380–81.

216. *Id.*

217. 652 F.3d 1333 (Fed. Cir. 2011).

218. *Id.* at 1334–36, 1339.

labor factor of production.²¹⁹ Since China is deemed a NME, Commerce relied on surrogate values to calculate normal value in the dumping calculation.²²⁰

Commerce selected India as the surrogate market economy for calculation of the normal value of the FSVs.²²¹ Commerce used the World Trade Atlas India import data to determine the surrogate value of brass bars, a primary input for FSVs.²²² DunAn objected to the World Trade Atlas India import data set's inclusion of import data from Japan, France, and the UAE, claiming that the material imported from these countries was incorrectly classified as brass bar.²²³ DunAn based its objection on another data set, Infrodive India.²²⁴ Commerce disagreed and issued a final determination in which it refused to exclude the imports from these countries because it determined that the Infodrive India data was inconclusive on the question of correct classification of the brass bars.²²⁵

During its investigation, Commerce was "unable to verify DunAn's sales data for December 2007" due to DunAn's failure to provide "accurate and verifiable data."²²⁶ Even during verification, a process required before issuing a final determination, Commerce found the data unclear.²²⁷ Under 19 U.S.C. § 1677e(a), Commerce can use "facts otherwise available" to fill gaps in data when "necessary information is not available on the record."²²⁸ It can also use an adverse inference under 19 U.S.C. § 1677e(b). if it finds that the interested party has not cooperated to the best of its ability.²²⁹ Thus, in this case, Commerce applied an adverse inference for the information it found incalculable on the basis of DunAn's record in its final determination.²³⁰

Finally, Commerce calculated the labor factor of production "using regression analysis that included wage rate data from sixty-one market economy countries."²³¹ DunAn objected and argued that the calculation was improper because it relied on "data from countries that are neither economically comparable to China nor significant

219. *Id.*

220. *Id.*

221. *Id.* at 1335–36.

222. *Id.* at 1336.

223. *Id.*

224. *Id.*

225. *Id.* at 1340–41, 1345.

226. *Id.* at 1339.

227. *Id.*

228. *Id.* at 1345 (citing 19 U.S.C. § 1677e(a)(1) (2006)).

229. *See* 19 U.S.C. § 1677e(b).

230. *DunAn*, 652 F.3d at 1345.

231. *Id.* at 1339.

producers of comparable merchandise.”²³² Commerce rejected this argument and included the analysis in its final determination.²³³

DunAn appealed to the CIT, challenging, among other issues, Commerce’s: (1) calculation of NME surrogate values for raw material inputs; (2) Commerce’s application of an adverse inference on missing sales quantity data; and (3) Commerce’s calculation of the labor factor of production.²³⁴ The CIT denied DunAn’s motion, sustaining Commerce’s final determination in all respects; consequently, DunAn appealed to the Federal Circuit.²³⁵

The Federal Circuit addressed each issue *seriatim*. The Federal Circuit deferred to Commerce’s determination on the calculation of the surrogate value for brass bars because the World Trade Atlas India import data, as opposed to the Infodrive data, was the “best available information.”²³⁶

With respect to the adverse inference, DunAn argued that Commerce could have calculated a transaction-specific dumping margin for the missing sales with verified data in the record, so it did not need to resort to any adverse inference.²³⁷ DunAn claimed that the only missing data related to quantity, which DunAn argued was not necessary to the calculation of the dumping margin in this particular case.²³⁸ The Federal Circuit agreed that it was possible to calculate a transaction-specific dumping margin without sales quantity because the FSVs were sold at a predetermined gross price per unit.²³⁹ It reasoned:

“[W]hen units are sold and the only data related to the sale is the gross price, you must know the quantity of units sold to determine gross price per unit. Quantity sold is not required, however, when a unit is sold at a predetermined gross unit price; if the gross unit price is already known, it is, by definition, independently verifiable.”²⁴⁰

Therefore, the Federal Circuit concluded that it was improper for Commerce to apply an adverse inference.²⁴¹ The Federal Circuit acknowledged and DunAn conceded that “the quantity of the FSVs sold in December 2007 is required to determine DunAn’s *overall*

232. *Id.*

233. *Id.*

234. *Id.* at 1340.

235. *Id.*

236. *Id.* at 1341, 1345 (citing 19 U.S.C. § 1677b(c) (2006)).

237. *Id.* at 1346.

238. *Id.*

239. *Id.* at 1347–48.

240. *Id.* at 1347.

241. *Id.* at 1348.

dumping margin.”²⁴² The Federal Circuit ultimately determined that “[b]ecause Commerce could calculate the transaction specific dumping margin for these FSVs with the missing information, it was improper for Commerce to apply” an adverse inference and remanded the case to the CIT “with instructions to use a partial [adverse inference] in selecting the quantity of the December 2007 sales of the FSVs at issue for purposes of calculating the relevant total dumping margin.”²⁴³

Lastly, the Federal Circuit concluded that Commerce’s calculation of the surrogate value of labor was improper because it failed to incorporate data from economically comparable countries that are significant producers of comparable merchandise as required by *Dorbest Ltd. v. United States*.²⁴⁴ Accordingly, the Federal Circuit remanded to the CIT for proper valuation of labor costs as well.²⁴⁵

In *QVD Food Co. v. United States*,²⁴⁶ QVD, an exporter of frozen fish fillets of genus pangasius (pangas fish) from Vietnam, challenged the final results of Commerce’s administrative review of an antidumping duty order.²⁴⁷ Since Vietnam is deemed a NME, Commerce selected Bangladesh as the surrogate market economy for the calculation of normal value.²⁴⁸ In its preliminary results, Commerce valued whole pangas fish based on the financial statement of the Bangladeshi pangas fish producer Gachihata for the 2006-2007 fiscal year (FY 2006-07) and used FY 2006-07 financial statements from two other Bangladeshi seafood producers to calculate financial ratios for general expenses.²⁴⁹ Based on these values, Commerce assigned QVD a de minimis dumping margin.²⁵⁰

Six days before the deadline to issue final results, Commerce placed a UN report on fish prices in the administrative record.²⁵¹ Commerce invited comment about the appropriateness of using the UN’s report for determining surrogate value.²⁵² In the end, Commerce declined to use the report due to concerns about reliability and ultimately relied on an inflation-adjusted value from the 2000-2001 fiscal year (FY 2000-01 statements) Gachihtata financial

242. *Id.* at 1347.

