2018 INTERNATIONAL TRADE LAW DECISIONS OF THE FEDERAL CIRCUIT

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INTRODUCTION

The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") is responsible for adjudicating a wide range of subjects—only one of which is international trade.[1] Historically, trade cases have occupied an extremely small portion of the Federal Circuit's jurisprudence.[2] For example, from October 2017 to September 2018, out of the 1530 Federal Circuit appeals docketed, just a little over four percent concerned matters from the U.S. International Trade Commission ("ITC" or "Commission"), the U.S. Court of International Trade ("CIT"), or the U.S. Department of Commerce ("DOC").[3] The impact of these cases upon trade policy and the economy, however, is far more immense. Indeed, the frequency and depth of discussion on trade issues in 2018 was remarkable—from courtrooms to congressional chambers, on television, and in tweets.

The 2018 term of the Federal Circuit included nineteen precedential opinions involving international trade. Part I examines those opinions addressing Section 337 of the Tariff Act of 1930, as amended ("Section 337"),[4] with a focus on the strategic role that remedies can play in achieving party goals. Part II explores a rare safeguard case testing the scope of Presidential power to issue tariffs.

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1. *See generally* 28 U.S.C. § 1295(a) (2012).
2. *Statistics*, U.S. CT. OF APPEALS FOR THE FED. CIR., http://www.cafc.uscourts.gov/the-court/statistics (last visited May 20, 2019) (providing statistics by source of appeal from 1997 to 2018).
3. U.S. CT. OF APPEALS FOR THE FED. CIR., YEAR-TO-DATE ACTIVITY AS OF DECEMBER 31, 2018 (Sept. 30, 2018), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/YTD-Activity-December-2018.pdf (reflecting that sixty-seven trade-related matters were docketed at the Federal Circuit in 2018—twenty-one ITC, forty-five CIT, and one DOC).
4. Pub. L. No. 71-361, § 337, 46 Stat. 590, 703 (codified as amended at 19 U.S.C. § 1337).

Part III summarizes those opinions addressing import classification, which reflect a strong affirmance rate for the CIT. Part IV surveys those opinions addressing antidumping ("AD") and countervailing duties ("CVD")—an area that saw considerable activity.

I. SECTION 337 INVESTIGATIONS

A. *Overview of Section 337 Investigations*

Investigations under Section 337 provide highly effective redress for harm caused by imports created using unfair trade practices.[5] Most often the unfair trade practice at issue is a violation of U.S. intellectual property ("IP")—the majority of actions are patent-based.[6] Other types of claims that may be adjudicated using Section 337 include, but are not limited to, antitrust, false advertising, passing off, and false designation of origin.[7] Because Section 337 has its roots in trade, there are additional elements a complainant must prove beyond what is required in a district court IP case—namely importation, domestic industry, and public interest.[8]

Jurisdiction is in rem in Section 337 matters,[9] and there are no joinder constraints like those governing district courts.[10] Accordingly, a complainant may bring suit against dozens of respondents from all over the globe in one litigation, in one court. Another hallmark of Section 337 investigations is that they move quickly. The average length of an overall investigation in the 2018 fiscal year was just over eleven months, and even for an investigation completed on the merits, the average length was only twenty-one months.[11]

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5. *See generally* 19 U.S.C. § 1337.

6. Patent-based Section 337 investigations, by far, are the most common. *See Section 337 Statistics: Types of Unfair Acts Alleged in Active Investigations, FY 2006–FY 2015*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/intellectual_property/337_statistics_types_unfair_acts_alleged_active.htm (last visited May 20, 2019).

7. *See About Section 337*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/intellectual_property/about_section_337.htm (last visited May 20, 2019).

8. 19 U.S.C. § 1337(a), (d).

9. *See* Sealed Air Corp. v. ITC, 645 F.2d 976, 985 (C.C.P.A. 1981) ("The Tariff Act of 1930 (Act) and its predecessor, the Tariff Act of 1922, were intended to provide an adequate remedy for domestic industries against unfair methods of competition and unfair acts instigated by foreign concerns operating beyond the in personam jurisdiction of domestic courts.").

10. *See* 35 U.S.C. § 29.

11. *Section 337 Statistics: Average Length of Investigations*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/intellectual_property/337_statistics_average_length_investiga

Section 337 also is known for its sweeping remedies, all of which take the form of some type of injunctive relief, such as: (1) a limited exclusion order ("LEO") that prevents violative goods of the named respondents from entering the U.S. market; (2) a cease and desist order ("CDO") that prevents violative goods already in the United States from being advertised or sold by the named respondents; and/or (3) a general exclusion order ("GEO") that prevents violative goods of both named respondents and unnamed violators from entering the U.S. market.[12] Although damages cannot be obtained via Section 337, a complainant may file a parallel case in district court, so as to achieve both injunctive relief and monetary compensation.[13]

Section 337 investigations are conducted by the ITC, formerly known as the U.S. Tariff Commission.[14] There are two layers of adjudication. Six administrative law judges ("ALJ"), who handle Section 337 matters exclusively, preside over the investigations through discovery, hearing, and initial determination.[15] The bipartisan, six-member Commission then determines whether to review those decisions.[16] If the Commission grants a remedy in its final

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tions.htm (last visited May 20, 2019). "Overall investigations" include "all investigations completed during the period, including terminations based on settlements, consent orders, complaint withdrawals and merit-based final determinations." *Id.* In contrast, "merits investigations" are those "in which the Commission rendered a final determination on the merits as to a violation." *Id.*

12. 19 U.S.C. § 1337(d), (f).

13. *See FAQs*, INT'L TRADE COMM'N TRIAL LAWYERS ASS'N, http://www.itctla.org/resources/faqs#section-337 (last visited May 20, 2019).

14. 19 U.S.C. § 2231(a).

