
2007 INTERNATIONAL TRADE DECISIONS OF THE FEDERAL CIRCUIT

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INTRODUCTION

In 2007, the United States Court of Appeals for the Federal Circuit (“Federal Circuit”) decided numerous cases demonstrating the varied nature of the cases appealed from the United States Court of International Trade (“CIT”). These cases included appeals to the

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CIT from United States Customs and Border Protection (“Customs”), the United States Department of Commerce (“Commerce”), and the United States International Trade Commission (“ITC”).

Since its inception in 1982, the Federal Circuit has exercised its jurisdiction over cases appealed from the CIT pursuant to 28 U.S.C. § 1295(a)(5).¹ This broad grant of appellate jurisdiction is apparent in the wide variety of cases the Federal Circuit hears. The complexity of these cases has continued to grow with numerous tariff classification and drawback cases, trade remedy cases, and jurisdictional issue cases, among others.

This Article reviews those cases decided by the Federal Circuit in 2007 dealing with international trade matters. Many cases decided by the Federal Circuit had complex procedural histories and turned on particular factual issues. However, some of the cases decided in 2007 also had broader implications that potentially will affect agency decision-making for years to come. The case summaries highlight the issues the Federal Circuit faced in 2007, broken down into the two major areas of the court’s international trade jurisdiction—customs laws and trade remedies laws.

I. CUSTOMS

As in previous years, in 2007, Customs cases represented a large number of international trade cases decided by the Federal Circuit. Since 2003, when Customs was reorganized as an agency within the U.S. Department of Homeland Security, the Federal Circuit’s purview has centered primarily on Customs’ functions of “[a]ssessing and collecting Customs duties, excise taxes, fees and penalties due on imported merchandise.”² In the 2007 term, the Federal Circuit heard cases involving tariff classification matters, and a wide range of other customs-related matters, including duty drawback and jurisdictional disputes.

A. *Tariff Classification*

The Federal Circuit decided seven classification cases in 2007. In classification cases, importers and Customs disagree about the proper classification of imported goods under the provisions of the

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

2. U.S. Customs and Border Protection, U.S. Customs Service, <http://www.cbp.gov/xp/cgov/toolbox/about/history/history2.xml> (last visited Feb. 13, 2008).

Harmonized Tariff Schedule of the United States (“HTSUS”).³ Because the HTSUS classification of imported goods determines the rate of duty that will be assessed on the goods, importers want the goods classified in an HTSUS provision with a lower duty rate than that in a potentially applicable alternative provision.

In *Optrex America, Inc. v. United States*,⁴ the Federal Circuit addressed the classification of a variety of liquid crystal displays (“LCDs”) imported by Optrex America, Inc. (“Optrex”).⁵ These LCDs included alphanumeric modules, graphic modules, and glass sandwiches (or panels), used in a number of different settings.⁶ While Customs liquidated the imports under various subheadings, including 8531.20.00 and 9013.80.70, of the HTSUS, the CIT ultimately found in favor of Customs’ counterclaims to reclassify certain imports under subheadings 9013.80.70,⁷ 9013.80.90,⁸ and 8537.10.90.⁹ Optrex appealed, contending that its goods are classifiable as parts of automatic data processing (“ADP”) machines, classifiable under

3. OFFICE OF TARIFF AFFAIRS AND TRADE AGREEMENTS, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (2007); *see, e.g.*, *Optrex Am., Inc. v. United States*, 475 F.3d 1367, 1367–72 (Fed. Cir. 2007) (deciding a dispute between Optrex and Customs regarding the classification of Optrex’s imports under the provisions of the HTSUS).

4. 475 F.3d 1367 (Fed. Cir. 2007).

5. *Id.* at 1367–68.

6. *Id.* at 1368.

7. Subheading 9013.80.70 covers “Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this chapter; parts and accessories thereof: Flat panel displays other than for articles of heading 8528, except subheadings 8528.51 or 8528.61.” Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202 (2000), Subheading 9013.80.70. The HTSUS is codified at 19 U.S.C. § 1202, but is not published in the Code. Pursuant to 19 U.S.C. § 3007, the HTSUS is published, as annotated for statistical reporting purposes, by the U.S. International Trade Commission. *See* United States International Trade Commission, Harmonized Tariff Schedule of the United States, *available at* <http://www.usitc.gov> (follow “Tariff Schedule” hyperlink).

8. Subheading 9013.80.90 covers “Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this chapter; parts and accessories thereof: Other.” Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202 (2000), Subheading 9013.80.90.

9. *Optrex*, 475 F.3d at 1369. Subheading 8537.10.90 covers

Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of chapter 90, and numerical control apparatus, other than switching apparatus of heading 8517: For a voltage not exceeding 1,000 V: Other.

Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202 (2000), Subheading 8537.10.90.

heading 8471, and ADP machine parts, classifiable under heading 8473.¹⁰

Heading 8473 states that, “[t]o be classified as an ADP machine part, an import must be ‘suitable for use solely or principally with’ ADP machines.”¹¹ The Notes to Chapter 84 define ADP machines as:

Digital machines, capable of (1) storing the processing program or programs and at least the data immediately necessary for execution of the program; (2) being freely programmed in accordance with the requirements of the user; (3) performing arithmetical computations specified by the user; and (4) and [sic] executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run¹²

The Federal Circuit found that, because Optrex failed to prove that its imports are solely or principally incorporated into machines meeting the second and third criteria listed above, the CIT correctly determined that they were not properly classified as parts of ADP machines under heading 8473.¹³

The Federal Circuit denied Optrex’s appeal for a number of reasons. First, the court found that “Optrex ha[d] not established that any of its imports are incorporated into devices that are freely programmed in accordance with the requirements of the user.”¹⁴ The court agreed with Customs’ interpretation of the “freely programmable” requirement,¹⁵ and this interpretation was also supported by the World Customs Organization’s Explanatory Notes.¹⁶ Second, Optrex failed to establish that any of its imports were incorporated solely or principally into machines that are capable of performing arithmetical computations specified by the user.¹⁷ Once

10. *Optrex*, 475 F.3d at 1369.

11. *Id.* (citing OFFICE OF TARIFF AFFAIRS AND TRADE AGREEMENTS, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, Heading 8473 (2006)).

12. *Id.* (citing OFFICE OF TARIFF AFFAIRS AND TRADE AGREEMENTS, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, Chapter 84, Note 5(A)(a) (2006)).

13. *Id.*

14. *Id.*

15. *Id.* at 1370 (citing U.S. Customs & Border Protection, Customs Headquarters Ruling No. 964880 (Dec. 21, 2001)) (“Customs believes that a freely programmable ADP machine is one that applications can be written for, does not impose artificial limitations upon such applications, and will *accept new applications* that allow the user to manipulate the data as deemed necessary by the user.” (emphasis added)).

16. *Id.* (“[M]achines which operate only on fixed programs, that is programs which cannot be modified by the user, are excluded [from heading 8471] even though the user may be able to choose between a number of such fixed programs.” (citing CUSTOMS CO-OPERATION COUNCIL, HARMONIZED COMMODITY DESCRIPTION AND CODING SYSTEM, Explanatory Note 84.71(I)(A) (2d ed. 1996))).

17. *Id.*

the CIT determined that none of the imports were classifiable under heading 8473, it classified the imported LCDs under either heading 8531 (signaling devices), 8537 (control panels), or 9013 (LCDs not constituting articles provided for more specifically in other headings).¹⁸ The Federal Circuit affirmed the CIT's classification of: certain graphic display modules as control panels under subheading 8537.10.90,¹⁹ all character display models capable of displaying eighty or less characters as indicator panels under subheading 8531.20.00,²⁰ and certain LCD panels and character display modules capable of displaying more than eighty characters under subheading 9013.²¹ While this finding was based on a Customs classification policy that was merely a guideline and not a rigid rule, Optrex did not present any evidence showing that its imported character display modules were not limited to signaling.²² Therefore, the Federal Circuit affirmed the CIT's decision in favor of Customs' classification of the LCDs.²³

*BASF Corp. v. United States*²⁴ involved the tariff classification of Lucarotin® 1% ("Lucarotin"), a food colorant containing one percent beta-carotene.²⁵ In this case, both the importer BASF Corporation ("BASF") and the government appealed the decision of the CIT, which held that Lucarotin was classifiable under subheading 3204.19.35 of the HTSUS ("Beta-carotene and other carotene coloring matter").²⁶ BASF argued that the product was entitled to duty-free treatment because beta-carotene is listed on the duty-free Pharmaceutical Appendix of the HTSUS.²⁷ The government cross-appealed, stating that the correct classification of Lucarotin is as a beta-carotene "preparation not otherwise specified" under subheading 3204.19.40 or 3204.19.50.²⁸ The Federal Circuit affirmed

18. *Id.*

19. *See id.* at 1371 n.4 (finding no error in the classification because the display modules contained touch panels).

20. *See id.* at 1371 (applying Customs' eighty character rule by considering all LCD modules capable of displaying eighty characters or less as being operationally limited to performing signaling functions, and determining that while this was merely a guideline and not a rigid rule, Optrex did not present any evidence showing that its imported character display modules were not limited to signaling).

21. *See id.* at 1371-72 (finding no error in the CIT's classification of these LCDs as LCDs "not constituting articles provided for more specifically in other headings").

22. *Id.*

23. *Id.* at 1372.

24. 482 F.3d 1324 (Fed. Cir. 2007).

25. *Id.* at 1325.

26. *Id.*

27. *Id.*

28. *Id.*

the CIT's decision to classify Lucarotin under subheading 3204.19.35 of the HTSUS.²⁹

In finding against BASF, the Federal Circuit held that the CIT's classification under subheading 3204.19.35 of the HTSUS prevailed over the listing of beta-carotene on the Pharmaceutical Appendix.³⁰ Lucarotin's use as a food colorant, and not as a vitamin, was never disputed.³¹ The CIT found that Lucarotin's use did not comply with the ITC's definition of a pharmaceutical product,³² and found that customers only bought the product for its properties as a food colorant.³³ Ultimately, the Federal Circuit affirmed the CIT's holding that Lucarotin was not eligible for duty-free importation despite the listing of beta-carotene on the Pharmaceutical Appendix.³⁴

In finding against the government, the Federal Circuit held that the CIT's classification under subheading 3204.19.35 was correct because the classification as "Beta-carotene and other carotenoid coloring matter" was more specific than the government's proposed classification under 3204.19.40 or 3204.19.50 as a beta-carotene "preparation not otherwise specified."³⁵ The Federal Circuit relied on HTSUS General Rule of Interpretation ("GRI") 3 to guide its analysis.³⁶ GRI 3(a) states that "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description."³⁷ GRI 3(b) states that mixtures or composite goods which cannot be classified by reference to 3(a) "shall be classified as if they consisted of the material or the component which gives them their essential character."³⁸ Therefore, the Federal Circuit concluded that the "most specific description" criterion of GRI 3(a) and/or the "essential character" criterion of

29. *Id.* at 1327.

30. *See id.* (asserting that the CIT's decision represented "the clearest and most direct application of the HTSUS provision of a separate tariff category for beta-carotene coloring matter").

31. *Id.* at 1326.

32. *Id.* (explaining that "[t]he CIT applied the International Trade Commission's . . . definition of a pharmaceutical product as 'used in the prevention, diagnosis, alleviation, treatment, or cure of disease in humans or animals'").

33. *See id.* (asserting that the purpose of Lucarotin as a method of delivering a beta-carotene colorant was undisputed).

34. *Id.* at 1326–27.

35. *Id.* at 1327.

36. *Id.*

37. *See id.* (citing OFFICE OF TARIFF AFFAIRS AND TRADE AGREEMENTS, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, General Rule of Interpretation 3(a) (2007) (preferring the "heading which provides the most specific description").

38. *See id.* (citing OFFICE OF TARIFF AFFAIRS AND TRADE AGREEMENTS, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, General Rule of Interpretation 3(b) (2007) (classifying mixtures "as if they consisted of the material or the component which gives them their essential character").

GRI 3(b) compelled the classification of Lucarotin under subheading 3204.19.35.³⁹ The government's contention that Lucarotin is a "preparation" therefore did not carry much weight in light of the fact that subheading 3204.19.35 was plainly the more specific of the potential classifications.⁴⁰

In another *BASF Corp. v. United States*⁴¹ case, the Federal Circuit affirmed the CIT's decision to classify the imported chemical polyisobutylene amine ("PIBA") under subheading 3811.90.00 of the HTSUS.⁴² After importing PIBA, BASF added other chemicals to form a finished detergent control package, which was then added to gasoline engines to remove and prevent the buildup of harmful deposits.⁴³ BASF argued that the product was not prima facie classifiable under heading 3811 (prepared additives for mineral oils (including gasoline)) and should be classified in subheading 3902.20.50 (classifying chemicals by structure).⁴⁴

The Federal Circuit rejected BASF's argument, finding that PIBA was prima facie classifiable under heading 3811.⁴⁵ In its analysis, the court found that, while the imported PIBA was not directly added to engines itself, "its detergent properties render[ed] it useful as a gasoline additive so long as other materials [were] added at the same time."⁴⁶ Additionally, the Federal Circuit held that heading 3811, a use provision, was more specific than heading 3902, an *eo nomine* provision, which described the product by name, not use.⁴⁷ Therefore, the court concluded that the CIT's classification was correct because the imported product was prima facie classifiable in heading 3811 and because heading 3811 was more specific than heading 3902. This, coupled with the Explanatory Notes to Chapter

39. *Id.*

40. *Id.*

41. 497 F.3d 1309 (Fed. Cir. 2007).

42. *See id.* at 1311 (determining that the CIT was correct "[b]ecause the imported product is prima facie classifiable in heading 3811 of the HTSUS, and because heading 3811 is more specific than the heading in which BASF argues the product should be classified").

43. *Id.*

44. *Id.* at 1312; *see id.* (explaining BASF's arguments that (1) the imported product is mixed with other chemicals before being added to gasoline and is thus not a "prepared additive for gasoline" falling under heading 3811, and (2) heading 3902 more specifically captures the true character of the product).

45. *Id.* at 1314–15.

46. *Id.* at 1314.

47. *See id.* at 1315 (explaining the court's decision to follow the general rule that use provisions are more specific than *eo nomine* provisions, as well as the court's application of the Explanatory Note corresponding to Chapter 39 of the HTSUS to support its decision).