243. *Id.* at 1348.

244. *Id.* at 1349 (citing 604 F.3d 1363, 1372 (Fed. Cir. 2010)).

245. *Id.*

246. 658 F.3d 1318 (Fed. Cir. 2011).

247. *Id.* at 1320.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 1321.

252. *Id.*

statement for the value of whole pangus fish.²⁵³ After Commerce's final results were announced, QVD alleged that Commerce committed ministerial errors by double counting general expenses for the financial ratio.²⁵⁴ Commerce refused to change its financial ratio calculations²⁵⁵ and QVD appealed to the CIT.²⁵⁶

The CIT sustained Commerce's decision, concluding that Commerce provided "reasonable grounds" for using financial statements of a Bangladeshi fish producer from the FY 2000-01 statements and that QVD's challenge to the financial ratio was raised too late.²⁵⁷

QVD appealed to the Federal Circuit, challenging Commerce's antidumping duty calculation by arguing that Commerce should have used contemporaneous data such as the UN report or FY 2006-07 statements.²⁵⁸

The Federal Circuit held that Commerce did not abuse its discretion by declining to use the UN report and the FY2006-07 statements to value the fish, because Commerce has broad authority to determine the best available information for an antidumping review and its decision was supported by substantial evidence.²⁵⁹ The Federal Circuit concluded that Commerce reasonably decided to rely on the well-vetted data from the FY2000-01 financial statements when it faced doubts about the UN report's methodology and reliability.²⁶⁰ Commerce's subsequent decision to use the UN report in new shipper reviews did not alter the Federal Circuit's conclusion about Commerce's decision not to use the UN report in the review involved in the appeal.²⁶¹ Moreover, the Federal Circuit noted that Commerce's decision not to rely on the FY2006-07 statements was reasonable because they were deemed unreliable, as they related to a company that was on the verge of financial collapse.²⁶²

The Federal Circuit also held that Commerce's assignment of certain expenses in calculating the financial ratio was not an inadvertent arithmetic or clerical error; it was a deliberate methodological choice, and thus could not be considered a

253. *Id.* at 1321-22.

254. *Id.* at 1322-23.

255. *Id.* at 1322.

256. *Id.*

257. *Id.*

258. *Id.* at 1322-23.

259. *Id.* at 1323-24.

260. *Id.* at 1324.

261. *Id.* at 1324-25.

262. *Id.* at 1325-26.

“ministerial error.”²⁶³ Moreover, the Federal Circuit noted that even if it were a ministerial error, QVD failed to raise it in a timely manner because it was discoverable during the preliminary proceedings.²⁶⁴

Commerce’s practice of zeroing in calculating antidumping margins has generated significant controversy and discussion over the years.²⁶⁵ Nonetheless, the Federal Circuit has upheld Commerce’s use of zeroing as reasonable at least seven times over the past decade, most recently in *SKF USA Inc.*²⁶⁶ Commerce traditionally practiced zeroing in both investigations and administrative reviews.²⁶⁷ Zeroing is the practice of including positive dumping margins in calculating the overall margin, but counting negative dumping margins as zeros.²⁶⁸

In response to a decision by the WTO Appellate Body, and pursuant to U.S. law providing for the implementation of adverse WTO rulings, Commerce discontinued the practice of zeroing in investigations, but has continued the practice in administrative reviews.²⁶⁹ In this regard, the Federal Circuit has opined that the statutory text applicable to both investigations and administrative reviews—namely the term “exceeds” in 19 U.S.C. § 1677(35)(A)—is sufficiently ambiguous with respect to the zeroing practice, and the Federal Circuit therefore has traditionally deferred to Commerce’s decision of whether to use zeroing in both stages of its antidumping procedures.²⁷⁰ Indeed, the Federal Circuit recently affirmed

263. *Id.* at 1328.

264. *Id.*

265. *See Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1365 (Fed. Cir. 2011) (summarizing the arguments for and against Commerce’s zeroing authority); *see also ThyssenKrupp Acciai Speciali Terni S.p.A. v. United States*, 603 F.3d 928 (Fed. Cir. 2010) (referring to some of the challenges to the zeroing practice at the WTO). There have been, and continue to be, several WTO rulings that are inconsistent with the obligations of the WTO Antidumping Agreement.

266. *See Dongbu Steel Co.*, 635 F.3d at 1365 n.1 (listing cases in which the court upheld Commerce’s zeroing authority).

267. *See id.* at 1366 (explaining that the court has upheld Commerce’s use of zeroing in both investigations and administrative reviews).

268. More specifically, zeroing is used in the following manner. In antidumping proceedings, Commerce “first calculates the dumping margin equal to the amount by which the normal value exceeds the export price or constructed export price.” *Id.* (internal citations omitted). Then, Commerce “calculates a weighted-average dumping margin by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate . . . constructed export prices of such exporter or producer.” *Id.* Then “only positive dumping margins (i.e., margins for sales of merchandise sold at dumped prices) are aggregated and negative margins (i.e., margins for sales of merchandise sold at non-dumped prices) are given a value of zero.” *Id.*

269. *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011).

270. *Corus Staal BV v. Dep’t of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005).