15. Although a full ITC bench is comprised of six ALJs, in 2018 the ITC was forced to operate with vacancies thereon. *See* Tiffany Hu, *Ex-ITC Lawyer Returns to Agency as Judge*, LAW360 (Mar. 7, 2018), https://www.law360.com/articles/1019427/ex-itc-lawyer-returns-to-agency-as-judge (reporting that retired Judge Theodore R. Essex's "cases would be assigned to Chief Administrative Law Judge Charles Bullock until a new judge arrived"); Tiffany Hu, *ITC Judge Who Presided over IP Probes Retires*, LAW360 (Sept. 7, 2018), https://www.law360.com/articles/1080745/itc-judge-who-presided-over-ip-probes-retires (explaining that previous ITC press releases have stated that a "'full complement' of judges overseeing [s]ection 337 is six," but only five were listed on the website at that time).

16. 19 U.S.C. § 1330(a); 19 C.F.R. §§ 210.43(d), 210.44, 210.45 (2018). Commissioners are appointed by the President with the advice and consent of the Senate and serve nine-year terms. 19 U.S.C. § 1330(a)–(b). During 2018, the Commission was forced to operate with multiple vacancies thereon. Alex Lawson, *ITC Close to Full Strength as Ex-WilmerHale Atty Sworn in*, LAW360 (Apr. 3, 2018), https://www.law360.com/articles/1029218/itc-close-to-full-strength-as-ex-wilmerhale-atty-sworn-in.

determination, it is sent to the President,[17] who has sixty days to disapprove the Commission's order.[18] If the President does not disapprove, the remedy takes effect.[19] Notice for appellate review by the Federal Circuit must be filed within sixty days of the determination becoming final.[20]

B. Diebold Nixdorf, Inc. v. ITC

With some notable exceptions,[21] the overwhelming majority of Section 337 appeals the Federal Circuit decides involve detailed, often case-specific, patent-based disputes, rather than trade issues. *Diebold Nixdorf, Inc. v. ITC*[22] represents this common type of action. Because the Author's law firm represents a party in this matter, the Author cannot provide commentary thereon and directs the reader to the Federal Circuit opinion and other portions of the case record.

C. Converse, Inc. v. ITC

There is a great deal packed into the *Converse, Inc. v. ITC*[23] decision, which considered alleged infringement of common law and registered trade dress owned by Converse covering the midsole of All Star shoes.[24] *Converse* was a unique Section 337 Federal Circuit opinion in at least two respects. Not only did it involve a type of IP not often the subject of an underlying Section 337 investigation,[25] it also was one of the infrequent Section 337 Federal Circuit appeals addressing questions that have a more direct bearing on international trade—in this case, in the form of remedial issues.[26]

Converse claimed a Section 337 violation against thirty-two respondents, resulting in twenty-three settlements or consent orders,

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17. In 2005, the President delegated the authority to veto the Commission's Section 337 remedies to the U.S. Trade Representative ("USTR"). Assignment of Certain Functions Under Section 337 of the Tariff Act of 1930, 70 Fed. Reg. 43,251 (July 26, 2005).
18. 19 U.S.C. § 1337(j).
19. *Id.*
20. 19 U.S.C. § 1337(c).
21. *See, e.g.*, ClearCorrect Operating, LLC v. ITC, 810 F.3d 1283, 1289 (Fed. Cir. 2015).
22. 899 F.3d 1291 (Fed. Cir. 2018).
23. 909 F.3d 1110 (Fed. Cir. 2018).
24. *Id.* at 1113.
25. *See supra* note 6.
26. *See, e.g.*, *Converse*, 909 F.3d at 1132–34 (O'Malley, J., concurring-in-part and dissenting-in-part) (expressing concern with the court's "failure to instruct the ITC to enter a remedy against all the defaulting parties, or to justify its failure to do so by reference to any relevant public interest concerns").

five defaults, and four active respondents.[27] The ALJ found a Section 337 violation because the registered trademark was infringed and, relying on the presumption of secondary meaning afforded to a registered mark, was not invalid.[28] As for the common law mark, the ALJ determined Converse had not established secondary meaning and, thus, was not protectable.[29] The Commission reversed the ALJ's findings on validity of the registered mark but agreed with the ALJ that the common law mark had not acquired secondary meaning.[30] The Commission and the ALJ both determined that, if the mark was not invalid, it was infringed.[31] With regard to the defaulting respondents, the Commission refused to enter an exclusion order against them, notwithstanding their default status.[32]

On appeal, the Federal Circuit concluded that the ITC made a series of errors requiring vacatur and remand. The court held that the "ITC failed to differentiate between alleged infringers who started infringing prior to Converse's trademark registration and those that infringed after the registration was granted."[33] The court explained that, for any respondent that infringed prior to the registration of the mark, Converse had to demonstrate, without the benefit of any presumption, that the mark had acquired secondary meaning before the respondent's first infringing use.[34] In so holding, the majority altered the test for determining secondary meaning in multiple ways, including, but not limited to, clarifying that the relevant prior use period should be five years before the first infringement.[35]

Further, the court stressed that for any prior competitor use to be relevant, it must involve a mark that is substantially similar to the one asserted—a tenet the Commission failed to follow in its final determination—and that this "substantially similar" analysis must be applied to infringement as well.[36] The majority also offered an assessment of a survey submitted by the active respondents.[37] The majority then

27. *Id.* at 1129–30.
28. *Id.* at 1114 (majority opinion).
29. *Id.*
30. *Id.* at 1114–15.
31. *Id.* at 1115.
32. *Id.*
33. *Id.*
34. *Id.* at 1118.
35. *See id.* at 1120–21 (citing Section 2(f) of the Lanham Act, 15 U.S.C. § 1052(f) (2012)).
36. *Id.* at 1122.
37. *Id.* at 1122–23. Further, the majority made clear it deemed unpersuasive the arguments that labeling is always legally sufficient to avoid likelihood of confusion,

instructed the ITC to consider whether the validity of the registered mark should be addressed on remand, given that Converse sought a GEO.[38]