39,⁴⁸ compelled the Federal Circuit to affirm the CIT's determination that the imported product should be classified in heading 3811.⁴⁹

*Home Depot, U.S.A., Inc. v. United States*⁵⁰ involved the appeal by Customs of a CIT decision reclassifying 105 models of imported light fixtures.⁵¹ The case originally involved the classification of 124 models of light fixtures imported by Home Depot, U.S.A., Inc. ("Home Depot"), which Customs classified under HTSUS subheading 9405.10.80 as light fixtures made of a base metal other than brass, subject to a 7.6% duty.⁵² Home Depot argued that these imports were better classified under subheading 9405.10.80, as light fixtures made of something other than base metal, and should thus be subject to only a 3.9% duty.⁵³ The Federal Circuit affirmed the CIT's decision, agreeing with Home Depot and reclassifying the light fixtures under 9405.10.80.⁵⁴

While both parties agreed that the proper first-level subheading for the subject goods is 9405.10, they disputed which of the two potential second-level subheadings covered the light fixtures.⁵⁵ In its analysis, the Federal Circuit applied the GRI provisions in numerical order, starting with GRI 2(b). Under GRI 2(b), because the light fixtures at issue consisted of more than one material or substance, the classifications of the goods were to be determined according to the principles of GRI 3.⁵⁶ Applying GRI 3(a), the Federal Circuit determined that "[t]he two subheadings at issue 'each refer to part only of the materials' contained in the subject goods, so they must be 'regarded as equally specific' pursuant to GRI 3(a)."⁵⁷

The Federal Circuit then turned to GRI 3(b), "which instructs that the goods should be classified as if they consisted of the material or component which gives them their essential character."⁵⁸ The

48. "When as a result of the addition of certain substances, the resultant products answer to the description in a more specific heading elsewhere . . . they are *excluded* from Chapter 39." OFFICE OF TARIFF AFFAIRS AND TRADE AGREEMENTS, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, Chapter 39, Explanatory Notes 718 (3d ed. 2002).

49. *BASF Corp.*, 497 F.3d at 1316.

50. 491 F.3d 1334 (Fed. Cir. 2007).

51. *Id.* at 1335.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 1336.

56. *Id.*

57. *Id.* (quoting OFFICE OF TARIFF AFFAIRS AND TRADE AGREEMENTS, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, General Rule of Interpretation 3(a) (3d ed. 2002)).

58. *Id.* (quoting OFFICE OF TARIFF AFFAIRS AND TRADE AGREEMENTS, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, General Rule of Interpretation 3(a) (2007)).

essential character test is a fact-intensive analysis. Customs argued that a light fixture's essential character is derived from the material that forms its structural framework. The Federal Circuit rejected that argument, holding that under the essential character test's fact-intensive analysis, many factors should be considered when determining the essential character of a light fixture, including but not limited to those factors enumerated in Explanatory Note VIII to GRI 3(b).⁵⁹ Thus, the Federal Circuit found no clear error in the CIT's factual analysis, and affirmed the CIT's determinations to reclassify the light fixtures under subheading 9405.10.80.⁶⁰

In *Michael Simon Design, Inc. v. United States*,⁶¹ the Federal Circuit addressed the classification of apparel items that the importer, Michael Simon Design, Inc. ("MSD"), claimed were properly classified as duty free "festive articles" under chapter 95 of the HTSUS.⁶² The CIT granted summary judgment in favor of MSD on several styles, holding they were "festive articles" properly classified under chapter 95.⁶³ The government appealed the grant of summary judgment to the Federal Circuit, arguing that the articles were properly classified under chapters 61 or 62, which cover sports clothing and dress shirts and do impose a duty.⁶⁴ The Federal Circuit affirmed the CIT's determination.⁶⁵

In its analysis, the Federal Circuit again held that utilitarian articles can be classified as festive articles under heading 9505.⁶⁶ The Federal Circuit found that "the tariff heading unambiguously includes festive apparel when construed in light of the section and chapter notes,

59. *Id.* at 1336–37 ("The factor which determines essential character will vary as between different kinds of goods . . . [and] may . . . be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods." (quoting OFFICE OF TARIFF AFFAIRS AND TRADE AGREEMENTS, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, General Rule of Interpretation 3(b), Explanatory Note VIII (2007))).

60. *Id.* at 1337.

61. 501 F.3d 1303 (Fed. Cir. 2007).

62. *Id.* at 1305.

63. *Id.*

64. *Id.*

65. *Id.* at 1307.

66. *Id.* at 1305–06. The court rejected the government's argument that utilitarian articles are not classifiable as festive articles under heading 9505, citing the court's similar decisions in *Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423, 1429 (Fed. Cir. 1997), where the Federal Circuit held that "[n]othing from the pertinent subheading 9505.90.60—'other festive, carnival or other entertainment articles'—limits 9505.90.60 to only 'non-utilitarian' items," and *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 929 (Fed. Cir. 2003), where the Federal Circuit classified napkins, placemats, and rugs bearing Halloween and Christmas symbols as festive articles, finding that their utilitarian functions did not preclude them from classification therein. *Id.*

which are binding.”⁶⁷ Additionally, a legal note to section XI of the HTSUS, which covers chapters 61 and 62, clarifies that the section does not cover articles of chapter 95.⁶⁸ The Federal Circuit noted that this was evidence that “the tariff scheme contemplates articles falling into both apparel and festive article categories, and [that] it expressly resolve[d] this conflict in favor of classification in chapter 95.”⁶⁹ Lastly, the government argued that an amendment to the Explanatory Notes expressly excluded articles having a utilitarian function from classification as a festive article.⁷⁰ However, the Federal Circuit noted that the Explanatory Notes are not binding, but are merely interpretive guides.⁷¹ The Federal Circuit cited *Rubie’s Costume Co. v. United States*⁷² for the proposition that, “although the examples in the Explanatory Notes are probative and sometimes illuminating,” the court did not have to “employ their limiting characteristics . . . to narrow the language of the classification heading itself.”⁷³ Therefore, in light of the unambiguous tariff heading, the Federal Circuit determined not to afford the Explanatory Notes any weight.⁷⁴ Thus, the Federal Circuit affirmed the CIT’s determination to classify the articles under chapter 95.⁷⁵

*Degussa Corp. v. United States*⁷⁶ involved the classification of certain surface-modified silicon dioxide imported by Degussa Corporation (“Degussa”).⁷⁷ The silicon dioxide at issue had been treated with hydrocarbon moieties, which caused the natural, unmodified hydrophilic (water-attractive) silica to become hydrophobic (water-repellant).⁷⁸ The government appealed the CIT’s classification of the imported silicon dioxide under subheading 2811.22.50 of the HTSUS, which provides for “Silicon dioxide: Other” and applies no duty.⁷⁹ On appeal, the Federal Circuit reversed the CIT, finding that Degussa’s products contained certain impermissible impurities that precluded classification under heading 2811, and the court classified

67. *Id.* at 1306.

68. *See id.* (citing OFFICE OF TARIFF AFFAIRS AND TRADE AGREEMENTS, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, Section XI, Note 1(t) (2007)).

69. *Id.*

70. *Id.* at 1307.

71. *Id.*

72. 337 F.3d 1350 (Fed. Cir. 2003).

73. *Michael Simon Design*, 501 F.3d at 1307 (quoting *Rubie’s Costume Co.*, 337 F.3d at 1359).

74. *Id.*

75. *Id.*

76. 508 F.3d 1044 (Fed. Cir. 2007).

77. *Id.* at 1045.

78. *Id.* at 1046.

79. *Id.* at 1047.

the products under Chapter 38, which covers goods of “Miscellaneous chemical industries.”⁸⁰

The Federal Circuit determined that silicon dioxide with added hydrocarbons for the express purpose of making the surface hydrophobic contained impermissible impurities and could not be classified under chapter 28 of the HTSUS.⁸¹ The Federal Circuit relied on chapter 28, Note 1(a) of the HTSUS, which provides: “except where context otherwise requires, the headings of this chapter apply only to: (a) Separate chemical elements and separate chemical defined compounds, whether or not containing impurities.”⁸² The Explanatory Note stated that “products with added water-repellants are . . . excluded from Chapter 28 because such agents modify the original characteristics of the products.”⁸³ Thus, the Federal Circuit determined that Degussa’s surface-treated silicon dioxide contained impermissible impurities (water-repellants) and were not properly classified under Chapter 28.⁸⁴ The Federal Circuit reversed the CIT and held that Customs had properly classified the surface modified silica products under subheading 3824.90.80 covering “chemical products and preparations of the chemical and allied industries.”⁸⁵

*Motorola, Inc. v. United States*⁸⁶ was brought before the Federal Circuit again when Motorola, Inc. (“Motorola”) contested the CIT’s remand determination on the classification of various circuits imported by Motorola for use in cellular phone battery packs.⁸⁷ This time, the Federal Circuit addressed whether goods entered by the bypass procedure, meaning that they were not inspected by Customs for a determination of the proper HTSUS classification, qualified as “treatment” under 19 U.S.C. § 1625(c), such that any changes to the classification would require notice and comment procedures.⁸⁸

80. *Id.* at 1045–46.

81. *Id.* at 1050–51.

82. *Id.* at 1049 (citing OFFICE OF TARIFF AFFAIRS AND TRADE AGREEMENTS, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, Chapter 28, General Note 1(a) (2007)). Chapter notes are part of the statutory text of the HTSUS and, therefore, are legally binding. *Id.* at 1047. While Explanatory Notes are generally non-binding, they may be consulted for guidance and are generally indicative of the proper interpretation of tariff provisions. *Id.*

83. *Id.* at 1048 (citing OFFICE OF TARIFF AFFAIRS AND TRADE AGREEMENTS, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, Chapter 28, General Note 1(a), Explanatory Note) (2007).

84. *Id.* at 1050.

85. *Id.* at 1051.

86. 509 F.3d 1368 (Fed. Cir. 2007).

87. *Id.* at 1369.

88. *Id.* at 1370–71.

Customs had issued pre-classification ruling letters (“PRLs”) classifying certain circuits previously imported by Motorola under a duty-free HTSUS provision, subheading 8542.40.00. Several years later, Motorola imported other circuit models, and Customs liquidated them without inspection under the same PRL subheading. Motorola filed some 900 entries under this procedure. Customs later reclassified these circuits under a different subheading that imposed a 3.2% duty. The CIT determined that the goods imported pursuant to the PRLs were not “treated” for the purposes of § 1625(c), so Customs’ reclassification was proper, even without prior notice and an opportunity for comment.⁸⁹ Motorola appealed this determination, and the Federal Circuit affirmed the CIT’s determination.⁹⁰

The Federal Circuit found that Motorola could not satisfy all of the requirements set forth in 19 C.F.R. § 177.12(c),⁹¹ under which importers may claim “treatment” as set forth in § 1625(c)(2).⁹² The Federal Circuit found that the 900 entries that Motorola cited could not satisfy subsection (c) because there were never any actual examinations or determinations that any of those transactions qualified for inclusion under schedule 8542.40.00 of the HTSUS.⁹³ Further, the Federal Circuit rejected Motorola’s argument that the PRLs alone satisfy subsection (c).⁹⁴ Noting that the PRLs are prior interpretive rulings that bind Customs only with respect to the items identified in the PRLs and not any other merchandise, the Federal Circuit affirmed the CIT’s determination that Customs did not violate section 1625(c) in classifying the entries under subheading 8536.30.80 of the HTSUS.⁹⁵

89. *Id.* at 1371.

90. *Id.* at 1372.

91. 19 C.F.R. § 177.12(c) provides that:

(i) There must be evidence to establish that:

(A) There was an actual determination by a Customs officer regarding the facts and issues involved in the claimed treatment;

(B) The Customs officer making the actual determination was responsible for the subject matter on which the determination was made; and

(C) Over a 2-year period immediately preceding the claim of treatment, Customs consistently applied that determination on a national basis as reflected in liquidations of entries or reconciliations or other Customs actions with respect to all or substantially all of that person’s Customs transactions involving materially identical facts and issues

19 C.F.R. § 177.12(c) (2002), *cited in Motorola*, 509 F.3d at 1371.

92. *Motorola*, 509 F.3d at 1372 (citations omitted).

93. *Id.*

94. *Id.*

95. *Id.*

Although classification decisions typically are only of interest for importers of goods identical, or at least similar, to those at issue in the decided cases, occasionally a decision of the Federal Circuit provides guidance on general principles of HTSUS classification. For example, in 2007, in *Degussa*, *Home Depot*, and *Optrex*, the court suggested the potential importance of the Explanatory Notes, particularly in instances where they elucidate the meaning of HTSUS legal notes or tariff provisions.⁹⁶ In *Michael Simon Design*, on the other hand, the Federal Circuit noted that it is not bound by the language of the Explanatory Notes.⁹⁷ In *Motorola*, the court demonstrated that Customs' interpretive regulations can be used to determine whether Customs has complied with 19 U.S.C. § 1625(c).⁹⁸

B. Drawback Claims

Two Federal Circuit opinions in 2007 addressed claims for drawback. Drawback is defined as “the refund or remission, in whole or in part, of a customs duty, fee or internal revenue tax which was imposed on imported merchandise under Federal law because of its importation.”⁹⁹

In *Merck & Co. v. United States*,¹⁰⁰ the Federal Circuit affirmed the CIT's determination that 19 U.S.C. § 1313(j)(4)(A) prohibited drawback for substituted merchandise exported to a NAFTA country unless the imported merchandise was of the type listed in 19 U.S.C. § 3333(a).¹⁰¹ This case involved Merck's importation of thirty-five kilograms of famotidine¹⁰² to the United States from Ireland, at a duty rate of 6.9% *ad valorem*, on May 25, 1993.¹⁰³ Two years later, Merck imported an additional 1195 kilograms of famotidine, duty free,

96. See *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (finding that the Explanatory Notes provided insight into the meaning of a term important to the analysis of the case); *Home Depot, U.S.A., Inc. v. United States*, 491 F.3d 1334, 1336–37 (Fed. Cir. 2007) (applying a test set forth in the Explanatory Notes); *Optrex America, Inc. v. United States*, 475 F.3d 1367, 1370 (Fed. Cir. 2007) (asserting that the Explanatory Notes inform the court's analysis).

97. *Michael Simon Design, Inc. v. United States*, 501 F.3d 1303, 1307 (Fed. Cir. 2007).

98. See 509 F.3d at 1371–72 (deferring to Customs' interpretation of its regulation, 19 C.F.R. § 177.12(c) (2002), in Customs' determination of whether it had complied with the requirements of 19 U.S.C. § 1625(c) (2000)).

99. *Merck & Co. v. United States*, 499 F.3d 1348, 1350 (Fed. Cir. 2007) (quoting 19 C.F.R. § 191.2(i) (2002)).

100. 499 F.3d 1348 (Fed. Cir. 2007).

101. *Id.* at 1353.

102. See *id.* at 1351 n.2 (“Famotidine chemical is formulated into famotidine tablets and is marketed under the trademark PEPCID.”).