Commerce's change in its zeroing policy in *U.S. Steel Corp. v. United States*.²⁷¹

In an important decision issued this year, however, the Federal Circuit restricted Commerce's freedom to use zeroing in *Dongbu Steel Co. v. United States*.²⁷²

In *Dongbu Steel Co.*, the Federal Circuit addressed "whether Commerce is entitled to deference when it interprets 19 U.S.C. § 1677(35) inconsistently."²⁷³ In 2005, Commerce commenced its twelfth administrative review of certain corrosion-resistant carbon steel flat products from the Republic of Korea using the zeroing methodology.²⁷⁴ Later, Commerce discontinued its policy of zeroing in investigations, but continued to use the zeroing methodology in administrative reviews, which included the final results in the corrosion-resistant carbon steel flat productions review.²⁷⁵ The plaintiff, Union Steel Manufacturing Co. (Union), filed suit, arguing that

it is unreasonable under *Chevron* for Commerce to construe the identical statutory provisions—19 U.S.C. § 1677(35)—to have opposite meanings in investigations and administrative reviews where (1) nothing in the statutory language indicates that different interpretations were intended and (2) this court has rejected the claim that the meaning of § 1677(35) depends on the stage of the antidumping proceeding.²⁷⁶

The CIT disagreed and sustained Commerce's final results.²⁷⁷ Union appealed.²⁷⁸

After reviewing its prior decisions, the Federal Circuit concluded that it had "never addressed the reasonableness of Commerce's interpretation of 19 U.S.C. § 1677(35) with respect to administrative reviews now that Commerce is no longer using a consistent interpretation."²⁷⁹ Thus, the Federal Circuit was not bound by prior case law and would "apply *Chevron* step two analysis anew."²⁸⁰ First, the Federal Circuit concluded that 19 U.S.C. § 1677(35) was ambiguous.²⁸¹ After doing so, the court acknowledged that

271. 621 F.3d 1351, 1363 (Fed. Cir. 2010).

272. 635 F.3d 1363, 1364–65 (Fed. Cir. 2011).

273. *Id.* at 1368.

274. *Id.*

275. *Id.* at 1368–69.

276. *Id.* at 1368.

277. *Id.* at 1369.

278. *Id.*

279. *Id.* at 1371.

280. *Id.*

281. *Id.* at 1372.

"Commerce plays an important role in resolving [the extant] gap in the statute," but declared nonetheless that "Commerce's discretion is not absolute"; consequently, Commerce was required to provide statutory support for its inconsistent interpretation.²⁸² Commerce proffered a single explanation for the inconsistent interpretation: "The methodology for investigations was changed in response to an adverse WTO report."²⁸³ Although the Federal Circuit agreed that Commerce was entitled to change its interpretation to respond to the adverse WTO decision, the court retorted, citing *Chevron*, that "Commerce's interpretation of the statute must comply with domestic law including reasonably interpreting statutes."²⁸⁴ Applying the *Chevron* step two analysis, the Federal Circuit concluded that Commerce failed to "provide[] a reasonable explanation for why the statute supports such inconsistent interpretations."²⁸⁵ The Federal Circuit further commented: "It may be that Commerce cannot justify using opposite interpretations of 19 U.S.C. § 1677(35) in investigations and in administrative reviews. Under such circumstances, Commerce is of course free to choose a single consistent interpretation of the statutory language."²⁸⁶

Later in the year, in *JTEKT Corp. v. United States*,²⁸⁷ importers of ball bearings from Japan challenged Commerce's use of zeroing in its eighteenth administrative review, relying on *Dongbu*.²⁸⁸ The Federal Circuit found in favor of the importers, holding that *Dongbu* required that the court vacate and remand the case "in order for Commerce to explain its reasoning for its current practice."²⁸⁹ In so holding, the Federal Circuit noted:

It is not illuminating to the continued practice of zeroing to know that one phase uses average-to-average comparisons while the other uses average-to-transaction comparisons. In order to satisfy the requirement set out in *Donghu*, Commerce must explain why these (or other) differences between the two phases make it reasonable to continue zeroing in one phase, but not the other. Thus, we

282. *Id.* The Government argued that "inconsistent interpretations are permissible and contemplated by Congress," but the Federal Circuit noted that it had "expressly adopted the position taken by the government in earlier cases that there is no statutory basis for interpreting 19 U.S.C. § 1677(35) differently in investigations than in administrative reviews." *Id.* at 1371.

283. *Id.* at 1372.

284. *Id.*

285. *Id.* at 1373.

286. *Id.*

287. 642 F.3d 1378 (Fed. Cir. 2011).

288. *Id.* at 1380.

289. *Id.* at 1384.

vacate in order for Commerce to provide its reasoning.²⁹⁰

In *JTEKT Corp.*, importers of ball bearings from Japan appealed the final results of Commerce's administrative review by challenging the calculations underlying the final determination.²⁹¹ In analyzing the sales made during the review period, Commerce switched methods of calculating the price of similar merchandise from the "family model match" method to the "sum of the deviations" method.²⁹² The importers responded by arguing that the "sum of deviations" method was less accurate.²⁹³ The CIT sustained Commerce's methodology, holding that Commerce was free to use the "sum of deviations method," that it was reasonable for Commerce to refuse to add an extra characteristic to its analysis and that Commerce had considerable discretion in "breaking ties."²⁹⁴ On appeal, the Federal Circuit agreed and upheld Commerce's change to the "sum of the deviations" approach as reasonable, deferring to Commerce's design of the method.²⁹⁵

Since the "sum of the deviations" method may result in more than one match, Commerce developed a tie-breaker system.²⁹⁶ Commerce first looks to the level of trade and contemporaneity of the sales; if this does not break the tie, then Commerce selects the product with the lowest difference in manufacturing cost (DIFMER).²⁹⁷ The importers argued that Commerce's tie-breaking method was improper and DIFMER should be considered first because, unlike level of trade and contemporaneity, which speak to the characteristics of a particular sale, DIFMER relates to the more important

290. *Id.* at 1384–85.