Judge O'Malley filed a separate opinion in which she dissented from the majority in substantial part.[39] In that opinion, Judge O'Malley first stated that validity is an improper subject for remand because the ITC has no authority to invalidate a trademark *unless* invalidity is specifically asserted by a respondent as an affirmative defense.[40] Moreover, she pointed out that validity of the registered trademark is not relevant to whether any remaining respondents infringed.[41] With regard to the defaulting respondents, they relinquished their opportunity to contest validity by defaulting.[42] With regard to the active respondents, the first use of the trademark for each began before registration, making validity of the registered mark irrelevant.[43] "Thus, the only question that could properly be before the ITC on remand is whether Converse can show that its mark acquired distinctiveness as of each first use by each" active respondent.[44] The dissent maintained that "[t]he majority's attempt to expand the scope of appellate review by considering the validity of the registered mark conflates the concepts of validity and priority of use."[45] Accordingly, Judge O'Malley found evaluation of the survey, which post-dates registration, to be unnecessary.[46]

Second, Judge O'Malley deemed the majority's assessment of infringement is improper. With regard to the defaulting respondents, she asserted that they waived the right to challenge infringement, as they did validity, due to their default status.[47] With regard to the active respondents, she clarified that, until priority of use is established, infringement is not ripe for review.[48] Moreover, according to Judge O'Malley, the ALJ and the ITC made findings regarding infringement to which deference is owed.[49]

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that reputational harm is a prerequisite to an infringement finding, and that the trademark was functional and thus not protectable. *Id.* at 1124.

38. *Id.* at 1118–19.
39. *Id.* at 1127–28 (O'Malley, J., concurring-in-part and dissenting-in-part).
40. *Id.* at 1128.
41. *Id.*
42. *Id.* at 1128.
43. *Id.* at 1128–29.
44. *Id.* at 1131.
45. *Id.*
46. *Id.* at 1131–32.
47. *Id.* at 1132.
48. *Id.*
49. *Id.*

Third, and most germane to international trade interests, Judge O'Malley opined that the majority should have instructed the ITC to issue remedial orders against the defaulting respondents.[50] When a party is found in default, Section 337(g)(1) requires the ITC to presume the facts alleged in the complaint as true and to provide some form of remedy upon request *unless* public interest would be harmed.[51] This allowance was provided via the 1988 amendment to the statute for very practical purposes.[52] "Congress acknowledged that, without the participation of a party in default, a complainant faced difficulties proving facts sufficient to establish a violation of § 1337."[53] Consequently, Judge O'Malley deemed the ITC without the power to deny Converse a remedy, given the absence of any public interest concern in the record.

This issue regarding the degree of discretion the ITC has over what type of remedy to issue against defaulters brings to the forefront an important consideration that will affect the utility derived from and effort needed for obtaining a GEO. To receive a GEO against defaulting respondents, a complainant must show that "a violation is established by substantial, reliable, and probative evidence," per Section 337(g)(2).[54] In the majority's view, there was an open question as to whether that standard requires a review of validity when no party has raised it as an affirmative defense.[55] Because neither the ITC nor the parties briefed the issue of "[w]hether the 1988 amendments, as the dissent urges, require the entry of a general exclusion order without addressing trademark validity or infringement," the majority instructed that this issue was best addressed on remand.[56]

There is, however, at least some indication the Federal Circuit would find such review inappropriate in this matter when a more fulsome record is presented. The majority noted "that even before 1988 [the Federal Circuit] had held in the patent context that the ITC cannot consider validity as to defaulting parties."[57] Although the majority "d[id] not decide whether the same approach governs under the 1988 amendments with respect to general exclusion orders or in the

50. *Id.*
51. *Id.* at 1132–33 (citing 19 U.S.C. § 1337(g)(1) (2012)).
52. *Id.* at 1133.
53. *Id.*
54. 19 U.S.C. § 1337(g)(2).
55. *See Converse*, 909 F.3d at 1118 (majority opinion); *id.* at 1129 & n.2 (O'Malley, J., concurring-in-part and dissenting-in-part).
56. *Id.* at 1119 (majority opinion).
57. *Id.* at 1119 n.4 (citing Lannom Mfg. Co. v. ITC, 799 F.2d 1572, 1573 (Fed. Cir. 1986)).

trademark context,"[58] the *Lannom Manufacturing Co. v. ITC*[59] opinion provides a rich history of why "Congress did not authorize the Commission to redetermine patent validity when no defense of invalidity has been raised"[60] by private parties.[61] It is noteworthy that, similar to patents, registered trademarks also are afforded a presumption of validity.[62] Thus, it is arguable that, notwithstanding the requirement to prove the need for a GEO through "substantial, reliable, and probative evidence,"[63] a review of validity still would not be warranted, as no private party challenged validity in this case.[64] Even if this approach is adopted on remand, however, it is not a foregone conclusion that a GEO will issue, as the ITC still has discretion under Section 337(g)(2) whether to grant that heightened remedial measure.[65]

The adjudication of remedy is also complicated in this matter by the fact that Converse, while maintaining its request for a GEO, pleaded in the alternative for an LEO and, separate and apart from either flavor of exclusion order, for CDOs.[66] Although not addressed directly, *Converse* generated a number of follow-on queries, such as: (1) whether requesting an LEO as an alternative to a GEO is sufficient to satisfy the "request" for relief required by Section 337(g)(1)(E); or (2) whether a complainant must abandon its pursuit of a GEO against active respondents in order to obtain an LEO against defaulting respondents.

The latitude the ITC has in awarding remedies against defaulting respondents has a direct influence on the likelihood of success in such situations. Because Section 337 often is used to obtain redress against entities that are not expected to present a defense, this will be a case to watch.