103. *Id.* at 1351.

pursuant to the Uruguay Round Trade Agreement.¹⁰⁴ Around that same time, Merck exported thirty-five kilograms of duty-free imported famotidine to Mexico and Canada.¹⁰⁵ Merck filed a claim for drawback seeking a refund of the duties paid for the thirty-five kilograms of famotidine imported in 1993.¹⁰⁶ It alleged that the exported merchandise was fungible with, and substituted for, the duty-paid imported merchandise, entitling Merck to drawback under § 1313(j)(2).¹⁰⁷ Customs denied the drawback, “reasoning that § 1313(j)(4)(A)¹⁰⁸ generally prohibits drawback for merchandise fungible with, and substituted for, the duty-paid imported merchandise when that merchandise is exported to a NAFTA country, unless it is of the type listed in § 3333.”¹⁰⁹ Merck filed suit and sought reversal, asserting that the exported merchandise met one of the exceptions in § 3333(a), as a “good exported to a NAFTA country in the same condition as when imported.”¹¹⁰ The CIT agreed with the government’s argument that, because the imported duty-paid merchandise itself was not subsequently exported, it could not qualify as a “good exported to a NAFTA country in the same condition as when imported,” under § 3333(a)(2), and therefore was subject to the NAFTA drawback restriction in § 1313(j)(4)(A).¹¹¹

Both the CIT and Federal Circuit noted that the statute was ambiguous on its face, and therefore required consideration of various sources, including the legislative history, the regulations, and United States Customs Headquarters (“Customs HQ”) rulings, to ascertain Congress’ intent.¹¹² “According to Merck, under the plain language of § 1313(j)(4)(A), the exceptions of § 3333(a) apply to the *substituted exported* merchandise, not to the duty-paid imported merchandise.”¹¹³ The government, on the other hand, contended that the *imported merchandise* had to be of the type listed in § 3333(a) for drawback to be permitted.¹¹⁴ The government argued that, because the duty-paid imported merchandise did not meet any of the exceptions in § 3333(a), § 1313(j)(4)(A) prohibited drawback.¹¹⁵

104. *Id.* at 1351; *see id.* at n.3 (“Under the Uruguay Round Trade Agreement, tariffs on pharmaceutical products were eliminated, effective January 1, 1995.”).

105. *Id.* at 1352.

106. *Id.*

107. *Id.*

108. *Id.* at 1352.

109. *Id.* at 1351.

110. *Id.* at 1351–52.

111. *Id.* at 1352.

112. *Id.* at 1354–55.

113. *Id.* at 1353 (emphasis added).

114. *Id.*

115. *Id.*

The Federal Circuit found that the legislative history made it clear that Congress enacted § 1313(j)(4)(A) in order to eliminate nearly all drawback for substituted goods exported to a NAFTA country.¹¹⁶ The relevant NAFTA provision itself also made it clear that drawback on substituted merchandise was to be eliminated.¹¹⁷ Therefore, the court determined that permitting drawback for Merck's exported merchandise would be contrary to the clear intent of Congress.¹¹⁸ Further, Customs regulations¹¹⁹ and Customs HQ rulings¹²⁰ supported this conclusion. In particular, 19 C.F.R. § 181.41 and 19 C.F.R. § 181.42 restricted or prohibited certain drawback on goods exported to Canada or Mexico on or after January 1, 1994.¹²¹ Customs HQ rulings were also consistent with these findings.¹²² The Federal Circuit therefore affirmed the CIT's finding that the government's interpretation of section 1313(j)(4)(A) was supported by the legislative history, Customs regulations, and Customs HQ rulings.¹²³

116. *Id.* at 1355.

117. *Id.* (citing North Am. Free Trade Agreement, U.S.-Can.-Mex., art. 3, Dec. 17, 1992, 32 I.L.M. 2 (1993)).

118. *See id.* (characterizing Merck's attempt at obtaining drawback as "precisely the type of situation where Congress clearly intended to preclude drawback").

119. In particular, the court relied on 19 C.F.R. § 181.41 and 19 C.F.R. § 181.42, as these regulations restricted or prohibited certain drawback on goods exported to Canada or Mexico on or after January 1, 1994. *Id.* at 1356. 19 C.F.R. § 181.41 provides: "Subpart E. Restrictions on Drawback and Duty-Deferral Programs. This subpart sets forth the provisions regarding drawback claims and duty-deferral programs under Article 303 of the NAFTA and applies to any good that is a 'good subject to NAFTA drawback' within the meaning of 19 U.S.C. 3333." 19 C.F.R. § 181.41 (2007). 19 C.F.R. § 181.42 provides:

The following duties or fees which may be applicable to a good entered for consumption in the Customs territory of the United States are not subject to drawback under this subpart: . . .

(d) Customs duties paid or owed under unused merchandise substitution drawback. There shall be no payment of such drawback under 19 U.S.C. 1313(j)(2) on goods exported to Canada or Mexico on or after January 1, 1994.

19 C.F.R. § 181.42 (2008).

120. The court cited one such ruling, Customs HQ Ruling No. 228209, where Customs considered the same issue and stated that "[w]e do not agree that the limitation in § 1313(j)(4) applies to the substituted merchandise which is not the basis of the drawback claim, but find that the limitation applies to the imported good which is the basis of the drawback claim." *Merck*, 499 F.3d at 1356 (citing U.S. Customs & Border Protection, Customs Headquarters Ruling No. 228209 (Apr. 12, 2002)). Customs has taken similar positions in prior decisions. *See, e.g., id.* (citing U.S. Customs & Border Protection, Customs Headquarters Ruling No. 227272 (May 1, 1997); U.S. Customs & Border Protection, Customs Headquarters Ruling No. 227876 (Aug. 21, 2000); U.S. Customs & Border Protection, Customs Headquarters Ruling No. 226541 (July 24, 1998)).

121. *See supra* note 119 (quoting from 19 C.F.R. § 181.41 and 19 C.F.R. § 181.42).

122. *See supra* note 120 (reviewing Customs Headquarters rulings).

123. *Merck*, 499 F.3d at 1357.

In *Graham Engineering Corp. v. United States*,¹²⁴ the Federal Circuit faced the issue of whether a Customs regulation requiring a party to give notice of intent to export prior to the filing of a drawback claim was valid.¹²⁵ In October of 2000, Graham Engineering Corp. (“Graham”) exported a blow molding machine that it had imported a few months earlier.¹²⁶ Graham sought “unused merchandise drawback” pursuant to 19 U.S.C. § 1313(j)(1), which “provides for a ninety-nine percent refund of duty paid if the imported merchandise upon which duty has been paid is exported within three years from entry without use in the United States before exportation.”¹²⁷ However, Customs denied its claim for drawback because Graham failed to provide notice of intent to export merchandise, as is required by 19 C.F.R. § 191.35(a).¹²⁸

The sole issue before the court was whether Customs’ notice of intent to export regulation is valid.¹²⁹ The CIT held that “the notice of intent to export regulation is based on statutory authority and therefore not unlawful on its face.”¹³⁰ The CIT relied on *United States v. Lockheed Petroleum Services, Inc.*,¹³¹ which stated that drawback privileges “are expressly conditioned, by statute, upon compliance with such rules and regulations as the Secretary of Treasury shall prescribe.”¹³² The CIT further found that the regulation was reasonable and not unduly burdensome because the notice of intent to export required only certification of lack of use in the United States, information regarding importation and intended exportation, contact information, and the location of the merchandise.¹³³

The Federal Circuit affirmed the CIT’s determination, recognizing that the rulemaking authority vested in Customs by § 1313(l)¹³⁴ explicitly conditions the benefits of § 1313 on compliance with

124. 510 F.3d 1385 (Fed. Cir. 2007).

125. *Id.* at 1387.

126. *Id.* at 1386.

127. *Id.* (citing 19 U.S.C. § 1313(j)(1) (2000)).

128. *Id.*

129. *Id.*

130. *Id.* at 1388.

131. 709 F.2d 1472 (Fed. Cir. 1983).

132. *Id.* at 1474.

133. *Graham*, 510 F.3d at 1388 (applying 19 C.F.R. § 191.35(b) (1998)).

134. This provision states:

Allowance of the privileges provided for in this section shall be subject to compliance with such rules and regulations as the Secretary of the Treasury shall prescribe, which may include, but need not be limited to, the authority for the electronic submission of drawback entries and the designation of the person to whom any refund or payment of drawback shall be made.
19 U.S.C. § 1313(l) (2000).

regulations Customs might prescribe.¹³⁵ The Federal Circuit determined that the notice of intent to export is “reasonably related to the statute it serves.”¹³⁶ Therefore, Customs acted within its statutory powers to promulgate and enforce its notice of intent to export regulation.¹³⁷ Because the regulation was not satisfied by Graham, the Federal Circuit held that Customs properly rejected its drawback claim.¹³⁸

The *Merck* decision demonstrates that, where the drawback statute or its related statutes are ambiguous, the Federal Circuit will use legislative history, as well as Customs’ interpretive regulations and rulings, to determine the meaning of the statutory language.¹³⁹ The *Graham* decision shows that, where Congress has clearly delegated authority to Customs to promulgate interpretive regulations, those regulations are enforceable.¹⁴⁰

C. Jurisdictional Issues

The Federal Circuit decided one case in 2007 that addressed whether the CIT had subject matter jurisdiction under 28 U.S.C. § 1581(i). The court also decided another case in 2007 that addressed the timeliness of filing protests.

In a non-precedential opinion, *International Custom Products, Inc. v. United States (Int’l Custom Prods. II)*,¹⁴¹ International Custom Products, Inc. (“ICP”) appealed the CIT’s dismissal of one count of its complaint under 28 U.S.C. § 1581(i) for lack of subject matter jurisdiction.¹⁴² ICP was an importer and distributor of a milk-fat based product that was used as an ingredient in sauces, salad dressings, dips, and other food products.¹⁴³ Prior to importing its product, ICP received an advance ruling letter from Customs that

135. *Graham*, 510 F.3d at 1389.

136. *See id.* (relying on *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), where the Supreme Court held that “when Congress provides express rulemaking authority to an agency in order to carry out the substantive provisions of a statute, a regulation promulgated under such authority is valid, so long as the regulation is ‘reasonably related to the purposes of the enabling legislation.’”).

137. *Id.*

138. *Id.*

139. *See Merck & Co. v. United States*, 499 F.3d 1348, 1354–55 (Fed. Cir. 2007) (providing that, because the statutory scheme was a “confusing and inconsistent maze of twists and turns,” the court would consider sources such as legislative history, the regulations, and Headquarters Rulings to determine Congress’s intent).

140. *See Graham*, 510 F.3d at 1389 (determining that Customs’ regulation here was valid, as it was reasonably related to the purposes of the statute, and therefore was enforceable).

141. 214 F. App’x 993 (Fed. Cir. 2007).

142. *Id.* at 993.

143. *Id.* at 994.

classified ICP's product under subheading 2103.90.9091.¹⁴⁴ ICP began importation of its product in April 1999, and continued until April 2005, when Customs issued a Notice of Action informing ICP that Customs was reclassifying ICP's product under subheading 0405.20.3000 of the HTSUS as a "dairy spread."¹⁴⁵ On May 6, 2005, ICP commenced its first action in the CIT challenging the Notice of Action.¹⁴⁶ While the CIT found in favor of ICP, the Federal Circuit reversed the CIT's holding of jurisdiction, vacated the judgment, and remanded for dismissal of the complaint.¹⁴⁷ The Federal Circuit held that "the remedy provided by 28 U.S.C. § 1581(a) was not manifestly inadequate, and, accordingly, the CIT lacked jurisdiction under § 1581(i) to determine the validity of the Notice of Action."¹⁴⁸

In the time between the government's notice of appeal and the Federal Circuit's decision, Customs published a Proposed Revocation notice in August 2005, and later a Revocation letter on November 2, 2005, reclassifying ICP's product as a "dairy spread" under subheading 0405.20.3000 of the HTSUS.¹⁴⁹ On November 14, 2005, ICP brought another action in the CIT challenging Customs' classification, and argued that the CIT had jurisdiction pursuant to 28 U.S.C. § 1581(i).¹⁵⁰ The CIT dismissed the complaint, finding that it did not have subject matter jurisdiction because ICP failed to exhaust its protest administrative remedies under 15 U.S.C. §§ 1514 and 1515 prior to filing with the CIT.¹⁵¹

The Federal Circuit addressed two arguments¹⁵² in deciding whether § 1581(a) jurisdiction was manifestly inadequate: (1) whether "§ 1581(a) jurisdiction 'fundamentally alters the legal framework of the adjudication'" by requiring de novo review of the

144. *See id.* (noting that ICP's product was classified as "white sauce").

145. *Id.*

146. *Id.*

147. *Id.* (citing *Int'l Custom Prods. v. United States (Int'l Custom Prods. I)*, 467 F.3d 1324, 1326 (Fed. Cir. 2006)).

148. *Id.* (citing *Int'l Custom Prods. I*, 467 F.3d at 1327); *see id.* at 995 (explaining that "jurisdiction under 28 U.S.C. § 1581(i) may not be invoked unless jurisdiction under another subsection of § 1581 is either unavailable or manifestly inadequate").

149. *Id.*

150. *See id.* at 994–95 (challenging the government's motion to dismiss all counts for lack of subject matter jurisdiction).

151. *Id.* at 995 (again citing the proposition that § 1581(i) jurisdiction exists only when jurisdiction under another subsection of the provision is "unavailable or manifestly inadequate").

152. *Id.* While ICP presented five arguments as to why § 1581(a) jurisdiction is manifestly inadequate, the Federal Circuit did not address the other three because they were rejected for the same reasons stated in the Court's earlier opinion. *Id.* For the court's reasoning in its earlier opinion, see *International Custom Products I*, 467 F.3d at 1327–28.

CIT classification rather than review of the administrative record;¹⁵³ and (2) whether “§ 1581(a) jurisdiction is incapable of holding Customs accountable for its failure to comply with the notice and comment process mandated by 19 U.S.C. § 1625(c).”¹⁵⁴ In addressing the first argument, the Federal Circuit noted that ICP could not prevail on a challenge of the administrative decision, anyway, because it “failed to file a protest of Customs’ actions and avail itself of jurisdiction under § 1581(a).”¹⁵⁵ Secondly, the Federal Circuit found that § 1581(a) was an adequate remedy, and, even if it was not, jurisdiction under § 1581(h) would be the only remedy available to challenge the validity of Customs’ Notice of Action without requiring prior importation of goods.¹⁵⁶ Finally, the Court rejected ICP’s challenge that the protest and review scheme contemplated by § 1581(a) was unavailable because the company had not imported any product prior to, or after, the filing of its action.¹⁵⁷ Because ICP did not attempt to import any shipments and then file a protest, the Federal Circuit found that ICP could not “manufacture jurisdiction under § 1581(i) by willfully avoiding the prerequisites of § 1581(a).”¹⁵⁸

*Samuel Aaron, Inc. v. United States*¹⁵⁹ involved the reliquidation of entries made by Samuel Aaron, Inc. (“Samuel Aaron”), an importer of jewelry from Thailand.¹⁶⁰ Under the Generalized System of Preferences (“GSP”) program, certain imports from Thailand and other developing countries were eligible for a free rate of duty.¹⁶¹ However, the GSP expired, and during the period of time before its reinstatement, Samuel Aaron imported and paid duties on its imports.¹⁶² While Congress granted retroactive refunds for certain items that had been imported during the lapse of the GSP, Samuel Aaron’s imports were found ineligible for the retroactive refunds provided for by statute.¹⁶³ Customs determined that a reliquidation of all refunds was necessary for certain imports from Thailand, including Samuel Aaron’s entries.¹⁶⁴ Customs placed a notice of liquidation in its “off-line bulletin” on February 8, 1999, at the

153. *Int’l Custom Prods. v. United States (Int’l Custom Prods. II)*, 214 F. App’x 933, 955 (Fed. Cir. 2007).

154. *Id.*

155. *Id.* at 995–96.

156. *Id.* at 996.

157. *Id.*

158. *Id.*

159. 508 F.3d 667 (Fed. Cir. 2007).

160. *Id.* at 667–70.

161. *Id.* at 668.