291. *Id.* at 1380.

292. *Id.*

293. *Id.* at 1381. Under the family model match method, Commerce considers sales of products in the exporter's home market that have the same physical characteristics as the United States sale, by evaluating, in this case, eight characteristics. *Id.* at 1380. Any merchandise that shares the eight characteristics are considered part of a family and the price of the family is averaged. *Id.* Under the sum of the deviations method, the matching sale only needs to be identical on four of the eight characteristics. *Id.* For each of the remaining four characteristics, Commerce determines a percentage difference and then adds up all four percentages. *Id.* If the sum total of these percentage differences is less than 40%, then the merchandise is considered similar. *Id.*

294. *JTEKT Corp. v. United States*, 717 F. Supp. 2d 1322, 1329–30 (Ct. Int'l Trade 2010), *vacated*, 642 F.3d 1378 (Fed. Cir. 2011). "Breaking ties" refers to situations in which two products (or two characteristics) are considered equally similar. Commerce has to make some choice as to which is most similar—that is, how to "break the tie."

295. *JTEKT Corp.*, 642 F.3d at 1379, 1382. The Federal Circuit vacated and remanded the CIT decision on other grounds, specifically leaving Commerce's use of the model match methodology untouched.

296. *Id.* at 1382.

297. *Id.*

consideration of a good's physical characteristics.²⁹⁸ The Federal Circuit disagreed and deferred to Commerce's system because the statute was silent as to tie-breaking methodology and the system was reasonable.²⁹⁹

In *Saha Thai Steel Pipe (Public) Co. v. United States*,³⁰⁰ the Federal Circuit addressed the "duty drawback adjustment" under 19 U.S.C. § 1677a(c)(1)(B), which increases the export price ("EP") of a product that benefited from rebated or unpaid import duties in its country of origin.³⁰¹ During an administrative review of an antidumping duty order covering carbon steel pipes from Thailand, Commerce determined that Saha, a Thai producer of carbon steel pipes that exports its products to the United States, "received duty exemptions . . . for its inputs of hot-rolled steel coil and zinc that Saha incorporated into the carbon steel pipes it exported to the United States." Accordingly, Commerce increased Saha's EP to account for the unpaid duty.³⁰² Commerce also "included the exempted import duties in Saha's cost of manufacture, thereby increasing" Saha's cost of production (COP) and constructed value (CV).³⁰³ Commerce reasoned that "the cost of the exempted duties should be included in Saha's cost of manufacture."³⁰⁴

Both Saha and domestic producers Allied Tube and Conduit Corp. and Wheatland Tube Company (interested U.S. manufacturers) challenged Commerce's decision before the CIT.³⁰⁵ The domestic producers contended that Commerce erred in making the duty drawback adjustment, while Saha argued that Commerce properly treated the duty drawback adjustment, "but erred in including the exempted import duties in its COP and CV."³⁰⁶ The CIT affirmed Commerce's decision in all respects except for the yield factors used

298. *Id.* at 1383.

299. *Id.* at 1382-83.

300. 635 F.3d 1335 (Fed. Cir. 2011).

301. *Id.* at 1338. 19 U.S.C. § 1677a(c)(1)(B) provides that the EP "shall be . . . increased by . . . the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." Increasing the EP results in a decrease of any antidumping margin. *Id.* (citing 19 U.S.C. § 1677a(c)(1)(B) (2006)).

302. *Id.* at 1338-39.

303. *Id.* at 1339. "CV and COP are closely related. The major components of COP are (1) the cost of manufacture; (2) 'selling, general, and administrative expenses'; and (3) packaging expenses." *Id.* at 1338. COP and CV are used to determine the normal value (NV) of a product in market economy countries such as Thailand. *Id.* at 1338.

304. *Id.* at 1339.

305. *Id.* at 1338-39.

306. *Id.* at 1339.

in calculating the cost of production.³⁰⁷ On remand, Commerce recalculated the dumping margin and the CIT affirmed the recalculation and entered final judgment.³⁰⁸

On appeal, the Federal Circuit affirmed the CIT's decision.³⁰⁹ The domestic producers argued that Saha was not eligible for the duty drawback adjustment because it received an "exemption" instead of a duty imposition that was later rebated.³¹⁰ Concluding that the domestic producers' argument was without merit, the Federal Circuit upheld Commerce's reading of 19 U.S.C. § 1677a(c)(1)(B) because a plain reading of the statute contemplated that "a duty drawback adjustment shall be granted when, but for the exportation of the subject merchandise to the United States, the manufacturer would have shouldered the cost of an import duty" and this case "present[ed] the precise circumstances that the statute . . . intended to address."³¹¹ Applying *Chevron* deference, the Federal Circuit likewise affirmed Commerce's decision to include the import duties in Saha's COP and CV.³¹² Referencing the basic accounting principle of "matching," the Federal Circuit opined that "[i]t would be illogical to increase EP to account for import duties that are purportedly reflected in NV, while simultaneously calculating NV based on a COP and CV that do not reflect those import duties."³¹³

B. *International Trade Commission*

In *Canadian Wheat Board v. United States*,³¹⁴ the Federal Circuit addressed

whether, after a [NAFTA] binational panel has invalidated a federal antidumping duty order and [Commerce] has revoked the order, the invalidated duties that had been deposited prior to the date of that determination but that had not been liquidated, may

307. *Id.* Saha challenged Commerce's "application of Saha's actual yield factors when calculating the drawback adjustment instead of the yield factors established by the Thai government." *Id.*

308. *Id.* at 1340.

309. *Id.* at 1344.

310. *Id.* at 1340. Specifically, the domestic producers argued that, "[b]ecause inputs imported and stored in Saha's bonded warehouse received an exemption from import duties upon entry into Thailand rather than a post-duty rebate, the domestic producers contend that no import duties were ever actually 'imposed' on Saha as required by statute." *Id.*

311. *Id.* at 1341.