D. Laerdal Medical Corp. v. ITC

Less than two months after the Federal Circuit issued the *Converse* decision, it again considered the scope of the ITC's authority

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58. *Id.*
59. 799 F.2d 1572 (Fed. Cir. 1986).
60. *Id.* at 1580.
61. *Id.* at 1578–79.
62. *Converse*, 909 F.3d at 1117 (citing 15 U.S.C. §§ 1057(b), 1115(a) (2012)).
63. 19 U.S.C. § 1337(g)(2)(B).
64. *See Converse*, 909 F.3d at 1128 (O'Malley, J., concurring-in-part and dissenting-in-part) ("The ITC has no authority to invalidate a trademark—or patent for that matter—except and to the extent that the validity of either is asserted as a defense . . . .").
65. *See* 19 U.S.C. § 1337(g)(2)(B) (noting that the ITC "may" issue a GEO against defaulting respondents but is not required to do so).
66. *Certain Footwear Prods.*, Inv. No. 337-TA-936, Compl. at 221 (Oct. 14, 2014).

regarding defaulter remedies in *Laerdal Medical Corp. v. ITC*.[67] This time, however, Judge O'Malley wrote for the majority. *Laerdal Medical* also involved trade dress and trademark infringement (along with patent- and copyright-based allegations) against eleven respondents, each of which defaulted.[68] The Commission non-reviewed the ALJ's default findings, and Laerdal Medical requested entry of an LEO and CDOs.[69] The Commission issued such orders based on Laerdal Medical's patent and trademark claims but issued no relief on its trade dress or copyright claims, determining that even when the facts in the complaint were presumed true, Laerdal Medical failed to show that any respondent committed such infringement.[70]

As in the *Converse* dissent, Judge O'Malley relied on the "shall" language in Section 337(g)(1) to "conclude that the statute, on its face, unambiguously requires the Commission to grant relief against defaulting respondents, subject only to public interest concerns, if all prerequisites of § 1337(g)(1) are satisfied."[71] As described in the opinion, although Section 337(d)(1) and (g)(2) contemplate a post-institution review of the issues, Section 337(g)(1) does not.[72] That the ITC must find a violation of Section 337 before issuing a remedy does not alter this interpretation.[73] The opinion explained that, unlike in district court, the ITC must determine pre-institution whether a complaint was pleaded adequately, per Commission Rule 201.9(a), making it improper to revisit the sufficiency of the claims post-institution.[74]

As in the *Converse* dissent, *Laerdal Medical* also reiterated that the legislative history from the 1988 amendment to the statute, which added subpart (g), supports this view.[75] Prior to 1988, a Section 337

67. 910 F.3d 1207 (Fed. Cir. 2018).

68. *Id.* at 1210.

69. *Id.* at 1210–11.

70. *Id.* at 1211.

71. *Id.* at 1212; *see* Converse, Inc. v. ITC, 909 F.3d 1110, 1132–33 (Fed. Cir. 2018) (O'Malley, J., concurring-in-part and dissenting-in-part) (stating that the language of 19 U.S.C. § 1337(g)(1) "requires the ITC . . . to provide some form of relief against any parties found to be in default").

72. *Laerdal Med.*, 910 F.3d at 1213–14.

73. *Id.* at 1213.

74. *Id.* at 1213–14. *Compare* 19 C.F.R. § 210.9(a) ("The Commission shall examine the complaint for sufficiency and compliance with the applicable sections of this chapter."), *with* FED. R. CIV. P. 55(b)(2) ("The [district] court may conduct hearings or make referrals" when needed "to enter or effectuate judgment . . . .").

75. *Laerdal Med.*, 910 F.3d at 1214; *see Converse*, 909 F.3d at 1132–33 (O'Malley, J., concurring-in-part and dissenting-in-part).

complainant had to offer the same proof of violation for defaulting respondents as it did for active ones.[76] The amendment recognized that "discovery is usually difficult, if not impossible, to obtain from named respondents who have chosen not to participate in an investigation."[77] For all these reasons, the Federal Circuit reversed the ITC's determination that Laerdal Medical failed to plead its trade dress claims sufficiently,[78] vacated the ITC's denial of relief, and remanded the matter for the ITC to determine an appropriate remedy after consideration of the statutory public interest factors.[79]

Although *Laerdal Medical* is based on several of the same arguments contained in the *Converse* dissent relating to remedial relief available vis-à-vis defaulting respondents, there is a key difference in the two investigations—the type of injunction requested. Remarkably, in *Laerdal Medical*, the complainant had originally asked that a GEO be granted but then changed its remedial request to include only an LEO and CDOs, avoiding the ambiguity faced in *Converse*.[80] Thus, Section 337(g)(1), with its mandatory relief against defaulters, applied unequivocally.[81] In contrast, as discussed above, the complainant in *Converse* maintained through appeal its request for a GEO,[82] which invokes consideration of Section 337(g)(2) and the discretion it allows the ITC as to relief against defaulters.[83]

The broader lesson from both *Converse* and *Laerdal Medical* is that Section 337 offers market-protecting injunctive relief against a plethora of global entities unlikely to put on a defense. Although the final decision in *Converse* may lend insight into the timing and types of relief a complainant should seek, there is no doubt the ITC provides complainants, in a single litigation, with far more opportunity to obtain redress against defaulters than in district court.

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76. *Laerdal Med.*, 910 F.3d at 1214.
77. *Id.*
78. The copyright claims were not on appeal. *Id.* at 1211.
79. *Id.* at 1216.
80. *Id.* at 1210.
81. *See* 19 U.S.C. § 1337(g)(1) (2012).
82. *See* Converse, Inc. v. ITC, 909 F.3d 1110, 1118–19 (Fed. Cir. 2018); *see also supra* notes 36–38, 55–56, 66 and accompanying text.
83. 19 U.S.C. § 1337(g)(2).