162. *Id.*

163. *Id.*

164. *Id.* at 669.

customhouse in the Port of New York.¹⁶⁵ Customs later placed a bulletin notice created by its automated system on file on April 30, 1999, to notify interested parties about the reliquidation of Samuel Aaron's imports.¹⁶⁶ However, Samuel Aaron did not file its protest to dispute the increased duties until July 29, 1999, more than ninety days after the date of reliquidation.¹⁶⁷ Customs, therefore, denied Samuel Aaron's protest as untimely.¹⁶⁸ The CIT dismissed for lack of jurisdiction, finding that a final computation of duties had occurred on February 8, 1999, the bulletin notice was legally sufficient, and thus there had been a valid reliquidation of Samuel Aaron's entries on February 8, 1999.¹⁶⁹

The Federal Circuit affirmed, finding that Samuel Aaron's protest of Customs' February 8, 1999 reliquidation was untimely, and that the CIT lacked jurisdiction to hear the complaint.¹⁷⁰ In particular, the Federal Circuit determined that Customs did, in fact, liquidate¹⁷¹ on February 8, 1999, in compliance with 19 C.F.R. § 159.1.¹⁷² Further, the Federal Circuit found that the reliquidation notice requirements were met by Customs' off-line bulletin notice in the customhouse.¹⁷³ Pursuant to 19 U.S.C. § 1500(e), Customs must give notice of any liquidation to an importer as prescribed by regulation.¹⁷⁴ The Federal Circuit determined that the notice was in a conspicuous place, in compliance with 19 C.F.R. § 159.9(b), and adequate as evaluated according to the standard of a prudent importer or other interested person exercising a reasonable amount of diligence.¹⁷⁵ Furthermore, it found that Customs' failure to file the notice on the correct form did not invalidate the filing, as the substance of the information provided in the off-line bulletin notice was sufficient to meet the requirements of 19 C.F.R. § 159.9(a).¹⁷⁶ Finally, the Court concluded

165. *See id.* (explaining that the notice was considered "off-line" because it was not generated by the Customs' automated system, which generates the vast majority of bulletin notices).

166. *Id.*

167. *Id.* The statutory limitations period for protests in 1999 was ninety days.

168. *Id.*

169. *Id.*

170. *Id.* at 674.

171. Liquidation is the "final computation or ascertainment of the duties . . . accruing on an entry." *Id.* at 670-71 (citing 19 C.F.R. § 159.1 (2007)).

172. *Id.* at 670-72.

173. *Id.* at 674.

174. *Id.* at 672 (citation omitted).

175. *See id.* at 672-73 (citing the "conspicuous place" standard set forth in *Frederick Wholesale Co. v. United States*, 754 F.2d 349, 352 (Fed. Cir. 1985)).

176. *See id.* at 673 (providing that all of the vital information was present on the form filed by Customs, and that "[f]ormality need not prevail over substance").

that, while § 1500(e) gives Customs the option of notifying importers of liquidations electronically, it does not require it.¹⁷⁷

The *International Custom Products* opinion is another in a long line of decisions circumscribing the CIT's jurisdiction under the residual jurisdiction provision, 19 U.S.C. § 1581(i).¹⁷⁸ If there is an opportunity for the importer to obtain jurisdiction of the CIT by importing a good and protesting its classification, the courts will not find jurisdiction pursuant to that provision.¹⁷⁹

Similarly, the *Samuel Aaron* decision is another in a long line of decisions emphasizing the importance of filing protests in a timely manner.¹⁸⁰ Such decisions continue to support the necessity for importers to monitor Customs' posting of bulletin notices of liquidation.

D. Other Customs Issues

*Forest Laboratories, Inc. v. United States*¹⁸¹ involved the authority of Customs to alter tariff rates for merchandise properly classified under the HTSUS.¹⁸² Forest Laboratories, Inc. ("Forest") imported a pharmaceutical product, hydroxypropyl methylcellulose ("HPMC").¹⁸³ Customs issued a ruling letter on March 17, 1999, in which Customs and Forest both agreed that the HPMC was properly classified under subheading 3912.39.00 of the HTSUS.¹⁸⁴ However, while Forest stated that the duty rate was 4.2% *ad valorem*, Customs stated in its ruling letter that the HPMC was duty free as a pharmaceutical product.¹⁸⁵ "HPMC was listed in the Pharmaceutical Appendix until 1997 when it was removed by Presidential proclamation."¹⁸⁶ Forest acknowledged

177. See *id.* at 674 (reasoning that Customs is given the option to either give notice in a manner prescribed by the Secretary or to give notice electronically).

178. See *supra* note 148 and accompanying text (explaining that the Federal Circuit has found that the ICP cannot manufacture jurisdiction under 19 U.S.C. § 1581(i)).

179. *Id.*

180. *Samuel Aaron*, 508 F.3d at 672.

181. 476 F.3d 877 (Fed. Cir. 2007).

182. *Id.* at 878.

183. *Id.*

184. *Id.* at 879.

185. *Id.* Customs cited General Note 13 of the HTSUS, which provides in part:

Pharmaceutical Products. Whenever a rate of duty of "Free" followed by the symbol "K" in parenthesis appears in the "Special" subcolumn for a heading or subheading, any product (by whatever name known) classifiable in such provision which is the product of a country eligible for tariff treatment under column 1 shall be entered free of duty, *provided that such product is included in the pharmaceutical appendix to the tariff schedule.*

Id. (emphasis added).

186. *Id.*

that HPMC is not listed in the Pharmaceutical Appendix to the tariff schedule and was not listed at the time it imported HPMC.¹⁸⁷ “Rather, Forest attempted to assert that Customs’ statement in [the ruling letter] that Forest’s HPMC qualified for duty free treatment . . . was binding on Customs and could not be revoked or modified without following the notice and comment requirements in 19 U.S.C. § 1625(c).”¹⁸⁸ Customs denied Forest’s duty assessment protest because HPMC was not listed in the Pharmaceutical Appendix as required by General Note 13 of the HTSUS, and therefore was not entitled to duty-free treatment.¹⁸⁹

The central issue before the Federal Circuit was “whether Customs ha[d] the legal authority to change the HTSUS tariff duty for otherwise properly classified merchandise under HTSUS.”¹⁹⁰ In its analysis, the Federal Circuit found that a requirement of General Note 13, which permits duty-free treatment of certain pharmaceutical products, was not met, as HPMC was not listed in the Pharmaceutical Appendix.¹⁹¹ Additionally, the Federal Circuit determined that Customs did not have the authority to change the duty rates set by Congress under the tariff statute, and therefore could not act outside of its statutory authority by permitting duty-free treatment through its issuance of N.Y. D88210.¹⁹² The HPMC was thus properly liquidated at the duty rate of 4.2% *ad valorem* as set forth in subheading 3912.39.00 of the HTSUS.¹⁹³

In *United States v. National Semiconductor Corp.*,¹⁹⁴ the Federal Circuit held that the CIT reached beyond the penalty provision § 1592(c)(4) in awarding compensatory interest, and thereby vacated and remanded the case to the court.¹⁹⁵ The CIT awarded compensatory interest in the amount of \$250,840.21 under 19 U.S.C. § 1505(c) and a penalty award in the amount of \$10,000 under 19 U.S.C. § 1592(c)(4).¹⁹⁶ This case arose out of National Semiconductor Corporation’s (“NSC”) discovery that it had undervalued certain integrated circuits, micro-assemblies, and parts thereof, resulting in

187. *Id.*

188. *Id.*

189. *Id.* at 880.

190. *Id.* at 881–82.

191. *See id.* (concluding that because HPMC was not listed in the Pharmaceutical Appendix, the product was not eligible for duty-free treatment under General Note 13).

192. *Id.*

193. *Id.*

194. 496 F.3d 1354 (Fed. Cir. 2007).

195. *Id.* at 1355.

196. *Id.* at 1356.

two groups of erroneous customs entries.¹⁹⁷ NSC voluntarily disclosed the errors and tendered the unpaid fees.¹⁹⁸ Customs accepted the tender but determined that negligent violations of 19 U.S.C. § 1592(a) allowed it to assess penalties.¹⁹⁹ Customs assessed penalties in the amount of \$250,840.21 for both negligent entries.²⁰⁰ NSC protested, stating that, while it had been negligent, it should not be assessed the maximum penalty because it had acted responsibly by voluntarily reporting the erroneous entries.²⁰¹

NSC filed an action at the CIT, which considered the fourteen factors, set forth in *United States v. Complex Machine Works Co.*,²⁰² that the CIT may consider when determining the appropriateness of a civil penalty for a violation of customs laws.²⁰³ The CIT concluded that the maximum allowable penalty under § 1592(c)(4) would not fully compensate the government.²⁰⁴ The CIT therefore determined that the government was entitled to an award of \$10,000 as a penalty under § 1592(c)(4) and compensatory interest under § 1505(c).²⁰⁵

On appeal to the Federal Circuit, NSC argued that the CIT abused its discretion in awarding non-penal compensatory interest, arguing that the only recovery available to the government was the penalty of \$10,000 that was awarded under § 1592(c)(4).²⁰⁶ The Federal Circuit held that the CIT erred in awarding compensatory interest to the government under § 1505(c).²⁰⁷ Under § 1592, where an importer's violation is due to negligence and the importer voluntarily discloses

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. 23 Ct. Int'l Trade 942 (1999).

203. The *Complex Machine Works* analysis includes fourteen factors:

(1) [T]he defendant's good faith effort to comply with the statute; (2) the degree of culpability involved; (3) the defendant's history of previous violations; (4) the nature of the public interest in ensuring compliance with the applicable law; (5) the nature and circumstances of the violation; (6) the gravity of the violation; (7) the defendant's ability to pay; (8) the appropriateness of the size of the penalty vis-à-vis the defendant's business and the effect of the penalty on the defendant's ability to continue doing business; (9) the economic benefit gained by the defendant through the violation; (10) whether the party sought to be protected by the statute is elsewhere adequately compensated for the harm; (11) the degree of harm to the public; (12) the value of vindicating agency authority; (13) whether the penalty shocks the conscience of the court; and (14) such other matters as justice may require.

Id. at 949–50.

204. *National Semiconductor*, 496 F.3d at 1357.

205. *Id.*

206. *Id.* at 1359.

207. *Id.*

the violation to Customs, the amount of the penalty cannot exceed the interest on the amount of lawful duties, taxes, and fees.²⁰⁸ This language unambiguously capped the amount the government may recover. Nothing in the statutory language provides for recovery of non-penal compensatory interest in an action to collect an interest penalty pursuant to § 1592(c).²⁰⁹ Furthermore, § 1505 requires liquidation or reliquidation of an entry at a higher rate of duty, fee, or tax for the government to recover compensatory interest under § 1505(c).²¹⁰ In this case, it was undisputed that more than one year had passed from the date of NSC's erroneous entries to the date when NSC notified Customs of the error.²¹¹ Therefore, the entries had already been liquidated and were final as a matter of law and there could be no accrual of interest on the unpaid merchandise processing fees.²¹² In light of this, the CIT's award of compensatory interest under 19 U.S.C. § 1505(c) was in error.²¹³ The Federal Circuit vacated the judgment of the CIT and remanded the case to the CIT to conduct a *Complex Machine Works* analysis solely under § 1592(c)(4).²¹⁴

In *United States v. Ford Motor Co.*,²¹⁵ the Federal Circuit faced issues of waiver and issue preclusion. The case was part of a long line of cases involving Ford Motor Company's ("Ford") alleged misrepresentations of motor vehicle engine and transmission import

208. 19 U.S.C. § 1592(c)(4)(B) (2000) provides:

[I]f the person concerned discloses the circumstances of a violation of subsection (a) of this section before, or without knowledge of, the commencement of a formal investigation of such violation, with respect to such violation, merchandise shall not be seized and any monetary penalty to be assessed under subsection (c) of this section shall not exceed, if such violation resulted from negligence or gross negligence, the interest (computed from the date of liquidation at the prevailing rate of interest applied under section 6621 of Title 26) on the amount of lawful duties, taxes, and fees of which the United States is or may be deprived so long as such person tenders the unpaid amount of the lawful duties, taxes, and fees at the time of disclosure, or within 30 days (or such longer period as the Customs Service may provide) after notice by the Customs Service of its calculation of such unpaid amount.

209. *Id.* § 1592.

210. 19 U.S.C. § 1505(c) (2000).

211. *National Semiconductor*, 496 F.3d at 1361.

212. 19 C.F.R. § 159.11(a) (2007) ("Except as provided in § 159.12, an entry not liquidated within 1 year from the date of entry of the merchandise, or the date of final withdrawal of all merchandise covered by a warehouse entry, shall be deemed liquidated by operation of law.").

213. *National Semiconductor*, 496 F.3d at 1361.

214. *Id.*

215. 497 F.3d 1331 (Fed. Cir. 2007).

entries.²¹⁶ As a result of its incorrect designations, Customs found that Ford owed approximately \$5.3 million in additional duties and referred Ford's errors to its fraud investigation office.²¹⁷ The government filed a § 1592 action against Ford at the CIT, seeking civil penalties for fraud, gross negligence, and negligence pursuant to § 1592(c).²¹⁸ The CIT dismissed those counts on the bases that the government failed to accept a waiver from Ford that waived the statute of limitations and issue preclusion,²¹⁹ in light of its decision in the last *Ford Motor Co. v. United States*²²⁰ decision.

The Federal Circuit reversed the CIT's decision to dismiss because the waiver was invalid, thereby allowing the statute of limitations to run on both claims for penalties and for duties.²²¹ Ford asserted that Customs refused to accept its last waiver by striking the words "and accepted" from the waiver.²²² However, the Federal Circuit found that a waiver is a "voluntary, unilateral waiver of a defense" that is not incumbent on the other party's "acceptance."²²³ Here, Ford's letter stated that it "knowingly and voluntarily" "waive[d] the period of limitations . . . with respect to the eleven (11) Customs entries."²²⁴ Therefore, the Federal Circuit held that its waiver was a voluntary act sufficient to extend the § 1621 statute of limitations period.²²⁵

The Federal Circuit also reversed the CIT on issue preclusion. Ford argued that the operative facts in both cases were essentially the same and thus concluded that the present case would involve relitigating those same issues.²²⁶ The Federal Circuit held that a prior proceeding where the government had not properly extended liquidation of entries and ordered refund of duties did not bar the government from pursuing civil penalties for fraud involving those same entries.²²⁷ The Federal Circuit further found that the holding in the last *Ford* decision was limited to the issue in that case—whether the government had properly extended the one-year liquidation

216. *See id.* at 1333–34 (describing how Ford incorrectly stated on forms that it was importing parts for assembled cars, rather than for assembled trucks, thus benefiting from an improperly low rate).

217. *Id.* at 1334.

218. *Id.* at 1335.

219. *Id.* at 1333.

220. 286 F.3d 1335, 1336–39 (Fed. Cir. 2002).

221. 497 F.3d at 1336–37.

222. *Id.* at 1336.

223. *Id.*

224. *Id.*

225. *Id.* at 1337.