312. *Id.*

313. *Id.* at 1342-43.

314. 641 F.3d 1344 (Fed. Cir. 2011).

be recovered from the United States by the depositors of those duties.³¹⁵

In 2003, Commerce determined that Canadian wheat had been sold in the United States at less than fair value, and the ITC made the required injury finding.³¹⁶ In the next year, the Canadian Wheat Board deposited the antidumping duties on its wheat entering the United States, but liquidation of those duties was suspended when the Canadian Wheat Board requested an annual review of those duties.³¹⁷ The Canadians challenged the Commission's injury determination before a NAFTA binational panel, which "found that there was not substantial evidence in the record that the 'dumping' had materially injured the domestic wheat industry."³¹⁸ As a result, the panel remanded the case.³¹⁹ The Commission then reversed its initial determination, finding that the importation of Canadian wheat did not materially injure the domestic industry.³²⁰ The domestic wheat industry challenged the remand-determination, but the NAFTA panel affirmed the finding, which became effective on January 2, 2006.³²¹

Commerce subsequently revoked the antidumping duty order, but stated that the "revocation does not affect the liquidation of entries made prior to January 2, 2006" and instructed Customs to liquidate those earlier entries.³²² The Canadian Wheat Board filed suit in the CIT "to enjoin Commerce from liquidating the antidumping duties on its wheat imported prior to January 2, 2006," and also sought the return of those duties.³²³ The CIT determined that the duties should not be collected because "the entries were suspended and unliquidated when the antidumping duty order was revoked," and the importers were thus entitled to return of the antidumping duties deposited at the time of entry.³²⁴ The Government appealed.³²⁵

The Federal Circuit affirmed the CIT's decision, characterizing Commerce's action as "extraordinary and seemingly arbitrary," and finding that "[n]either the statute nor its legislative history 'suggests

315. *Id.* at 1346.

316. *Id.* at 1347.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.* at 1348.

323. *Id.*

324. *Id.*

325. *Id.*

that Congress intended to produce such an inequitable result.”³²⁶ The court concluded that “[o]nce the NAFTA panel had finally determined that the unliquidated antidumping duty order was invalid—a ruling not subject to judicial review . . . Commerce had no valid basis for retaining the unliquidated duties that the Canadians had deposited pursuant to that order.”³²⁷

In *Papierfabrik August Koehler AG v. United States*,³²⁸ a non-precedential opinion, the Federal Circuit overruled the CIT’s decision affirming the ITC’s determination that Papierfabrik August Koehler AG’s and Koehler America’s (Koehler) dumping of Light Weight Thermal Paper (LWTP) posed “a threat of material injury to a domestic industry.”³²⁹

In this case, Commerce analyzed seven Koehler products and found that “six of the seven products had positive dumping margins,” meaning they were being sold at less than fair market value (LTFV).³³⁰ The only product without a positive dumping margin was Koehler’s 48 gsm LWTP product, which “constituted 38.15 percent of Kohler’s quantity of sales in the United States and made up 40.28 percent of the value of sales in the United States.”³³¹ Imports of 48 gsm LWTP were increasing.

In the investigation, Commerce defined LWTP as “thermal paper with a basis weight of 70 [gsm] (with tolerance of + 4.0 [gsm] or less.”³³² Commerce did not separate out the 48 gsm because LWTP “allegedly was not physically distinct enough to become a separate class.”³³³

Before the Commission issued its final determination, Koehler “requested that the Commission disregard the increased shipments of 48 gsm jumbo rolls because they were the one product without a positive dumping margin.”³³⁴ The Commission refused, relying on *Algoma Steel Corp. v. United States*³³⁵ for the proposition that the

326. *Id.* at 1349 (citing *Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1576 (Fed. Cir. 1990)).

327. *Id.* at 1350. The Government made several other arguments, which the Federal Circuit quickly dismissed. *See id.* at 1350–51 (dismissing several government arguments, including the government’s contentions that 19 U.S.C. § 3312(c) barred suit and that the court should defer to Commerce’s reasonable interpretation of the statute).

328. 413 F. App’x 227 (Fed. Cir. 2011) (per curiam).

329. *Id.* at 228 (noting the unique circumstances of the case).

330. *Id.* at 229.

331. *Id.* at 229–30.

332. *Id.* at 229.

333. *Id.* at 230.

334. *Id.*

335. 865 F.2d 240 (Fed. Cir. 1989).

Commission could not consider "intermediate individual product dumping margin calculations."³³⁶ The Commission ultimately found that the LWTP paper industry was threatened with material injury, "almost entirely based on the impact" of 48 gsm jumbo rolls, even though the rolls were not being sold at LTFV.³³⁷ The CIT affirmed the Commission's determination and Koehler appealed to the Federal Circuit.³³⁸

The Federal Circuit held that "[w]hen the threat determination is based almost exclusively on one product with the subject merchandise, and that one product is not being sold at LTFV, the Commission should be able to use all materials at its disposal to make an equitable determination."³³⁹ Accordingly, the court found that the Commission incorrectly denied Koehler's request to consider "potentially dispositive intermediate data," namely the dumping margin of 48 gsm jumbo rolls.³⁴⁰

The Commission petitioned the court for a panel rehearing and rehearing en banc, which the court denied in a precedential opinion, *Papierfabrik August Koehler AG v. United States*.³⁴¹ Three judges dissented from the denial of the petition, arguing, among other things, that the panel misapplied *Algoma Steel Corp.* to this case and departed from "long-standing precedent."³⁴²

IV. INTERNATIONAL TRADE COMMISSION: SECTION 337 CASES

Unlike its jurisdiction to review Customs and International Trade decisions—in which the review is of the CIT decision reviewing administrative decisions—the Federal Circuit's jurisdiction to review decisions by the ITC under Section 337 of the Trade Act is direct. The administrative decisions do not go to the CIT, but rather go directly to the Federal Circuit. This is a vestige of the system of review that existed in the U.S. Court of Customs and Patent Appeals, the predecessor of the Federal Circuit.