II. SECTION 201 SAFEGUARD INVESTIGATIONS

A. *Overview of Section 201 Safeguard Investigations*

Section 201 of the Trade Act of 1974 ("Section 201") authorizes the President to impose tariffs under certain conditions, instructing that:

> If the [ITC] . . . determines under section 2252(b) of this title that an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article, the President, in accordance with this part, shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.[84]

In this context, a "positive adjustment to import competition" is defined as "the ability of the industry to compete successfully with imports after termination of the safeguard measure, *or* the industry's orderly transfer of resources to other productive pursuits; *and* the ability of dislocated workers to transition productively."[85]

Unlike Section 337 or AD/CVD matters, "Section 201 investigations do not require a finding of an unfair trade practice."[86] Proving the requisite injury under Section 201, however, "is considered to be more difficult."[87] If a petitioner demonstrates that the imports in question are a substantial cause (i.e., "important and not less than any other cause") of actual or threatened serious injury, the ITC will provide the President and USTR with a report and remedy recommendations designed to achieve import relief.[88] After the ITC's findings are submitted, USTR, in consultation with other organizations (including the DOC), will make its own recommendation to the President as to what, if any, relief is in

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84. Pub. L. No. 93-618, tit. II, ch. 1, § 201, 88 Stat. 1978, 2011 (codified as amended at 19 U.S.C. § 2251(a)); *see* 19 U.S.C. § 2253(a) (providing similar instructions and noting reporting requirement).

85. CONG. RES. SERV., *Safeguards: Section 201 of the Trade Act of 1974*, https://fas.org/sgp/crs/misc/IF10786.pdf (last updated Dec. 31, 2018) [hereinafter *Section 201 Safeguards*]; *see* 19 U.S.C. § 2251(b) (defining "positive adjustment to import competition").

86. *Understanding Safeguard Investigations*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/press_room/us_safeguard.htm (last visited May 20, 2019) [hereinafter *Understanding Safeguard Investigations*].

87. *Id.*

88. 19 U.S.C. § 2252(b)(1), (e); *see Safeguards*, INT'L TRADE ADMIN., https://www.trade.gov/mas/ian/tradedisputes-enforcement/tg_ian_002099.asp (last visited May 20, 2019) [hereinafter *Safeguards*, INT'L TRADE ADMIN.].

the national economic interest.[89] The President must determine whether to act within sixty days of receiving the ITC report.[90] On the day that determination is made, the President must transmit to Congress in writing the bases for the President's actions or inactions, including the reasoning for any difference between the ITC's recommendations and the actions or inactions the President ultimately adopts.[91]

As the ITC describes the framework for Section 201:

> Criteria for import relief under Section 201 are based on those in article XIX of the GATT [General Agreement on Tariffs and Trade], as further defined in the WTO [World Trade Organization] Agreement on Safeguards. Article XIX of the GATT is sometimes referred to as the escape clause because it permits a country to "escape" temporarily from its obligations under the GATT with respect to a particular product when increased imports of that product are causing or are threatening to cause serious injury to domestic producers.[92]

Notwithstanding this purported compliance, in May 2018, South Korea requested WTO consultations with the United States regarding the two U.S. safeguards recently promulgated on washing machines and solar products and, a few months later, South Korea formally requested that the WTO establish dispute settlement panels thereon.[93] In August 2018, China also requested consultations with the United States on the solar products safeguard.[94]

Section 201 cases are extremely rare. During the last forty-three years (1975–2018), the ITC has handled only seventy-five such investigations.[95] Indeed, since 2001, there had not been a single Section 201 action initiated until the recent efforts by the Trump administration.[96] This makes the following safeguard-related opinion, which already is reflective of broader trade policy discourse that occurred in 2018, even more intriguing.

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89. *Safeguards*, INT'L TRADE ADMIN., *supra* note 88.
90. 19 U.S.C. § 2253(a)(4)(A).
91. 19 U.S.C. § 2253(b).
92. *Understanding Safeguard Investigations*, *supra* note 86.
93. *Section 201 Safeguards*, *supra* note 85.
94. *Id.*
95. *Id.*
96. *Id.*

B. Silfab Solar, Inc. v. United States

Silfab Solar, Inc. v. United States[97] involved the scope of Presidential power in conjunction with issuing tariffs.[98] Specifically, the Federal Circuit affirmed the CIT's denial of a preliminary injunction to bar the enforcement of tariffs on solar products imposed by President Trump because movants could not demonstrate a likelihood of success on the merits that the President exceeded his statutory authority.[99] The origin of the dispute began in May 2017 when a U.S. manufacturer of solar products filed a petition with the ITC, seeking protective measures against foreign imports for the crystalline silicon photovoltaic ("CSPV") cell domestic industry.[100] The ITC undertook an investigation "to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."[101] In November 2017, the ITC made affirmative findings that such injury was taking place, but, because it could not garner the required number of votes, it did not recommend a remedy.[102]

Pursuant to Section 302 of the North American Free Trade Agreement ("NAFTA") Implementation Act,[103] the ITC's report specifically addressed CSPV imports from Canada, determining that: (1) Canada contributed approximately two percent of the solar imports at issue during the applicable period; (2) the solar industry in Canada was not among the top five suppliers of CSPV imports during the relevant period; (3) Canada was the ninth largest source of solar products; (4) imports from Canada declined during 2015–2016, notwithstanding the increase in global imports; (5) three of four sitting Commissioners determined that Canada did not contribute a "substantial share" of solar imports; (6) Canada's solar imports did not "contribute importantly" to the serious injury; and (7) three of four Commissioners determined that Canadian solar products should be exempted from any safeguards.[104]

97. 892 F.3d 1340 (Fed. Cir. 2018).
98. *Id.* at 1342.
99. *Id.* at 1342, 1344–45, 1349.
100. *Id.* at 1342.
101. *Id.*
102. *Id.* at 1342–43.
103. Pub. L. No. 103-182, tit. III, § 302, 107 Stat. 2057, 2100 (1993) (codified at 19 U.S.C. § 3352).
104. *Silfab Solar*, 892 F.3d at 1343; *see Understanding Safeguard Investigations*, *supra* note 86.