226. *Id.*

227. *Id.*

deadline pursuant to § 1504(b).²²⁸ Therefore, the court held that the CIT erred in dismissing the government's claims based on issue preclusion grounds.²²⁹

*Koyo Corp. of U.S.A. v. United States*²³⁰ involved two issues, whether an importer can protest a deemed liquidation and what duty rate applies if the importer properly protests the deemed liquidation. Koyo Corporation of U.S.A. ("Koyo") made three entries of bearings subject to an antidumping order.²³¹ All entries were deemed liquidated according to 19 U.S.C. § 1504(d) at the cash deposit rates in effect at the time of entry.²³² However, Customs had made final assessment determinations at rates lower than the deposit rates.²³³ Koyo protested the liquidation rates, contending that the final assessment rates should be applied.²³⁴

The Federal Circuit first found that the entries were deemed liquidated by operation of law pursuant to 19 U.S.C. § 1504(d).²³⁵ However, it also determined that deemed liquidation did not take away the right of protest.²³⁶ The government, on the other hand, contended that deemed liquidation is inherently conclusive, final, and binding, cannot be protested by an importer, and that the rate of duty asserted at entry is the only duty rate that can be assessed.²³⁷ The Federal Circuit found that the purpose and legislative history of 19 U.S.C. § 1504 supported the holding that Congress did not intend to remove the importer's protest remedy.²³⁸ Thus, the court determined that the first two protests were timely filed.²³⁹ The third protest, however, presented a genuine issue of material fact, and the court remanded for further findings to determine whether it was timely filed.²⁴⁰ With regard to the applicable duty rate, the Federal Circuit determined that the duty rate should be that determined in the administrative and judicial reviews.²⁴¹ While a deemed liquidation makes liquidation final, it does not determine the final duty rate

228. *Id.*

229. *Id.* at 1338.

230. 497 F.3d 1231 (Fed. Cir. 2007).

231. *Id.* at 1233.

232. *Id.* at 1234.

233. *Id.*

234. *Id.*

235. *Id.* at 1237.

236. *Id.*

237. *Id.* at 1238.

238. *Id.* at 1239.

239. *Id.* at 1240.

240. *Id.*

241. *Id.* at 1243.

imposed on the imported goods.²⁴² Therefore, the Federal Circuit affirmed the CIT's decision to reliquidate the entries in the first two protests and remanded the entry in the third protest for further findings.²⁴³

In *SKF USA, Inc. v. United States*,²⁴⁴ the Federal Circuit vacated and remanded a CIT decision on the basis that deemed liquidation had made the case moot.²⁴⁵ The entries at issue were liquidated by operation of law before the trial court ruled on SKF USA's ("SKF") motion for preliminary injunction.²⁴⁶ The Federal Circuit applied the *Zenith Radio Corp. v. United States*²⁴⁷ rule, which renders a court action moot once liquidation occurs, stating "[o]nce liquidation occurs, a subsequent decision by the trial court on the merits of [a] challenge can have no effect on the dumping duties assessed."²⁴⁸ Here, the Federal Circuit found that the entries at issue were deemed liquidated before the trial court ruled on the motion.²⁴⁹ Therefore, the case was moot as soon as the entries were deemed liquidated.

II. TRADE REMEDY LAWS

The United States Department of Commerce ("Commerce") and the United States International Trade Commission ("ITC") are responsible for conducting antidumping and countervailing duty investigations.²⁵⁰ If Commerce determines that foreign goods are being sold at "less than fair value," as calculated under a statutory formula,²⁵¹ and if the ITC finds that such sales are injuring or threatening to injure a domestic industry, or that the establishment of a domestic industry is materially retarded, Commerce is required to issue an antidumping order imposing antidumping duties on the imported good.²⁵² In a countervailing duty investigation, Commerce determines whether a government or public entity is providing the producer with a countervailable subsidy to aid in the manufacture,

242. *Id.* at 1241.

243. *Id.* at 1243.

244. 246 F. App'x 692 (Fed. Cir. 2007).

245. *Id.* at 698.

246. *Id.* at 693-94.

247. 710 F.2d 806 (Fed. Cir. 1983).

248. *SKF USA*, 246 F. App'x at 695 (quoting *Zenith*, 710 F.2d at 810).

249. *Id.* at 694.

250. See United States International Trade Commission, Antidumping and Countervailing Duty Investigations and Reviews, http://www.usitc.gov/trade_remedy/731_ad_701_cvd/index.htm (last visited Feb. 13, 2008) (describing Commerce and ITC responsibilities under Title VII of the Tariff Act of 1930).

251. 19 U.S.C. § 1677b (2000).

252. 19 U.S.C. § 1673d(a) (2000).

export, or production of a product, and, in most cases, the ITC also makes an injury determination.²⁵³

A. *United States Department of Commerce*

There were sixteen cases in 2007 involving appeals from Commerce determinations. The trade remedy cases involving Commerce covered a wide variety of issues, including scope rulings, duty absorption, and statutory interpretation.

In *Mukand International, Ltd. v. United States*,²⁵⁴ the Federal Circuit affirmed the CIT's determination denying Mukand International's ("Mukand") reliquidation and refund claim. That case involved the 2001–02 administrative review of Mukand's entries of stainless steel bar produced in the United Arab Emirates out of stainless steel wire rod from India, with Commerce issuing its results determining a final antidumping duty rate on August 11, 2003.²⁵⁵ Commerce then provided notice that Customs would be instructed to liquidate those entries at the determined rate.²⁵⁶ Mukand did not participate in the review; however, it submitted a scope ruling application on May 14, 2003, while the administrative review was pending, seeking a determination of whether its imports fell within the scope of the antidumping order.²⁵⁷ Commerce did not take any immediate action on that application.²⁵⁸ More than a year later, Mukand filed an action in the CIT seeking a writ of mandamus requiring Commerce to issue a scope determination, suspend further liquidation, reliquidate entries of stainless steel bar produced in the United Arab Emirates, and refund all of Mukand's antidumping duties on those entries.²⁵⁹

The CIT ruled that, because Mukand failed to take timely action to prevent its entries from being liquidated and did not diligently pursue its injunctive remedies, it was not entitled to the requested relief.²⁶⁰ On appeal, the Federal Circuit held that, while the CIT had

253. 19 U.S.C. § 1671d(a)(1) (2000).

254. 502 F.3d 1366 (Fed. Cir. 2007).

255. See Antidumping Duty Order: Stainless Steel Bar from Brazil, India and Japan, 60 Fed. Reg. 9661 (Feb. 21, 1995) (revealing the underlying antidumping duty order).

256. *Mukand*, 502 F.3d at 1367.

257. *Id.* at 1368. Within forty-five days of receiving a scope ruling application, Commerce must either issue a final ruling on the matter or initiate a "scope inquiry." 19 C.F.R. § 351.225(c)(2) (2008). If Commerce chooses to initiate a scope inquiry, and if liquidation of the entry in question has already been suspended, the suspension of liquidation will continue for the duration of the scope inquiry. *Id.* § 351.225(l).

258. *Mukand*, 502 F.3d at 1368.

259. *Id.*

260. *Id.* at 1369.

jurisdiction to hear the merits of the mandamus petition, Mukand was not entitled to mandamus because it failed to take advantage of adequate alternative remedies available to it at the time.²⁶¹ “Moreover, at any time before its entries were liquidated and after the forty-fifth day following the submission of its completed scope ruling application, Mukand could have filed a mandamus action to compel Commerce to institute a scope inquiry and order the continued suspension under 19 C.F.R. § 351.225.”²⁶² The Federal Circuit also found that *Timken Co. v. United States*²⁶³ and *Shinyei Corp. of America v. United States*²⁶⁴ are both inapposite and would not have barred Mukand from seeking a writ of mandamus forty-five days after it filed its scope ruling application.²⁶⁵ Therefore, the Federal Circuit upheld the CIT’s order dismissing the action.

In *Parkdale International v. United States*,²⁶⁶ Parkdale International (“Parkdale”) appealed the CIT determination that Commerce’s application of its “Reseller Policy” did not have an impermissibly retroactive effect.²⁶⁷ Parkdale was a reseller, importer, and exporter of corrosion-resistant carbon steel products (“CORE”) between Canada and the United States.²⁶⁸ Parkdale chose not to participate in the administrative review for the period of review (“POR”) between August 1, 2002, and July 31, 2003.²⁶⁹ Parkdale challenged the preliminary results as an interested party, but Commerce rejected its challenge and issued final results in March 2005.²⁷⁰ In its final results, Commerce stated that its May 6, 2003, Reseller Policy would apply to unreviewed resellers, like Parkdale, who purchased their CORE from a reviewed producer who did not know its goods were destined for the United States.²⁷¹ As a result, Parkdale’s subject goods entered during the POR would be liquidated at the “all-others” rate, which was considerably higher than exporter-specific rates in this case.²⁷² The Reseller Policy was initially proposed in 1998 and provided that,

261. *Id.*

262. *Id.*

263. 893 F.2d 337 (Fed. Cir. 1990) (holding that the alternative remedy of an injunction was not adequate, thus the third element of a mandamus action, the lack of an adequate alternative remedy, was met).

264. 355 F.3d 1297 (Fed. Cir. 2004) (holding that the CIT can still grant relief after liquidation).

265. *Mukand*, 502 F.3d at 1369–70.

266. 475 F.3d 1375 (Fed. Cir. 2007).

267. *Id.* at 1378.

268. *Id.* at 1376.

269. *Id.* at 1377.

270. *Id.*

271. *Id.*

272. *Id.*

if Commerce determines that the producer did not know that the merchandise it sold to the reseller was destined for the United States, the reseller's merchandise would be liquidated at the all-others rate.²⁷³

Commerce acknowledged that the Reseller Policy gave rise to relatively significant change for affected parties.²⁷⁴ Parkdale claimed that Canadian resellers had every reason to believe, at the time of importation, that their imports were subject to existing practice, not the all-others rate.²⁷⁵ Commerce nonetheless adopted the policy, and Parkdale filed suit in the CIT, arguing that the application of the Reseller Policy had an impermissibly retroactive effect.²⁷⁶ The CIT denied its challenge, and Parkdale appealed.

In its analysis, the Federal Circuit relayed that, to determine whether the application of a law or policy is impermissibly retroactive, it must examine the “‘nature and extent of the change of the law,’ ‘the degree of connection between the operation of the new rule and a relevant past event,’ and ‘considerations of fair notice, reasonable reliance, and settled expectations.’”²⁷⁷ While the government conceded that the policy was a significant change, the Federal Circuit found that the other two factors weighed heavily in favor of the government.²⁷⁸ The Federal Circuit noted that there was not a “significant retroactive connection with past events,” since the degree of connection between the policy and Parkdale's subject entries was minimal.²⁷⁹ Furthermore, the Federal Circuit concluded that there was adequate notice to Parkdale, especially in light of the Federal Circuit's recent holdings that liquidation of entries is the operative event for deciding whether application of a statute or regulation is impermissibly retroactive.²⁸⁰ Parkdale could not have had an objectively reasonable settled expectation of what its duty rate would be until liquidation.²⁸¹ Moreover, since 1998, Parkdale was on notice

273. Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties, 63 Fed. Reg. 55,361 (Oct. 15, 1998).

274. *Parkdale*, 475 F.3d at 1378.

275. *Id.* at 1379.

276. *Id.*

277. *Id.* at 1378–79 (quoting *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1364 (Fed. Cir. 2005)).

278. *Id.* at 1380.

279. *Id.* at 1379 (quoting *Princess Cruises*, 397 F.3d at 1366).

280. See, e.g., *Travenol Labs., Inc. v. United States*, 118 F.3d 749, 753 (Fed. Cir. 1997) (holding that liquidation is the operative event because liquidation defines the basis upon which interest may be due by deciding whether there has been an overpayment or an underpayment).

281. *Parkdale*, 475 F.3d at 1380.

that Commerce might adopt the Reseller Policy.²⁸² Therefore, the Federal Circuit affirmed the CIT's determination.²⁸³

In *Viraj Group v. United States*,²⁸⁴ the Federal Circuit reversed the CIT's decision that held that Commerce incorrectly applied the collapsing regulation to the Viraj Group ("Viraj").²⁸⁵ In that case, Commerce conducted an antidumping duty investigation of stainless steel bar imports from India.²⁸⁶ Certain regulations allow Commerce, as part of its investigation, to treat affiliated companies as though they were one entity.²⁸⁷ Viraj's appeal concerned whether Viraj met each of the requirements in the collapsing regulation, such that Commerce should have treated Viraj as one group in its administrative review for the 2000–01 POR.²⁸⁸ The relevant Viraj companies during the 2000–01 POR were: (1) Viraj Impoexpo, Ltd. ("VIL"); (2) Viraj Alloys, Ltd. ("VAL"); and (3) Viraj Forgings, Ltd. ("VFL").²⁸⁹

In 2002, Commerce made a final determination that the Viraj Group should be collapsed (i.e., treated as a single entity) for calculating its dumping margin.²⁹⁰ On appeal, the CIT found that Commerce's decision was not supported by substantial evidence and remanded to Commerce to reanalyze the collapsing decision and revise its dumping margin calculation if necessary.²⁹¹ Commerce reconsidered its collapsing analysis and found that collapsing was permissible under the statute because VAL could produce equivalent products to VIL without substantial retooling.²⁹² The CIT remanded Commerce's determinations twice, each time finding that Commerce's decision to collapse the Viraj Group was incorrect.²⁹³

282. *Id.*

283. *Id.*

284. 476 F.3d 1349 (Fed. Cir. 2007).

285. *Id.* at 1359.

286. *Id.* at 1351–52; see Antidumping Duty Order: Stainless Steel Bar from Brazil, India, and Japan, 60 Fed. Reg. 9661 (Feb. 21, 1995) (specifying the antidumping duty orders on stainless-steel bar imported from Brazil, India, and Japan).

287. For example, one regulation provides:

In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.

19 C.F.R. § 351.401(f)(1) (2007).

288. *Viraj*, 476 F.3d at 1351–54.

289. *Id.*

290. *Id.* at 1352.

291. *Id.*

292. *Id.*

293. *Id.* at 1351–54.

Commerce complied with the CIT's instructions to calculate separate dumping margins for VAL and VIL/VFL.²⁹⁴ The CIT affirmed Commerce's separate dumping margin calculation.²⁹⁵ Viraj challenged that decision in an appeal to the Federal Circuit.²⁹⁶

The Federal Circuit disagreed, finding that the Viraj Group satisfied all the requirements set forth in 19 C.F.R. § 351.401(f)(1) to collapse the company.²⁹⁷ The court found that the second prong—that the companies must have “production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities”—was ambiguous on its face because the word “either” was unclear.²⁹⁸ The CIT stated that the regulation required Commerce to “examine the production facilities of both (or all) companies and evaluate the possibility that production may be shifted from one company to another and vice versa.”²⁹⁹ Commerce, on the other hand, believed that it was sufficient if any one company could shift production to another, without substantial retooling.³⁰⁰ The Federal Circuit found that Commerce's definition was more consistent with the purpose of the regulation because it allowed Commerce to collapse companies where manipulation could occur in any one direction.³⁰¹ Furthermore, the Federal Circuit found that the collapsing regulation only required similarity among the products produced, not among the facilities that produced them.³⁰² The CIT had stated that the production facilities had to be similar.³⁰³

Lastly, the Federal Circuit addressed the application of the major input rule in deciding whether to collapse affiliated companies.³⁰⁴ “The major input rule, codified at 19 U.S.C. § 1677b(f)(3), provides Commerce discretion in valuing one company's production input, when the company receives that input from an affiliated company at a price less than the cost of production for the input.”³⁰⁵ The CIT stated that because VIL/VFL purchases an important material input from its affiliate VAL, application of this rule would accentuate

294. *Id.* at 1354.