In *John Mezzalingua Associates, Inc. v. International Trade Commission*,³⁴³ PPC, a manufacturer of coaxial cable connectors, filed a complaint with the ITC asserting that the importation of certain coaxial cable connectors infringed its design patent and violated

336. *Papierfabrik August Koehler AG*, 413 F. App'x at 230.

337. *Id.*

338. *Id.*

339. *Id.* at 232.

340. *Id.*

341. 646 F.3d 904 (Fed. Cir. 2011).

342. *Id.* at 907–09.

343. 660 F.3d 1322 (Fed. Cir. 2011).

section 337 of the Tariff Act of 1930.³⁴⁴ Section 337 prohibits the importation of articles that infringe a valid and enforceable U.S. patent of a domestic industry.³⁴⁵ The “domestic industry” element requires a showing of: “(A) significant investment in plant and equipment; (B) significant employment or labor or capital; or (C) substantial investment in its exploitation, including engineering, research and development, or licensing.”³⁴⁶

The ITC determined that PPC failed to satisfy the “domestic industry” requirement and PPC appealed.³⁴⁷ The Federal Circuit affirmed the ITC determination, holding that litigation expenses incurred in asserting and defending the validity of the patent did not constitute a “substantial investment in exploitation” of a patent through licensing.³⁴⁸ The Federal Circuit concluded that expenses associated with ordinary patent litigation “should not automatically be considered a ‘substantial investment in . . . licensing’ even if the lawsuit happens to culminate in a license.”³⁴⁹ The court held that PPC failed to make a substantial investment in licensing, relying on the lack of evidence of pre-litigation licensing efforts and licensing negotiations during the lawsuit, as well as a lack of formal licensing program, which indicated that litigation expenses were not connected to licensing efforts.³⁵⁰

In *TianRui Group Co. v International Trade Commission*,³⁵¹ the Federal Circuit held that the ITC has the authority to look to extraterritorial conduct in the course of a trade secret misappropriation investigation if it is necessary to protect domestic industries from injuries arising out of unfair competition in the domestic marketplace.³⁵² In this case, TianRui, a Chinese manufacturer, allegedly misappropriated a U.S. manufacturer’s trade secret by hiring employees away from a licensee. These employees allegedly disclosed the U.S. manufacturer’s proprietary and confidential process for producing cast steel railway wheels.³⁵³

When TianRui exported the wheels to the U.S., the domestic

344. *Id.* at 1324.

345. 19 U.S.C. § 1337(a)(1)(B)(i) (2006).

346. *Id.* § 1337(a)(3).

347. *John Mezzalingua Assocs.*, 660 F.3d at 1324.

348. *Id.* at 1329–31.

349. *Id.* at 1328.

350. *Id.* The dissent believed that additional fact-finding was required to determine if PCC’s expenditures could be considered “a substantial investment in exploitation” of a patent for the domestic industry requirement. *Id.* at 1331.

351. 661 F.3d 1322 (Fed. Cir. 2011).

352. *Id.* at 1324.

353. *Id.*

manufacturer filed a complaint with the ITC asserting that the importation violated section 337 because the wheels were manufactured using its misappropriated trade secret.³⁵⁴ TianRui argued that Congress did not intend for section 337 to be applied extraterritorially and that the application of section 337 to alleged misconduct in China would improperly interfere with Chinese law.³⁵⁵ The ITC found that the wheels were manufactured using a process that was developed in the United States, protected under domestic trade secret law, and misappropriated abroad in violation of section 337.³⁵⁶

Section 337 prohibits unfair methods of competition, including the misappropriation of trade secrets and unfair acts in the importation of articles into the U.S. that negatively affect an industry in the United States.³⁵⁷ Applying a single federal standard for what constitutes a misappropriation of trade secrets, the Federal Circuit affirmed the ITC's determination that TianRui misappropriated the secret process by obtaining access to the U.S. producer's confidential information.³⁵⁸ The Federal Circuit concluded that the general presumption against the extraterritorial application of laws did not apply to Section 337 because: (1) the focus of section 337 is on an inherently international transaction; (2) the foreign "unfair" conduct at issue has a domestic nexus; and (3) legislative history implies consideration of conduct that occurs abroad.³⁵⁹ The Federal Circuit noted that since the ITC's exercise of authority is limited to foreign conduct only insofar as it relates to goods imported into the U.S., there was no conflict with Chinese law.³⁶⁰ Moreover, China, as a member of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Treaty, is subject to the same general principles of trade secret misappropriation law.³⁶¹

Ultimately, the Federal Circuit held that it was proper for the ITC

354. *Id.* at 1325.

355. *Id.* at 1332. TianRui also argued that there was no "domestic industry injury" for purposes of Section 337 because the U.S. manufacturer had discontinued use of the misappropriated process. *Id.* at 1335. The Federal Circuit disagreed and affirmed the ITC injury determination based on evidence indicating that the imported wheels directly competed with similar wheels domestically produced by the trade secret owner. *Id.* at 1337.

356. *Id.* at 1324.

357. 19 U.S.C. § 1337(a)(1)(A)(i) (2006).

358. *TianRui Grp. Co.*, 661 F.3d at 1327.

359. *Id.* at 1329-30.

360. *Id.* at 1332.

361. *Id.* at 1332-33; see Marrakesh Agreement Establishing the World Trade Organization, art. 39, annex 1C, Apr. 15, 1994, 1867 U.N.T.S. 154 (setting forth misappropriation requirements that mirrored the obligations that the administrative law judge applied in the instant case).