Under 19 U.S.C. § 2251(a) (known as the "escape clause"), once the ITC determines that quantities of an import are a "substantial cause of serious injury, or threat thereof," to the corresponding domestic industry, the President has the power to take "all appropriate and feasible action within his power which the President determines will facilitate efforts to make a positive adjustment to import competition and provide greater economic and social benefits than costs."[105] Such safeguard measures also are authorized by 19 U.S.C. § 2253(a), which sets forth ten factors the President should consider when deciding what measures to take.[106]

In January 2018, President Trump issued Proclamation No. 9693, announcing a four-year safeguard that included a thirty percent tariff on solar products.[107] Although the Proclamation acknowledged the ITC's findings to the contrary, President Trump did not exclude CSPV products from Canada because he found they "account[ed] for a substantial share of total imports and contribute[d] importantly to the serious injury or threat of serious injury found by the ITC."[108] The safeguards went into effect on February 7, 2018.[109] That same day, Canadian manufacturers of solar panels and a U.S. importer of solar cells ("Manufacturers") sought a declaratory judgment that the Proclamation was contrary to law, along with a corresponding preliminary injunction.[110] On March 5, 2018, the CIT, which had jurisdiction over the dispute pursuant to 28 U.S.C. § 1581(i), denied Manufacturers' requests because plaintiffs were not likely to succeed on the merits of the case, and public interest did not favor a preliminary injunction.[111] Manufacturers appealed.[112]

The Federal Circuit, exercising its jurisdiction under 28 U.S.C. § 1292(c)(1) and applying an abuse of discretion standard of review, affirmed the CIT's determination, emphasizing "relief is only rarely available" for acts that purportedly extend beyond the President's statutory authority.[113] Manufacturers presented several arguments they claimed were likely to succeed. First, they asserted that the President

105. *Silfab Solar*, 892 F.3d at 1342 (citing 19 U.S.C. § 2251(a) (2012)).
106. *Id.* at 1344 (citing 19 U.S.C. § 2253(a)(2)).
107. *Id.* (citing Proclamation No. 9693, 83 Fed. Reg. 17, 3541 (Jan. 23, 2018)).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 1344–45.
112. *Id.* at 1345.
113. *Id.* at 1345–46 (citing 28 U.S.C. § 1292(c)(1) (2012)).

lacked authority to act because the ITC had not made any remedial recommendations.[114] The Federal Circuit held that the President's authority to issue the tariffs was in no way conditioned on the existence of such a recommendation, but rather only on a determination of serious injury, or the threat thereof, to a domestic industry.[115]

Second, Manufacturers claimed that the President only had authority to act if the ITC complied with the statute, which, according to Manufacturers, it could not have done without providing the statutorily required recommendation.[116] The Federal Circuit disagreed, explaining that "[n]othing in [the statute] requires the President to determine whether the Secretary or Commission committed any procedural violations in making their recommendations, nor does [the statute] prohibit the President from approving recommendations that are procedurally flawed."[117]

Third, Manufacturers argued that the President had not submitted the requisite report to Congress regarding his actions and, thus, was not in compliance with the statute.[118] The Federal Circuit rejected this argument because the record showed the President, in fact, had made such a report and, in any event, explained that "the making of a report is not a precondition for presidential action in this case."[119]

Fourth, Manufacturers contended the President failed to consider the ITC's recommendation, as the statute requires.[120] The Federal Circuit also rejected this argument based on the record because the Proclamation indicated such consideration occurred.[121] The court made clear that it has "no authority to determine whether the President's statement [wa]s factually accurate."[122]

Finally, Manufacturers maintained the President's Proclamation violated the NAFTA Implementation Act, which requires the President to determine whether a NAFTA country's exports to the United States "account for a substantial share of total imports," and whether the imports "contribute importantly to the serious injury" identified by the

114. *Id.* at 1346.
115. *Id.*
116. *Id.* at 1346–47.
117. *Id.* at 1347 (alterations in original).
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 1347–48.

ITC.[123] Imports from a NAFTA country will be excluded only if the President makes negative determinations on these points.[124] The Proclamation, however, included affirmative findings related thereto.[125] The Federal Circuit held that the ITC's findings are in no way binding on the President, and "[t]he President's findings of fact and the motivations for his action are not subject to review."[126] Indeed, the opinion recognized that "courts have repeatedly confirmed that, where the statute authorizes a Presidential 'determination,' the courts have no authority to look behind that determination to see if it is supported by the record."[127]

III. CIT CLASSIFICATION CASES

A. *Overview of CIT Classification Cases*

When goods are imported into the United States, they are initially classified under the Harmonized Tariff Schedule ("HTSUS") by U.S. Customs and Border Protection ("CBP").[128] "The HTSUS scheme is organized by headings, each of which has one or more subheadings; the headings set forth general categories of merchandise, and the subheadings provide a more particularized segregation of the goods within each category."[129] The General Rules of Interpretation ("GRIs") and the Additional U.S. Rules of Interpretation are used to assess HTSUS headings and subheadings when classifying imports.[130] "The GRIs are applied in numerical order and a court may only turn to subsequent GRIs if the proper classification of the imported goods cannot be accomplished by reference to a preceding GRI."[131]

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123. *Id.* at 1348 (referencing 19 U.S.C. § 3372 (2012)).
124. *Id.*
125. *Id.* at 1344.
126. *Id.* at 1349 (quoting Maple Leaf Fish Co. v. United States, 762 F.2d 86, 89 (Fed. Cir. 1985)).
127. *Id.*; *see* 19 U.S.C. § 1337(j) (referencing non-reviewable presidential review of Section 337 remedies).
128. *Harmonized Tariff Schedule of the United States (HTS)*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/glossary/term/harmonized-tariff-schedule-united-states-hts (last visited May 20, 2019); *see* 19 U.S.C. § 1484; Wilton Indus., Inc. v. United States, 741 F.3d 1263, 1266 (Fed. Cir. 2013).
129. *Wilton Indus.*, 741 F.3d at 1266.
130. *Id.*; *see* Otter Prods., LLC v. United States, 834 F.3d 1369, 1375 (Fed. Cir. 2016).
131. *Wilton Indus.*, 741 F.3d at 1266.