295. *Id.*

296. *Id.*

297. *Id.* at 1355.

298. *Id.* at 1355–56.

299. *Id.* at 1355.

300. *Id.* at 1355–56.

301. *Id.* at 1356.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

“potential misstatements” in costs that would arise if Viraj Group were treated as one entity.³⁰⁶ The Federal Circuit found that Congress made a delegation on this issue to the agency, pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*³⁰⁷ Further, Commerce’s practice in implementing the major input rule was found to be reasonable.³⁰⁸ The Federal Circuit noted that its decision was not dictated by *AK Steel Corp. v. United States*³⁰⁹ because *AK Steel* dealt with the application of the major input rule once it had properly determined that companies should be collapsed.³¹⁰ Here, the Federal Circuit was considering application when deciding whether to collapse affiliated entities.³¹¹ However, the conclusion was the same—“Commerce’s practice, to either treat affiliated companies as one or to consider transactions among the companies under the fair value and major input rules, is reasonable.”³¹² Therefore, the Federal Circuit reversed the CIT’s decision on the collapsing regulation, reinstating Commerce’s original determination.³¹³

In yet another Federal Circuit case involving the same issue, *Carpenter Technology Corp. v. United States*,³¹⁴ the Federal Circuit upheld Commerce’s decision to collapse the three companies within the Viraj Group for the purpose of calculating antidumping duties.³¹⁵ This case involved the same issue but an antidumping duty order involving a different product—stainless steel wire rod (“SSWR”) from India.³¹⁶ The same three Viraj entities were at issue: VAL, VFL, and VIL.³¹⁷ In its analysis of the collapsing regulation, the Federal Circuit determined that only two prongs were involved—the substantial retooling of production facilities and the significant potential for manipulation.³¹⁸ The Federal Circuit first found that the Viraj Group satisfied the substantial retooling of production facilities prong of the collapsing entity analysis.³¹⁹ The Viraj entities all utilized the same facility to make SSWR from steel billets since they used the same

306. *Id.* at 1357.

307. 467 U.S. 837 (1984).

308. *Viraj*, 476 F.3d at 1358.

309. 226 F.3d 1361 (Fed. Cir. 2000).

310. *Viraj*, 476 F.3d at 1358.

311. *Id.*

312. *Id.*

313. *Id.*

314. 510 F.3d 1370 (Fed. Cir. 2007).

315. *Id.* at 1371.

316. *Id.*

317. *Id.*

318. *Id.* at 1373.

319. *Id.* at 1373–74.

subcontractor.³²⁰ The Federal Circuit also found that no retooling would be required since they all utilized the same facilities.³²¹ Second, the Federal Circuit determined that there was significant potential for manipulation.³²² It took into consideration that Commerce had found all three companies had the same two directors, that those directors effectively controlled all three companies, that those directors and their relatives were the principal stockholders, and that their operations were substantially intertwined.³²³ Thus, the factual findings on these two issues demonstrated that Commerce's determination was supported by substantial evidence.³²⁴

In *NSK Ltd. v. United States*,³²⁵ the Federal Circuit upheld the CIT's determination sustaining Commerce's use of "facts otherwise available" and "adverse inferences" when determining the four appellants' (collectively known as "NTN") antidumping margin.³²⁶ This case involved the twelfth administrative review of an antidumping order covering certain antifriction bearings imported from Japan.³²⁷ As part of the review, Commerce allowed NTN to allocate its freight expenses, if necessary, according to the basis on which the expenses were incurred, such as weight or volume.³²⁸ If NTN was unable to allocate its freight expenses according to the bases on which they were incurred, "Commerce required NTN to (1) explain how it allocated the expenses, (2) explain why it could not allocate them on the bases on which they were incurred, and (3) demonstrate that the allocation method that NTN selected in its response was not distortive."³²⁹ NTN chose to allocate its freight expenses according to sales value.³³⁰ In response to Commerce's requests for further information, NTN asserted that its allocation was not distortive because it based freight expenses on the factor common to each shipment—sales value—but the firm did not provide the supporting data requested by Commerce.³³¹ Commerce rejected NTN's allocation methodology and determined freight

320. *Id.* at 1373.

321. *Id.*

322. *Id.* at 1374.

323. *Id.*

324. *Id.*

325. 481 F.3d 1355 (Fed. Cir. 2007).

326. *Id.* at 1361.

327. *Id.* at 1357.

328. *Id.* at 1358.

329. *Id.*

330. *Id.*

331. *Id.*

expenses by “drawing adverse inferences” from “facts otherwise available,” pursuant to 19 U.S.C. § 1677e.³³²

The Federal Circuit determined that NTN failed to justify allocating expenses on a basis not used in incurring them.³³³ The relevant regulation specifically requires that the respondent demonstrate that the proposed method did not cause inaccuracies or distortions and that the respondent has allocated its expenses on as specific a basis as is feasible.³³⁴ NTN failed to demonstrate that allocation by sales value is not distortive or inaccurate, only offering conclusory assertions without full explanations.³³⁵ Also, NTN did not provide any evidence to support its assertion that allocation by sales value was as specific as feasible.³³⁶

In *Crawfish Processors Alliance v. United States*,³³⁷ the Federal Circuit affirmed a CIT decision sustaining a scope ruling by Commerce that crawfish etouffee is not included within the scope of an antidumping duty order covering freshwater crawfish tail meat.³³⁸ On June 4, 2004, Coastal Foods, LLC (“Coastal”), requested a scope ruling from Commerce to determine whether the antidumping duty order³³⁹ included crawfish etouffee within its scope.³⁴⁰ Commerce, pursuant to its regulations, under § 351.225(k)(1), had considered the language of the order but found that the language did not resolve the inquiry.³⁴¹ In particular, Commerce evaluated the different interpretations of what constitutes “preserved” or “prepared” and whether the tail meat had been transformed into another product.³⁴² Accordingly, Commerce weighed the additional *Diversified Products Corp. v. United States*³⁴³ factors as set forth in § 351.225(k)(2)³⁴⁴ to find

332. *Id.* at 1359.

333. *Id.* at 1359–60.

334. 19 C.F.R. § 351.401(g) (2007).

335. *NSK*, 481 F.3d at 1360.

336. *Id.*

337. 483 F.3d 1358 (Fed. Cir. 2007).

338. *Id.* at 1359.

339. Antidumping Duty Order: Freshwater Crawfish Tail Meat From the People’s Republic of China, 62 Fed. Reg. 48,218 (Sept. 15, 1997).

340. *Crawfish Processors Alliance*, 483 F.3d at 1359–60.

341. *Id.* at 1360; *cf.* Antidumping Duty Order: Freshwater Crawfish Tail Meat From the People’s Republic of China, 62 Fed. Reg. at 48,219 (describing the issue as concerning “freshwater crawfish tail meat, in all its forms (whether washed or with fat on, whether purged or unpurged), grades, and sizes; whether frozen, fresh, or chilled; and regardless of how it is packed, preserved, or prepared”).

342. *Crawfish Processors Alliance*, 483 F.3d at 1360.

343. 6 Ct. Int’l Trade 155 (1983).

344. Those factors include the physical characteristics of the product, the expectations of the ultimate purchasers, the ultimate use of the product, the channels of trade in which the product is sold, and the manner in which the product

that the etouffee had undergone substantial transformation into a new and different product beyond the crawfish tail meat covered by the order.³⁴⁵ The CIT agreed with and sustained Commerce's scope ruling.

Despite Crawfish Processors Alliance's ("CPA") arguments to the contrary, the Federal Circuit found that the language of the scope order was not dispositive to determine whether etouffee is included within the order and that Commerce had properly considered the *Diversified Products* factors.³⁴⁶ The court noted that the ingredients had penetrated the tail meat and permanently altered its original flavor, evidence of a substantial transformation.³⁴⁷ The Federal Circuit also addressed CPA's reliance on *Orlando Food v. United States*³⁴⁸ in its argument that the addition of other ingredients did not fundamentally change the underlying product.³⁴⁹ *Orlando Food* was factually distinguishable because the mere addition of seasonings to whole tomatoes in that case did not alter the essential tomato character of the product.³⁵⁰ Therefore, the Federal Circuit upheld the CIT's decision that etouffee is not included within the scope of the antidumping duty order.³⁵¹

In another case involving the CPA, *Crawfish Processors Alliance v. United States*,³⁵² the Federal Circuit addressed whether a transfer of cash or assets was required to prove affiliation.³⁵³ In that matter, Commerce had determined that Fujian Pelagic Fishery Group Co. ("Fujian") and Pacific Coast Fisheries Corp. ("Pacific Coast"), two companies that initiated a civil action to contest Commerce's antidumping decision, were not affiliated.³⁵⁴ However, the record showed that Fujian owned and exercised a sufficient amount of Pacific Coast's public shares—more than five percent—during the POR.³⁵⁵

This was an issue of statutory interpretation for the Federal Circuit.³⁵⁶ Affiliated parties are defined in the statute as "[a]ny

is advertised and displayed. 19 C.F.R. § 351.225(k)(2) (2007), cited in *Crawfish Processors Alliance*, 483 F.3d at 1360.

345. *Crawfish Processors Alliance*, 483 F.3d at 1361.

346. *Id.* at 1362–63.

347. *Id.* at 1363.

348. 140 F.3d 1437 (Fed. Cir. 1998).

349. *Crawfish Processors Alliance*, 483 F.3d at 1363.

350. *Id.*

351. *Id.* at 1364.

352. 477 F.3d 1375 (Fed. Cir. 2007).

353. *Id.* at 1384.

354. *Id.* at 1378.

355. *Id.*

356. *Id.* at 1379.

person directly or indirectly owning, controlling, or holding with power to vote, [five] percent or more of the outstanding voting stock or shares of any organization and such organization.”³⁵⁷ The Federal Circuit held that the statute clarified that owning, controlling or holding “directly or indirectly” over five percent of an entity’s stock constitutes “affiliation.”³⁵⁸ The plain language of the statute did not require the transfer of cash or merchandise to show ownership of five percent or more of the shares as Commerce had interpreted.³⁵⁹ Here, under the law of the State of Washington where Pacific Coast issued the stock to Fujian, a promissory note to purchase stock or shares of a corporation constituted sufficient proof.³⁶⁰ The Federal Circuit further found no reason to apply *Chevron* deference to Commerce’s interpretation in this case.³⁶¹ Therefore, the Federal Circuit held that the companies were, in fact, affiliated, and reversed the CIT’s determination that 19 U.S.C. § 1677(33)(E) requires proof of full payment in cash or merchandise during the POR.³⁶²

*Wheatland Tube Co. v. United States*³⁶³ involved issues of statutory construction and agency deference.³⁶⁴ In this case, the Federal Circuit reversed the CIT and held that Commerce’s interpretation of “United States import duties” under 19 U.S.C. § 1677a(c)(2)(A) was reasonable.³⁶⁵ Here, § 201 safeguard duties were in effect during the POR.³⁶⁶ According to 19 U.S.C. § 1677a(c)(2)(A), Commerce is required to decrease an exporter’s export price by the amount of “any additional costs, charges, or expenses, and *United States import duties*, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States.”³⁶⁷ Commerce had previously never ruled on this issue, but found here that § 201 safeguards were not deductible from the export price in calculating the antidumping margin.³⁶⁸

Wheatland Tube, the domestic producer, contested Commerce’s treatment of § 201 safeguard duties, arguing that they qualified as

357. 19 U.S.C. § 1677(33)(E) (2000).

358. *Crawfish Processors Alliance*, 477 F.3d at 1380.

359. *Id.*

360. *Id.* at 1381.

361. *See id.* at 1380 (observing that *Chevron* deference is not necessary where an agency’s interpretation is put forth in the midst of litigation).

362. *Id.* at 1382.

363. 495 F.3d 1355 (Fed. Cir. 2007).

364. *Id.* at 1357.

365. *Id.*

366. *See id.* (referring to duties imposed under 19 U.S.C. § 2251 (2000)).

367. *Id.* at 1358 (quoting 19 U.S.C. § 1677a(c)(2)(A) (2000)) (emphasis added).

368. *Id.*

“United States import duties”³⁶⁹ and therefore should be deducted from the export price.³⁷⁰ The CIT agreed with Wheatland Tube, stating that the effect of Commerce not including safeguard duties was to improperly negate the § 201 duty imposed by the President, artificially decrease Respondent’s antidumping margin, and upset the balance between § 201 and antidumping duties.³⁷¹

The issue before the Federal Circuit was whether § 201 duties are “United States import duties” that can be deducted from the export price in determining an antidumping margin.³⁷² The case was essentially one of statutory interpretation of § 1677a(c)(2)(A).³⁷³ The Federal Circuit conducted a *Chevron* analysis to determine whether Commerce’s statutory interpretation was entitled to deference.³⁷⁴

In this case, the Federal Circuit found that Congress had not defined or explained the meaning of “United States import duties,” and therefore proceeded to step two of the *Chevron* analysis.³⁷⁵ In *United States v. Mead*,³⁷⁶ the Supreme Court held that an agency’s statutory interpretation qualifies for *Chevron* deference if the interpretation is the result of the agency’s formal notice-and-comment rulemaking process.³⁷⁷ Here, Commerce posted notice requesting comments on the treatment of § 201 duties, and at the completion of the formal notice-and-comment period, it filed its final ruling that § 201 safeguard duties are not United States import duties for purposes of 19 U.S.C. § 1677a(c)(2)(A) and therefore should not be deducted from the export price in calculating dumping margin.³⁷⁸ Because this ruling was the result of Commerce’s formal notice-and-

369. *Id.*

370. *Id.*

371. *Id.* at 1359 (citing *Wheatland Tube Co. v. United States*, 414 F. Supp. 2d 1271, 1283 (Ct. Int’l Trade 2006)).

372. *Id.*

373. *Id.*

374. A *Chevron* analysis requires the court to address two questions. *Id.* “The first step of *Chevron* is to determine ‘whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’” *Id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). Under the second step of *Chevron*, “if Congress expressly or implicitly delegated authority to an agency to interpret a statute by authorizing the agency to issue substantive rules or regulations, [the] court must give deference to the agency’s interpretation of the statute as promulgated in the rules or regulations if the agency’s interpretation is ‘reasonable.’” *Id.* at 1360. Step two of *Chevron* applies only where “the statute is silent or ambiguous with respect to the specific issue.” *Id.* at 1359 (quoting *Chevron*, 467 U.S. at 843).

375. *Id.* at 1359–60.

376. 533 U.S. 218 (2001).

377. *Id.* at 226–27.