“to find a section 337 violation based, in part, on acts of trade secret misappropriation occurring overseas.”³⁶² In particular, the Federal Circuit was concerned about evasion of section 337 through a “loophole” allowing misappropriation of U.S. trade secrets abroad with immunity.³⁶³ The dissent objected to the extraterritorial and anti-competitive implications of the decision.³⁶⁴

In another section 337 action, *Tessera, Inc. v. International Trade Commission*,³⁶⁵ Tessera, Inc. filed a complaint with the ITC on December 21, 2007, alleging patent infringement by importers of certain semiconductor chips.³⁶⁶ The patents at issue were U.S. Patent Nos. 5,663,106 (the '106 patent); 5,679,977 (the '977 patent); and 6,458,681 (the '681 patent).³⁶⁷ The '106 patent concerns “innovations preventing contamination of exposed terminals on packages during encapsulation” of semiconductor chips.³⁶⁸ A semiconductor chip (chip) is a widely used miniaturized electronic circuit.³⁶⁹ “A semiconductor package (package) protects these delicate chips from mechanical and thermal damage. Most modern packages protect the chip by encapsulating it with a molded plastic, generally referred to as ‘encapsulant.’”³⁷⁰ The problem with the encapsulant, however, is that it may contaminate the miniature electrical terminals on the exterior of those packages.³⁷¹

During encapsulation, the '106 patent describes using an encapsulate barrier and a protective barrier as the encapsulation area.³⁷² The patent describes a material called “solder mask,” but also permits the use of “any other means which protects . . . the terminals from coming into contact with encapsulant.”³⁷³ The products accused of infringement at issue on appeal used a laminate-based package substrate named “wBGA.”³⁷⁴ Otherwise, the accused products were similar in most respects.³⁷⁵ wBGA consisted of a stack of three layers—a laminate substrate layer (a solid foundational layer), a copper wiring layer above it, which “provide[d] for the

362. *TianRui Corp. Co.*, 661 F.3d at 1332.

363. *Id.* at 1330, 1333.

364. *Id.* at 1343.

365. 646 F.3d 1357, 98 U.S.P.Q.2d (BNA) 1868 (Fed. Cir. 2011).

366. *Id.* at 1360, 98 U.S.P.Q.2d (BNA) at 1870.

367. *Id.*, 98 U.S.P.Q.2d (BNA) at 1870.

368. *Id.* at 1361, 98 U.S.P.Q.2d (BNA) at 1871.

369. *Id.*, 98 U.S.P.Q.2d (BNA) at 1871.

370. *Id.*, 98 U.S.P.Q.2d (BNA) at 1871.

371. *Id.*, 98 U.S.P.Q.2d (BNA) at 1871.

372. *Id.*, 98 U.S.P.Q.2d (BNA) at 1871.

373. *Id.*, 98 U.S.P.Q.2d (BNA) at 1871.

374. *Id.* at 1362, 98 U.S.P.Q.2d (BNA) at 1871–72.

375. *Id.*, 98 U.S.P.Q.2d (BNA) at 1871–72.

controlled flow of electrical signals," and a solder mask layer on top to prevent corrosion of the copper.³⁷⁶

Concluding that there was no section 337 violation, the ITC issued a final determination on January 4, 2010, stating that the wBGA products did not infringe.³⁷⁷ Tessera sought review by the Federal Circuit on multiple grounds, challenging: (1) the Commission's claim construction of the '106 patent; (2) the Commission's finding of no infringement by wBGA products; and (3) the Commission's finding of patent exhaustion.³⁷⁸ Finally, Tessera sought to vacate the Commission's decision as to the expired '977 and '627 patents.³⁷⁹

The Federal Circuit agreed with the ITC that there was no patent infringement because "for the wBGA packages, the laminate-based substrate core layer represents the claimed 'top layer,' and because the 'protective barrier' does not come into contact with that layer, the wBGA packages do not infringe the asserted claims of the '106 patent."³⁸⁰ Indeed, the Federal Circuit further agreed with the ITC that the "laminate substrate layer of the accused wBGA products corresponded to the 'top layer' . . . of the '106 patent," not the solder mask layer.³⁸¹

With respect to patent exhaustion, Tessera argued that it never authorized sales of its licenses because royalties were never paid or were paid late in some cases.³⁸² The Federal Circuit disagreed, finding that Tessera's licensees were authorized to sell the accused products and nothing in the licenses limited the licensee's ability to sell, even if royalty payments were late.³⁸³ The Federal Circuit further

376. *Id.*, 98 U.S.P.Q.2d (BNA) at 1871-72.

377. *Id.* at 1363, 98 U.S.P.Q.2d (BNA) at 1872. Another group of patents were also at issue during this action, but were not raised on the appeal. The other group of products had a polyimide-based package substrate (μ BGA). *Id.* at 1362, 98 U.S.P.Q.2d (BNA) at 1871-72.

378. *Id.* at 1363, 98 U.S.P.Q.2d (BNA) at 1872. The Commission and intervener Elpida Memory, Inc. and Elpida Memory (USA) Inc. (collectively, Elpida), challenged the jurisdiction of the Federal Circuit with respect to patent exhaustion, arguing Tessera did not timely appeal the issue. *Id.* at 1367, 98 U.S.P.Q.2d (BNA) at 1875. The Federal Circuit disagreed, finding that the ITC did not render final determination until December 29, 2009, and that Tessera filed a timely notice of appeal within 60 days of that date. *Id.* at 1369, 98 U.S.P.Q.2d (BNA) at 1876-77.

379. *Id.* at 1371, 98 U.S.P.Q.2d (BNA) at 1878.

380. *Id.* at 1365, 98 U.S.P.Q.2d (BNA) at 1874 (internal quotation marks omitted). The Federal Circuit noted that "[t]he issue of infringement ultimately turns upon which layer is identified as the 'top layer.'" *Id.*, 98 U.S.P.Q.2d (BNA) at 1874.