An importer dissatisfied with CBP's classification may file a protest with CBP,[132] and a denied protest may be challenged at the CIT.[133] The CIT is a nine-judge[134] Article III court, located in New York, NY, but authorized to sit in other locations, including in foreign countries.[135] The subject matter jurisdiction of the CIT covers a variety of international trade-related civil suits that concern imports into the United States.[136] Most litigation before the CIT pertains to AD/CVD duties, the classification and valuation of imports, recovery of unpaid customs duties and civil penalties, and other actions arising under tariff laws.[137] Appeals from final CIT decisions are heard by the Federal Circuit.[138]

Proper classification of products under the HTSUS is a two-step process. First, "the meaning of specific terms in the tariff provisions" must be ascertained.[139] Second, it must be determined "whether the subject merchandise comes within the description of those terms."[140] In the six precedential classification opinions decided by the Federal Circuit in the 2018 term, each affirmed the CIT's classification, though, at times, using an alternative analysis.

B. Pleasure-Way Industries, Inc. v. United States

In *Pleasure-Way Industries, Inc. v. United States*,[141] the Federal Circuit affirmed the CIT's determination that certain vans exported from the United States to Canada, converted into motorhomes, and then reimported could not be treated as repaired or altered goods re-

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132. *See* 19 U.S.C. § 1514(a) (stating that "decisions of [CBP], including the legality of all orders and findings entering into the same . . . shall be final and conclusive upon all persons . . . unless a protest is filed").

133. *See* 28 U.S.C. § 1581(a) (2012) (explaining that the CIT has exclusive jurisdiction over any civil actions contesting the denial of a protest).

134. For 2018, the CIT was forced to operate with multiple vacancies on the bench. *Judicial Vacancies*, AM. BAR ASS'N. (Nov. 14, 2018), https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/judicial_vacancies.

135. *About the Court*, U.S. COURT OF INT'L TRADE, https://www.cit.uscourts.gov/about-court (last visited May 20, 2019).

136. *See generally* 28 U.S.C. §§ 1581–1584.

137. *U.S. Court of International Trade - Judicial Business 2017*, U.S. COURTS, http://www.uscourts.gov/statistics-reports/us-court-international-trade-judicial-business-2017 (last visited May 20, 2019).

138. *See* 28 U.S.C. § 1295(a)(5) (granting the Federal Circuit exclusive jurisdiction over appeals of final decisions from the CIT).

139. Victoria's Secret Direct, LLC v. United States, 769 F.3d 1102, 1106 (Fed. Cir. 2014).

140. *Id.*

141. 878 F.3d 1348 (Fed. Cir. 2018).

entered into the United States.[142] CBP classified the motorhomes under the facially applicable HTSUS subheading 8703.33.00.[143] Pleasure-Way, however, argued that HTSUS subheading 9802.00.50 was more appropriate, which allows favorable treatment of imports that meet the requirements set forth in 19 C.F.R. § 181.64—that is, qualifying as "[g]oods *re*-entered after repair or alteration in Canada or Mexico."[144] The Federal Circuit affirmed the CIT's summary judgment that the regulation relied on by Pleasure-Way was inapplicable.[145]

In analyzing 19 C.F.R. § 181.64(a), the Federal Circuit explained that the provision created two requirements for "[g]oods re-entered after repair or alteration in Canada or Mexico": (1) that the repair or alteration not create "a new or commercially different good from" the exported good; and (2) that the repair or alteration "not destroy the essential characteristics of" the exported good.[146] Subsection (b) of 19 C.F.R. § 181.64 specifically excludes from favorable import treatment those goods that are "incomplete for their intended use" at the time of export from the United States and "for which the processing operation performed in Canada or Mexico constitutes an operation that is performed as a matter of course in the preparation or manufacture of finished goods."[147]

The CIT determined that: (1) Pleasure-Way created a new or commercially different product from the exported vans; (2) Pleasure-Way destroyed the essential character of the exported vans; and (3) the exported vans were incomplete for their intended use at the time of export.[148] The Federal Circuit, however, found it sufficient to address only the first issue and agreed with the CIT that the converted motorhomes were commercially different from the exported vans, rendering them unqualified for special treatment under 19 C.F.R. § 181.64.[149] In doing so, the court relied on evidence that the motorhomes were given new names, sold for much higher prices than the vans, and marketed as upscale leisure vehicles rather than cargo haulers.[150] That the motorhomes were still "identifiable" because they retained the vehicle identification number from the vans was not

142. *Id.* at 1349, 1355.
143. *Id.* at 1349.
144. *Id.* (emphasis added) (quoting 19 C.F.R. § 181.64 (2017)).
145. *Id.* at 1355.
146. *Id.* at 1350 (quoting 19 C.F.R. § 181.64(a)).
147. *Id.* (quoting 19 C.F.R. § 181.64(b)).
148. *Id.* at 1352.
149. *Id.* at 1352–55.
150. *Id.* at 1353.

deemed compelling, according to the court, because "whether the resulting good is 'commercially' different from the original . . . has very little to do with whether it is possible to recognize the original embedded in the altered good."[151]

C. GRK Canada, Ltd. v. United States

In *GRK Canada, Ltd. v. United States*,[152] the Federal Circuit affirmed the CIT's remand determination regarding the classification of imported screw fasteners.[153] During 2008, GRK imported three types of screws made with "corrosion-resistant, case-hardened steel" that could "be used to penetrate" a variety of materials.[154] CBP classified the screws as "other wood screws" under HTSUS subheading 7318.12.00.[155] GRK protested, arguing that the products should be classified as "self-tapping screws" under HTSUS subheading 7318.14.10.[156] CBP denied the protest, and GRK filed suit in the CIT.[157] The CIT sided with GRK, determining that GRK's screws did fall within HTSUS subheading 7318.14.10.[158] The Federal Circuit, however, vacated the CIT's judgment, holding that the CIT should have taken into account the use of the screws when determining their classification.[159]

On remand, the CIT again determined that GRK's products were "self-tapping screws" under HTSUS subheading 7318.14.10, and, again, the government appealed.[160] The Federal Circuit agreed with the CIT's revised construction and declined to adopt the government's proposal for two reasons.[161] First, the Federal Circuit opined that the government's construction ignored the *eo nomine* (i.e., "one that names a specific product or describes by name the subject merchandise") nature of the terms at issue, instead defining them *solely* based on the use of the screws.[162] The CIT, according to the court, had given appropriate consideration of use without making it the sole criterion