378. *Wheatland Tube*, 495 F.3d at 1358.

comment rulemaking process, under step two of *Chevron* the court was obliged to “defer to [the] agency’s reasonable interpretation of a statute and [could] not substitute its own judgment for that of the agency even if the court might have preferred another interpretation and even if the agency’s interpretation is not the only reasonable one.”³⁷⁹ Furthermore, the Federal Circuit noted that it usually gives Commerce’s interpretation of antidumping laws significant deference because of its expertise in administering the antidumping duty laws.³⁸⁰

In reaching its determination that the interpretation of “United States import duties” was reasonable, the Federal Circuit first considered that the legislative history distinguished normal customs duties from “special dumping duties.”³⁸¹ The court found that § 201 duties were more like antidumping duties than normal customs duties because they were remedial relief from the adverse effects of imports.³⁸² Further, if § 201 duties were included as “United States import duties,” Commerce would improperly collect § 201 safeguard duties twice.³⁸³ Therefore, the Federal Circuit determined that Commerce’s interpretation that “United States import duties” does not include § 201 safeguard duties for the purposes of determining the export price and calculating the dumping margin was reasonable.³⁸⁴

In *Polyethylene Retail Carrier Bag Committee v. United States*,³⁸⁵ the Federal Circuit affirmed a CIT decision finding that Commerce’s determination that two respondents had *de minimis* dumping margins and should be excluded from the antidumping order was supported by substantial evidence.³⁸⁶ The appellant in the case challenged Commerce’s methodology in applying “facts otherwise available” to the factors of production.³⁸⁷

The Federal Circuit found that Commerce’s decision to apply facts otherwise available was supported by substantial evidence.³⁸⁸ The court stated that “the application of adverse inferences is not intended to be punitive; rather, Congress ‘intended for an adverse

379. *Id.* at 1360–61 (citing *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994); *PPG Indus., Inc. v. United States*, 928 F.2d 1568, 1571 (Fed. Cir. 1991)).

380. *Id.* at 1361 (citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002); *Koyo Seiko*, 36 F.3d at 1750).

381. *Id.*

382. *Id.*

383. *Id.* at 1362.

384. *Id.* at 1363.

385. 232 F. App’x 965 (Fed. Cir. 2007).

386. *Id.* at 967.

387. *Id.* at 968 (citing 19 U.S.C. § 1677e (2000)).

388. *Id.*

facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.³⁸⁹ The Federal Circuit found that Commerce had complied with that standard in determining that its findings of the factors of production were "adverse" within the meaning of 19 U.S.C. § 1677e.³⁹⁰ In concluding that substantial evidence supported Commerce's determinations, the court noted the broad discretion granted to the agency in valuing factors of production, as well as the thoroughness of Commerce's investigation and reasonableness of the methodologies employed.³⁹¹

In *Corus Staal BV v. United States (Corus Staal II)*,³⁹² the Federal Circuit upheld Commerce's use of zeroing and classification of the disputed sales transactions, as well as its finding that Corus Staal BV ("Corus") had failed to exhaust its administrative remedies with regard to its absorption claim.³⁹³ Corus argued that Commerce's announcement, in light of WTO determinations, that it would abandon the use of zeroing methodology³⁹⁴ in average-to-average comparisons to calculate weighted average dumping margins in antidumping investigations, demonstrated that Commerce has abandoned its policy of zeroing,³⁹⁵ which the Federal Circuit had previously held was a permissible interpretation of the statutory provisions.³⁹⁶ However, the Federal Circuit found that Commerce's statements did not change with respect to retroactive application of the zeroing methodology.³⁹⁷ Commerce intended to apply its new

389. *Id.* at 969 (quoting *F. Lii De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)).

390. *Id.*

391. *Id.* at 969–70.

392. 502 F.3d 1370 (Fed. Cir. 2007).

393. *Id.* at 1372.

394. According to the court:

"Zeroing" is a method of calculating weighted average dumping margins [whereby] Commerce first determines a dumping margin for U.S. sales of a particular product by comparing the transaction price with the monthly weighted average "normal value" of that product, i.e., the price charged for the product in its home market. Commerce then aggregates the dumping margins for all U.S. sales made below normal value. With respect to all U.S. sales made above normal value (i.e., non-dumped sales), Commerce assigns a dumping margin of zero. Thus, when Commerce calculates the weighted average dumping margin, the dumping margins for sales below normal value are not offset by "negative dumping margins" for those sales made above normal value.

Id. (citing 19 U.S.C. § 1677b (2000) (describing the calculation of normal value)).

395. *Id.* at 1373.

396. *Id.* at 1372 (citing *Corus Staal BV v. Dep't of Commerce (Corus Staal I)*, 395 F.3d 1343, 1347 (Fed. Cir. 2005); *Timken Co. v. United States*, 354 F.3d 1334, 1340–45 (Fed. Cir. 2004)).

397. *Id.* at 1374.

policy only prospectively.³⁹⁸ Furthermore, the Federal Circuit noted that it accords Commerce substantial deference in its administration of the antidumping statute.³⁹⁹ In this case, Commerce made it clear that those changes do not apply retroactively to administrative reviews.⁴⁰⁰

Second, the Federal Circuit determined that certain sales to an unaffiliated U.S. customer were properly classified as constructed export price (“CEP”) rather than export price (“EP”) transactions.⁴⁰¹ Commerce found, and the Federal Circuit affirmed, that the final sales occurred *after* the date of importation.⁴⁰²

The Federal Circuit affirmed the CIT’s determination that Corus had not exhausted its administrative remedies on the duty absorption claim, finding that the “futility exception” Corus raised did not apply.⁴⁰³ The futility exception applied only in situations in which enforcing the exhaustion requirement would mean that parties “would be ‘required to go through obviously useless motions in order to preserve their rights.’”⁴⁰⁴ The Federal Circuit thus found that the policies requiring exhaustion stated that, absent a strong contrary reason, the court should insist that parties exhaust their remedies before the pertinent administrative agencies.⁴⁰⁵

The Federal Circuit addressed zeroing again in *NSK Ltd. v. United States*.⁴⁰⁶ There, NSK, NTN Corporation (“NTN”), and Koyo appealed Commerce’s application of zeroing in its weighted-average dumping margin calculations.⁴⁰⁷ The court reiterated the determination it made in *Corus Staal I*,⁴⁰⁸ stating that it would not overturn Commerce’s zeroing practice based on any ruling by the WTO until such ruling had been adopted pursuant to a specific statutory scheme.⁴⁰⁹

398. *Id.*

399. *Id.* at 1375; accord *Corus Staal I*, 395 F.3d at 1349.

400. *Corus Staal II*, 502 F.3d at 1375.

401. *Id.* at 1375–76.

402. *Id.* at 1376.

403. *Id.* at 1378–81.

404. *Id.* at 1379 (quoting *Bendure v. United States*, 554 F.2d 427, 431 (Ct. Cl. 1977)).

405. *Id.* at 1379; see 28 U.S.C. § 2637(d) (2000) (“[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.”).

406. 510 F.3d 1375 (Fed. Cir. 2007).

407. *Id.* at 1378.

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

409. *NSK*, 510 F.3d at 1380.

The second issue in *NSK* involved Koyo's billing adjustment allocations, which Commerce found to be distortive.⁴¹⁰ While Commerce had previously accepted similar data in a past review, it determined that Koyo had not satisfied its burden of demonstrating that methodology was non-distortive in the instant review.⁴¹¹ The Federal Circuit agreed, finding that Commerce's determination was supported by substantial evidence.⁴¹²

Third, the Federal Circuit held that Commerce's decision to include small-volume, high-profit home market sales in its value calculations was supported by substantial evidence.⁴¹³ NTN argued that inclusion of these sales was distortive.⁴¹⁴ However, this was contradicted by its submissions before the CIT, wherein it stated that these sales were made fairly regularly in the general course of business.⁴¹⁵ Lastly, the Federal Circuit determined that NSK's challenge to Commerce's model-match methodology was not ripe for review because the policy had not been adopted yet.⁴¹⁶ Commerce had merely issued a memorandum indicating that it considered changing the model-match approach it used for antidumping orders; however, it had not abandoned its previous methodology and adopted a new one.⁴¹⁷ Commerce had further stated that it would offer a notice and comment period on the proposed change.⁴¹⁸ Therefore, the Federal Circuit affirmed the CIT's dismissal of NSK's challenge.⁴¹⁹

The issues in *Eurodif S.A. v. United States*⁴²⁰ were also dismissed by the Federal Circuit as being unripe because they concerned application to future entries of the subject merchandise.⁴²¹ This case concerned future entries of low enriched uranium ("LEU") that were to be made pursuant to separate work unit ("SWU") contracts made by Eurodif, S.A. ("Eurodif").⁴²² In previous litigation, the Federal Circuit held that SWU contracts were not subject to the antidumping

410. *Id.* at 1381.

411. *Id.*

412. *Id.* at 1382.

413. *Id.* at 1384.

414. *Id.*

415. *Id.*

416. *Id.* at 1385.

417. *Id.*

418. *Id.*

419. *Id.*

420. 506 F.3d 1051 (Fed. Cir. 2007).

421. *Id.* at 1053.

422. *Id.*

statute because they were contracts for the sale of services.⁴²³ Eurodif argued that Commerce should be permitted to suspend liquidation of future LEU imports until it determines whether the SWU contract exception applies.⁴²⁴ However, the CIT held that the proper manner in which to address whether merchandise is within the scope of an order is through a scope determination.⁴²⁵ That determination would be reviewable by the CIT. Furthermore, the issue was a speculative one—“what may or may not happen in the next LEU case, a case about which there were no facts.”⁴²⁶ Therefore, since there was an adequate administrative remedy, the case was dismissed as being unripe.⁴²⁷

Magnola Metallurgy, Inc. v. United States,⁴²⁸ involved a new shipper review of a countervailing duty order concerning alloy magnesium.⁴²⁹ Magnola Metallurgy, Inc. (“Magnola”) was found to have received reimbursements from the government of Quebec through its Manpower Training Measure program (“MTM program”), which was designed to improve and develop Quebec’s labor market.⁴³⁰ In its review, Commerce determined that Magnola’s 1998 and 2000 MTM program reimbursements were non-recurring subsidies as defined in 19 C.F.R. § 351.524(c), for which the benefits extended beyond the period that the subsidy was conferred.⁴³¹ As such, it decided to amortize those benefits over a fourteen-year period pursuant to 19 C.F.R. § 351.524(d) (2) (i).⁴³²

The Federal Circuit first addressed the issue of whether Commerce was required to make a de novo finding of specificity in its 2003 administrative review.⁴³³ Absent new facts or evidence, however, the specificity determination made in the new shipper review remained.⁴³⁴ The Federal Circuit noted that the statutory language on which Magnola relied was ambiguous.⁴³⁵ The Federal Circuit has previously

423. See *Eurodif S.A. v. United States*, 423 F.3d 1275 (Fed. Cir. 2005); *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005).

424. *Eurodif*, 506 F.3d at 1053.

425. *Id.* at 1054 (citing *Eurodif S.A. v. United States*, 431 F. Supp. 2d 1351, 1356 (Ct. Int’l Trade 2006)).

426. *Id.* at 1055.

427. *Id.*

428. 508 F.3d 1349 (Fed. Cir. 2007).

429. *Id.* at 1351.

430. *Id.* at 1351–52.

431. *Id.* at 1352.

432. *Id.*

433. *Id.* at 1354.

434. *Id.*

435. *Id.* Specifically, the statutory language at issue was: “review and determine the amount of any net countervailable subsidy.” *Id.* (citing 19 U.S.C. § 1675 (a)(1)(2000)).

held that statutory interpretations articulated by Commerce during adjudicatory proceedings are entitled to *Chevron* deference.⁴³⁶ Here, nothing convinced the court that Commerce's interpretation of the statute was unreasonable, and, thus, the Federal Circuit deferred to Commerce's interpretation.⁴³⁷ The Federal Circuit also found that Magnola's argument that it had new evidence requiring Commerce to revisit its original determination was irrelevant because this simply dealt with the amortization of the subsidy.⁴³⁸

Additionally, the Federal Circuit concluded that it did not have to reexamine whether the specificity determination made in the new shipper review was clearly erroneous and should be reexamined.⁴³⁹ The Federal Circuit found that the Supreme Court case *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*⁴⁴⁰ directly addressed this issue.⁴⁴¹ There, the court denied judicial review of an agency's refusal to reconsider on the ground of material error.⁴⁴² In other cases, the Court has held that an agency's refusal to reopen a closed case is an issue committed to agency discretion.⁴⁴³ The Federal Circuit therefore held that Commerce was not required to determine whether it should reconsider its earlier specificity determination based on alleged error in the original decision.⁴⁴⁴

In *Agro Dutch Industries Ltd. v. United States*,⁴⁴⁵ the Federal Circuit reversed the CIT's decision to affirm Commerce's interpretation of the term "affiliation" in 19 U.S.C. § 1675(a)(4) and its affirmative finding of duty absorption.⁴⁴⁶ The antidumping statute allows Commerce, in the second or fourth administrative reviews, to determine whether antidumping duties have been absorbed by a foreign producer or exporter if the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter.⁴⁴⁷ Commerce conducted a duty absorption analysis of Agro Dutch Industries, Ltd. ("Agro") and found that

436. *Id.* at 1355.

437. *Id.*

438. *Id.* at 1356.

439. *Id.* at 1357.

440. 482 U.S. 270 (1987).

441. *Magnola*, 508 F.3d at 1357.

442. *Bhd. of Locomotive Eng'rs*, 482 U.S. at 280.

443. *E.g.*, *Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 457 (1999).

444. *Magnola*, 508 F.3d at 1357–58.

445. 508 F.3d 1024 (Fed. Cir. 2007).

446. *Id.* at 1033–34.

447. 19 U.S.C. § 1675(a)(4) (2000).

antidumping duties had been absorbed by Agro instead of being passed on to customers.⁴⁴⁸

Agro appealed with the sole contention that Commerce could not properly conduct a duty absorption analysis because Agro did not sell its merchandise “in the United States through an importer who is affiliated” with Agro, as required by § 1675(a)(4).⁴⁴⁹ However, before reaching the merits, the Federal Circuit agreed with the CIT that, although Agro failed to raise the argument that formed the basis for the appeal during the Commerce proceedings, the court could address Agro’s argument on appeal because it implicated a pure question of law.⁴⁵⁰ The Federal Circuit held that the application of exhaustion principles is generally subject to the discretion of the CIT.⁴⁵¹ The CIT had previously articulated a “pure question of law” exception to the exhaustion requirement in trade cases.⁴⁵² The Federal Circuit determined that the CIT had not abused its discretion in the instant case.⁴⁵³

In reaching the merits, the Federal Circuit conducted a *Chevron* statutory analysis.⁴⁵⁴ Here, the dispute focused on whether the phrase “through an importer who is affiliated with such foreign producer or exporter”⁴⁵⁵ encompassed Agro.⁴⁵⁶ The Federal Circuit first found that the meaning of the term “affiliated” required two parties.⁴⁵⁷ Furthermore, it found that that interpretation of the term should be consistent with its use elsewhere in the antidumping laws.⁴⁵⁸ In this case, it was undisputed that Agro was acting as its own importer of record.⁴⁵⁹ Thus, according to the unambiguous meaning of the statutory terms, a company cannot be an “affiliate” with itself, and the

448. *Agro*, 508 F.3d at 1026–27.

449. 19 U.S.C. § 1675(a)(4) (2000); *Agro*, 508 F.3d at 1028.