381. *Id.* at 1364-65, 98 U.S.P.Q.2d (BNA) at 1874. The Federal Circuit further noted that the '106 patent "describes using 'solder mask' as the preferred material for the protective barrier, not the top layer, and, at times, even use[d] the term 'solder mask' interchangeably with 'protective barrier.'" *Id.* at 1365, 98 U.S.P.Q.2d (BNA) at 1874.

382. *Id.* at 1369-70, 98 U.S.P.Q.2d (BNA) at 1877.

383. *Id.*, 98 U.S.P.Q.2d (BNA) at 1877.

noted that, in some cases, "royalty obligations do not accrue until eight months after the licensed products are sold."³⁸⁴ Finally, with respect to the '977 and '627 patents, the Federal Circuit found the portion of appeal pertaining to these patents moot and remanded to the ITC "with instructions to dismiss as moot the portion of the complaint relating to those patents."³⁸⁵

CONCLUSION

The Federal Circuit continues to develop a rich body of precedential case law, furthering the transparency and consistency of United States international trade law. This year was no exception. The majority of the decisions of the Federal Circuit in 2011 addressed tariff classifications, Commerce's authority to impose antidumping and countervailing duties, and Commerce's calculations of antidumping duties. The decisions in *GPX International* and *Dongbu* were perhaps surprising because the Court refused to defer to Commerce's practice with respect to zeroing and the application of CVD law to non-market economy countries. The Federal Circuit's decisions, however, were based on unsurprising principles of statutory interpretation. The Federal Circuit reaffirmed its commitment to issuing fair and well-reasoned decisions, interpreting the governing statutes, and requiring administrative actions pursuant to these laws to be consistent with established principles of administrative law and judicial precedent.

384. *Id.*, 98 U.S.P.Q.2d (BNA) at 1877.

385. *Id.* at 1371, 98 U.S.P.Q.2d (BNA) at 1878.

ADDENDUM

#	Precedential Decisions Issued by the Federal Circuit in 2011 (in Chronological Order)	Agency	Ruling
1	SKF USA Inc. v. United States, 630 F.3d 1365 (Fed. Cir. 2011).	Department of Commerce	Affirmed in part, vacated in part, and remanded
2	Home Prods. Int'l, Inc. v. United States, 633 F.3d 1369 (Fed. Cir. 2011).	Department of Commerce	Reversed and remanded
3	Saha Thai Steel Pipe (Pub.) Co. v. United States, 635 F.3d 1335 (Fed. Cir. 2011).	Department of Commerce	Affirmed
4	Ford Motor Co. v. United States, 635 F.3d 550 (Fed. Cir. 2011).	Bureau of Customs and Border Protection	Reversed and remanded
5	StoreWALL, LLC v. United States, 644 F.3d 1358 (Fed. Cir. 2011).	Bureau of Customs and Border Protection	Reversed and remanded
6	Dongbu Steel Co. v. United States, 635 F.3d 1363 (Fed. Cir. 2011).	Department of Commerce	Vacated and remanded
7	Canadian Wheat Bd. v. United States, 641 F.3d 1344 (Fed. Cir. 2011).	International Trade Commission	Affirmed
8	Dell Prods. LP v. United States, 642 F.3d 1055 (Fed. Cir. 2011).	Bureau of Customs and Border Protection	Affirmed
9	Papierfabrik August Koehler AG v. United States, 646 F.3d 904 (Fed. Cir. 2011).	International Trade Commission	Denial of petition rehearing en banc

10	Tessera, Inc. v. Int'l Trade Comm'n, 646 F.3d 1357 (Fed. Cir. 2011).	International Trade Commission	Affirmed in part, vacated in part, and remanded
11	BenQ Am. Corp. v. United States, 646 F.3d 1371 (Fed. Cir. 2011).	Bureau of Customs and Border Protection	Vacated and remanded
12	CamelBak Prods., LLC v. United States, 649 F.3d 1361 (Fed. Cir. 2011).	Bureau of Customs and Border Protection	Reversed and remanded
13	Sahaviriya Steel Indus. Pub. Co. v. United States, 649 F.3d 1371 (Fed. Cir. 2011).	Department of Commerce	Affirmed
14	Zhejiang DunAn Hetian Metal Co. v. United States, 652 F.3d 1333 (Fed. Cir. 2011).	Department of Commerce	Vacated and remanded
15	Almond Bros. Lumber Co. v. United States, 651 F.3d 1343 (Fed. Cir. 2011).	United States Trade Representative	Reversed and remanded
16	JTEKT Corp. v. United States, 642 F.3d 1378 (Fed. Cir. 2011).	Department of Commerce	Vacated and remanded
17	Hartford Fire Ins. Co. v. United States, 648 F.3d 1371 (Fed. Cir. 2011).	Bureau of Customs and Border Protection	Reversed and remanded
18	Arko Foods Int'l, Inc. v. United States, 654 F.3d 1361 (Fed. Cir. 2011).	Bureau of Customs and Border Protection	Affirmed
19	QVD Food Co. v. United States, 658 F.3d 1318 (Fed. Cir. 2011).	Department of Commerce	Affirmed
20	LeMans Corp. v. United States, 660 F.3d 1311 (Fed. Cir. 2011).	Bureau of Customs and Border Protection	Affirmed
21	John Mezzalingua Assocs., Inc. v. Int'l Trade Comm'n, 660 F.3d 1322 (Fed. Cir. 2011).	International Trade Commission	Affirmed

22	TianRui Grp. Co. v. Int'l Trade Comm'n, 661 F.3d 1322 (Fed. Cir. 2011).	International Trade Commission	Affirmed
23	Hitachi Home Elecs. (Am.), Inc. v. United States, 661 F.3d 1343 (Fed. Cir. 2011).	Bureau of Customs and Border Protection	Affirmed
24	GPX Int'l Tire Corp. v. United States, 666 F.3d 732 (Fed. Cir. 2011).	Department of Commerce	Affirmed on different grounds

Copyright of American University Law Review is the property of American University Washington College of Law and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.