450. *Agro*, 508 F.3d at 1029.

451. *Id.* (citing 28 U.S.C. § 2637(d) (2000)); *Corus Staal BV v. United States (Corus Staal II)*, 502 F.3d 1370, 1381 (Fed. Cir. 2007).

452. *See* *Consol. Bearings Co. V. United States*, 166 F. Supp. 2d 580, 587 (Ct. Int’l Trade 2001) (stating that the requirements for the “pure question of law” exception are that the plaintiff raise a new argument that is of a purely legal nature, that the inquiry not require further agency involvement or fact-finding, and that the inquiry not create undue delay or cause expenditure of party time and resources), *rev’d* 348 F.3d 997, 1003 (Fed. Cir. 2003).

453. *Agro*, 508 F.3d at 1029.

454. *Id.* at 1030.

455. 19 U.S.C. § 1675(a)(4) (2000).

456. *Agro*, 508 F.3d at 1030.

457. *Id.* at 1030–31.

458. *Id.* at 1032–33.

459. *Id.* at 1030.

Federal Circuit held that Commerce was not empowered to conduct a duty absorption inquiry under § 1675(a)(4).⁴⁶⁰

In *American Signature, Inc. v. United States*,⁴⁶¹ the Federal Circuit reversed the CIT's dismissal of American Signature, Inc.'s ("ASI") complaint for lack of jurisdiction and remanded for further proceedings.⁴⁶² The case centered on an antidumping investigation of wooden bedroom furniture from the People's Republic of China.⁴⁶³ During the course of the investigation, Commerce made numerous ministerial errors that affected the cash deposit rates.⁴⁶⁴ After publication of the preliminary determination, Commerce issued revised instructions to correct those errors, but only for entries on or after the date of publication of the amended preliminary determination.⁴⁶⁵ Commerce made similar errors in its final determination, which it corrected through an amended final determination reducing the rates.⁴⁶⁶ However, in its liquidation instructions, it directed Customs to assess duties at the cash deposit rates in effect at the time of entry.⁴⁶⁷ As a result, for entries between the date of the preliminary determination and the amended preliminary determination, and for entries between the date of the final determination and the amended final determination, duties were assessed at the cash deposit rates erroneously calculated by Commerce.⁴⁶⁸ ASI challenged Commerce's liquidation instructions to apply the reduced rates retroactively to the interim periods.⁴⁶⁹

The CIT dismissed for lack of subject matter jurisdiction. Specifically, the CIT concluded that jurisdiction under 28 U.S.C. § 1581(i)(4) was improper because the claim actually challenged the final determination and, therefore, it should have been brought under § 1581(c), which grants the CIT jurisdiction over final reviewable determinations under 19 U.S.C. § 1516a.⁴⁷⁰ The Federal Circuit, however, found that liquidation instructions were properly reviewed under § 1581(i)(4).⁴⁷¹ While the government alleged that

460. *Id.* at 1033.

461. No. 2007-1216, 2007 WL 4224210 (Fed. Cir. Nov. 30, 2007).

462. *Id.* at * 1.

463. *Id.*

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.* at *2.

471. *Id.* (citing *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002-03 (Fed. Cir. 2003)) (holding that liquidation instructions are properly reviewed under

the true nature of ASI's challenge was to Commerce's underlying final determination, the Federal Circuit determined that ASI's claim concerned Commerce's liquidation instructions.⁴⁷² Thus, it reversed the CIT's dismissal and remanded for further proceedings consistent with its opinion.⁴⁷³

In *Sango International L.P. v. United States*,⁴⁷⁴ the Federal Circuit reversed and remanded a CIT decision affirming an antidumping duty scope determination.⁴⁷⁵ The products at issue were imported gas meter swivels and gas meter nuts imported by Sango International L.P. ("Sango").⁴⁷⁶ Commerce had determined that these swivels and nuts were within the scope of the antidumping duty order covering malleable iron pipe fittings from the People's Republic of China based on factors set forth in 19 C.F.R. § 351.225(k)(1), which include the descriptions of the merchandise in the petition, initial investigation, and other determinations by Commerce and the ITC.⁴⁷⁷ Only if those descriptions are not dispositive should Commerce consider the enumerated criteria of 19 C.F.R. § 351.225(k)(2). Commerce found that the description according to the sources listed in 19 C.F.R. § 351.225(k)(1) was dispositive.⁴⁷⁸

The CIT determined that the products did not fall within the express exceptions within the antidumping order, and thereby held that Commerce's findings were supported by substantial evidence.⁴⁷⁹ The Federal Circuit, however, found that the language of the relevant documents relied upon by Commerce did not provide substantial evidence to support Commerce's scope determination.⁴⁸⁰ The Federal Circuit specifically examined the evidence suggesting that gas meter swivels and nuts differ from "traditional" pipe fittings because the flanged end of the swivel only mates and seals to a gas meter through the use of a meter nut.⁴⁸¹ Thus, the swivels and meter nuts served no purpose in a piping system without a gas meter.⁴⁸² The Federal Circuit found that the fittings covered by the order serve to connect only to pipes, while gas meter swivels and nuts never appear

§ 1581(i)(4) because they concern the administration and enforcement of Commerce's final determination).

472. *Id.*

473. *Id.*

474. 484 F.3d 1371 (Fed. Cir. 2007).

475. *Id.* at 1382.

476. *Id.* at 1375.

477. *Id.* at 1377.

478. *Id.*

479. *Id.*

480. *Id.* at 1381–82.

481. *Id.* at 1381.

482. *Id.*

in a piping system without a gas meter.⁴⁸³ Thus, the Federal Circuit held that Commerce should have considered the additional criteria set forth in 19 C.F.R. § 351.225(k)(2) to determine whether gas meter swivels and nuts are within the scope of the Order.⁴⁸⁴

B. United States International Trade Commission

The ITC is charged with determining whether the domestic industry is materially injured, or is threatened with material injury, or whether the imports or sales of subject merchandise have materially retarded the establishment of a U.S. industry.⁴⁸⁵ Only if the ITC makes an affirmative injury determination, can Commerce issue an antidumping or, in most cases, countervailing duty order.⁴⁸⁶ Two CIT decisions in ITC cases were appealed to the Federal Circuit in 2007, both dealing with issues of the ITC's material injury determination.⁴⁸⁷

In *Cleo Inc. v. United States*,⁴⁸⁸ the Federal Circuit affirmed the CIT's decision upholding a determination by the ITC that imports of bulk and consumer tissue paper from China were materially injuring the domestic tissue paper industry.⁴⁸⁹ Cleo Inc. ("Cleo") and Target Corp. ("Target") were domestic companies importing tissue paper from China.⁴⁹⁰ Both companies appealed the ITC's like product determination and material injury determination on four points:

- (1) that the Commission incorrectly found that bulk and consumer tissue paper are a single like product, (2) that the Commission improperly considered Cleo's and Target's imports in its material injury determination and that its causation analysis was thus flawed, (3) that the Commission erred in concluding that the domestic products were being undersold by the imports, and (4) that the Commission used flawed financial data when concluding that the domestic industry was in poor health.⁴⁹¹

The Federal Circuit first upheld the ITC's finding that bulk and consumer tissue paper constituted a single domestic like product.⁴⁹²

483. *Id.*

484. *Id.* at 1382.

485. 19 U.S.C. § 1673 (2000).

486. 19 U.S.C. §§ 1671e, 1673e (2000).

487. *Cleo Inc. v. United States*, 501 F.3d 1291 (Fed. Cir. 2007); *Nippon Steel Corp. v. United States Int'l Trade Comm'n*, 494 F.3d 1371 (Fed. Cir. 2007).

488. 501 F.3d 1291 (Fed. Cir. 2007).

489. *Id.* at 1297.

490. *Id.* at 1294.

491. *Id.* at 1296.

492. *Id.* at 1298. The ITC weighs six factors in considering a like product determination: (1) physical characteristics and uses; (2) common manufacturing facilities and production employees; (3) interchangeability; (4) customer perceptions; (5) channels of distribution; and, where appropriate, (6) price. *Id.* at

The court found that bulk and consumer tissue paper were similar in physical appearance and use, both coming from jumbo rolls of tissue paper, and coming in a variety of sizes and colors.⁴⁹³ The manufacturing and production processes were also similar, in that both were produced by the same companies on the same machines run by the same employees.⁴⁹⁴ On the other hand, there was only limited overlap between the types of tissue paper with regard to channels of distribution and price.⁴⁹⁵ The evidence suggested that consumer tissue paper is generally higher in price than bulk.⁴⁹⁶ However, the Federal Circuit determined that the significant overlap in physical characteristics and uses as well as in manufacturing processes, and some overlap in the other factors was sufficient to find that the Commission's decision was supported by substantial evidence.⁴⁹⁷

The Federal Circuit also upheld the ITC's determinations that the dumped imports were causing the material injury to the domestic tissue paper industry and that the volume of dumped tissue paper increased sharply over the period examined.⁴⁹⁸ The increase in volume led to a transfer in market share from domestic producers to the importers, resulting in a decline in the domestic tissue paper industry.⁴⁹⁹ Also, the Federal Circuit upheld the ITC's determination that imported tissue paper was significantly undercutting the domestic industry's prices.⁵⁰⁰ The ITC compared four categories of goods: white consumer tissue paper, solid consumer tissue paper, combination color consumer tissue paper, and white bulk tissue paper.⁵⁰¹ The data showed that imports undersold the domestic product a significant amount of time.⁵⁰² Therefore, the ITC's underlying determinations regarding the scope of the industry and material injury analysis were found to be supported by substantial evidence.⁵⁰³

1295 (citing *Torrington Co. v. United States*, 938 F.2d 1278, 1280 (Fed. Cir. 1991); *NMB Sing. Ltd. v. United States*, 288 F. Supp. 2d 1306, 1313 (Ct. Int'l Trade 2003); *Timken Co. v. United States*, 913 F. Supp. 580, 584 (Ct. Int'l Trade 1996)).

493. *Id.* at 1297.

494. *Id.*

495. *Id.*

496. *Id.* at 1298.

497. *Id.*

498. *Id.* at 1300–01.

499. *Id.*

500. *Id.* at 1303.

501. *Id.* at 1302.

502. *Id.*

503. *Id.* at 1303.

In the latest installment of *Nippon Steel v. U.S. International Trade Commission*,⁵⁰⁴ the Federal Circuit reversed the CIT's decision and directed the CIT to reinstate the ITC's affirmative material injury determination.⁵⁰⁵ The sunset review of *Nippon Steel* has a long procedural history spanning more than six years, and including four determinations by the ITC and six opinions from the CIT.⁵⁰⁶ The facts relevant to this case started in 2001, when the ITC "affirmatively determined, by a three-to-three vote of the Commissioners, that revocation of the antidumping and countervailing duty orders covering [grain oriented electrical steel ("GOES")] from Italy and Japan was likely to cause material injury to an industry in the United States."⁵⁰⁷ The matter was appealed and remanded twice with affirmative material injury determinations.⁵⁰⁸ On the third remand, after re-opening the record, but before the voting, Commissioner Miller left the Commission.⁵⁰⁹ Neither the departing Commissioner nor her replacement took part in the voting, resulting in a three-to-two negative determination that revocation of the orders would not likely cause material injury to the domestic industry.⁵¹⁰ The CIT affirmed this negative determination.⁵¹¹

As in *Tung Mung Development Co. v. United States*,⁵¹² the government attempted to portray the issue as involving an independent change of agency policy.⁵¹³ In *Tung Mung*, the appellant steel company challenged an interim CIT decision as improper because it failed to give deference to Commerce's decision to use a certain method when calculating the appropriate antidumping duty.⁵¹⁴ Here, in its analysis of the issue, the Federal Circuit found that the change in the Commission's vote was solely a product of the departure of a Commissioner.⁵¹⁵ The court noted that a similar situation occurred in *Altz, Inc. v. United States*,⁵¹⁶ in which the court found that a change in the identity of the voting Commissioners did not amount to an independent policy change by the Commission.⁵¹⁷ Therefore, the

504. 494 F.3d 1371 (Fed. Cir. 2007).

505. *Id.* at 1381.

506. *Id.* at 1373.

507. *Id.* at 1373-74 (citation omitted).

508. *Id.* at 1374.

509. *Id.*

510. *Id.*

511. *Id.* at 1375.

512. 354 F.3d 1371 (Fed. Cir. 2004).

513. *Nippon Steel*, 494 F.3d at 1375.

514. *Tung Mung Dev.*, 354 F.3d at 1378.

515. *Nippon Steel*, 494 F.3d at 1376.

516. 370 F.3d 1108 (Fed. Cir. 2004).

517. *Id.* at 1118-19 n.8.

Federal Circuit found that weighing the evidence differently than the old majority of Commissioners did not amount to a change in Commission practice or policy.⁵¹⁸

Also of note, the Federal Circuit found it appropriate to review the remand order de novo, rather than for abuse of discretion, because of the remand instructions it gave to the Commission.⁵¹⁹ Namely, it gave two options on how to proceed: “(1) reopen the record in order to obtain substantial evidence to support its adverse impact conclusion or (2) make a determination that subject imports will have no adverse impact should the orders be revoked.”⁵²⁰ This made the remand order precisely the type that is reviewed de novo, and not for abuse of discretion.

The Commission’s cumulation of imports, pursuant to 19 U.S.C. § 1675a(a)(7), was further upheld by the Federal Circuit as supported by substantial evidence.⁵²¹ The Commission has discretion to “cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to reviews . . . [that] were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market.”⁵²² The Commission reasoned that there was direct competition between Italian and Japanese imports, that the like domestic product was substitutable for the subject imports, and that the two countries shared similar channels of distribution.⁵²³ Given the evidence of higher prices for GOES in the United States, which supported the finding that imports were likely to have an adverse impact on the domestic industry, the Federal Circuit held that the ITC’s material injury determination was supported by substantial evidence.⁵²⁴

The international trade decisions of the Federal Circuit show the importance of keeping informed about evolving developments in trade remedy matters, and not only when they involve products that a company exports to, or imports into, the United States. The court’s decisions on appeals from Commerce determinations also demonstrate that, at least in the context of regulations interpreting antidumping duty statutes, the Federal Circuit is likely to uphold

518. *Nippon Steel*, 494 F.3d at 1377–78.

519. *Id.* at 1378–79.

520. *Id.* at 1378 (quoting *Nippon Steel Corp. v. United States*, 391 F. Supp. 2d 1258, 1284 (Ct. Int’l Trade 2005)).

521. *Id.* at 1379–80.

522. *Id.* at 1379 (quoting 19 U.S.C. § 1675a(a)(7) (2000)).

523. *Id.*

524. *Id.* at 1380–81.

Commerce's position because the agency has been granted broad discretion in such matters by Congress.

CONCLUSION

In 2007, The Federal Circuit decided thirty-four appeals from the CIT, sixteen of which involved customs issues and eighteen of which involved trade remedy issues. The Federal Circuit addressed a wide range of international trade issues, representative of the varied and complex nature of the international trade cases normally appealed to the court. Although international trade appeals continue to be only a small percentage of the Federal Circuit's total caseload, these appeals are very important, not only for the litigants, but also for others who are similarly situated.