151. *Id.* at 1353–54.
152. 885 F.3d 1340 (Fed. Cir. 2018).
153. *Id.* at 1342–43.
154. *Id.* at 1343.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 1343–44.
159. *Id.* at 1344.
160. *Id.* at 1343–46.
161. *Id.* at 1350.
162. *Id.* at 1347.

and "abrogat[ing] the foundational tenet of tariff classification that *eo nomine* provisions are distinct from use provisions and do not depend on either principal or actual use of the imported merchandise."[163] Second, the Federal Circuit held that the record did not support the government's proposed constructions.[164] Like the CIT, the Federal Circuit looked to the World Customs Organization Harmonized Description and Coding System Explanatory Notes ("ENs"),[165] dictionaries, and industry standards to conclude that the common and commercial meaning of "self-tapping screw" was not limited to only non-fibrous materials.[166]

D. WWRD US, LLC v. United States

In *WWRD US, LLC v. United States*,[167] the Federal Circuit affirmed the CIT's determination that imported seasonal dinnerware and crystal ware were not eligible for duty-free treatment because they were not used in specific cultural ritual celebrations.[168] Between 2009–2010, WWRD imported decorative ceramic plates, ceramic mugs, ceramic gravy boats, crystal punch bowls, crystal flutes, and crystal hurricane lamps decorated with Thanksgiving and Christmas motifs.[169] CBP classified these items under the HTSUS based on their constituent materials.[170] WWRD protested these classifications, arguing that the products were entitled to duty-free importation under HTSUS subheading 9817.95.01 that covered "[u]tilitarian articles of a kind used in the home in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions, such as Seder plates, blessing cups, menorahs[,] or kinaras."[171] CBP rejected WWRD's protests, and WWRD filed suit in the CIT.[172]

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163. *Id.*
164. *Id.*
165. The World Customs Organization publishes Explanatory Notes to interpret the Harmonized Commodity Description and Coding System, the global system of trade nomenclature on which the HTSUS is modeled. The ENs are not controlling, but rather offer guidance on proper interpretation. Well Luck Co. v. United States, 887 F.3d 1106, 1111 n.5 (Fed. Cir. 2018).
166. *GRK*, 885 F.3d at 1347–50.
167. 886 F.3d 1228 (Fed. Cir. 2018).
168. *Id.* at 1233–35.
169. *Id.* at 1230.
170. *Id.*
171. *Id.*
172. *Id.*

The CIT granted the government's cross-motion for summary judgment.[173] Relying on the legislative history of HTSUS subheading 9817.95.01, the CIT explained that, before its creation in 2007, utilitarian items used in ritual celebrations were covered by HTSUS heading 9505, which allowed for duty-free importation of "[f]estive, carnival, or other entertainment articles."[174] In 2007, chapter 95 was amended to add Note 1(v), which removed tableware and other specific utilitarian articles from its scope.[175] Note 1(v), however, referred to subheadings 9817.95.01 and 9817.95.05, allowing exceptions for utilitarian articles used "in the performance of specific religious or cultural ritual celebrations."[176] The CIT found that "rituals generally encompass specific scripted acts or series of acts that are customarily performed in an often formal or solemn manner."[177] Thanksgiving and Christmas, though cultural holidays involving cultural dinner celebrations, lacked any specific formal or solemn act, according to the CIT.[178] The type of general purpose holiday tableware at issue, the CIT stated, is not used in the same ritualistic manner as the examples listed in HTSUS subheading 9817.95.01.[179]

The Federal Circuit agreed with the CIT that "specific" modifies "ritual" rather than "religious or cultural," but emphasized that "formality and/or solemnity, while relevant, are not required characteristics of all specific religious or cultural ritual celebrations."[180] The court identified two requirements for a religious or cultural ritual: (1) it "must have some prescribed acts or codes of behavior"; and (2) it "must have some cultural or religious meaning."[181] Other non-dispositive factors to consider include the formality or solemnity in which the acts are performed, the degree to which such acts are recognized, how established the organization is that is involved in the ritual, and the purpose of the act in serving the organization or representing the cultural/religious meaning.[182]

173. *Id.* at 1230–31.
174. *Id.* at 1230.
175. *Id.* at 1231.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 1232.
181. *Id.* at 1233.
182. *Id.*

Although the Federal Circuit recognized that "WWRD present[ed] a compelling argument that Thanksgiving and Christmas dinners are religious or cultural ritual celebrations," they were not specific enough to qualify under HTSUS subheading 9817.95.01, particularly when juxtaposed to the exemplars provided.[183] Moreover, the products at issue were not "used . . . in the performance" of the ritual.[184] According to the court, "the use must advance or serve a particular purpose in the ritual," which the imports in question do not do in the same way as the exemplars (e.g., the Seder plates used to hold six specific foods—each with a particular meaning or the blessing cup used in specific Communion liturgy).[185]

E. Well Luck Co. v. United States

In *Well Luck Co. v. United States*,[186] the Federal Circuit affirmed the CIT's classification of imported sunflower seeds.[187] Well Luck imported three types of in-shell sunflower seeds—all meant for human consumption and not for the "extraction of edible or industrial oils or fats."[188] CBP classified Well Luck's sunflower seeds under HTSUS subheading 2008.19.90 as "[f]ruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: [n]uts, peanuts (ground-nuts) and other seeds, whether or not mixed together: [o]ther, including mixtures: [o]ther."[189] Well Luck protested, arguing that the products were entitled to a duty-free rate because the sunflower seeds were more accurately classified under HTSUS subheading 1206.00.00 as "[s]unflower seeds, whether or not broken."[190] CBP denied the protest, Well Luck filed suit in the CIT, and the CIT agreed with CBP's classification.[191]

On appeal, the Federal Circuit held that, "by relying on the 'narrower interpretation' provided by the EN to determine that

183. *Id.* at 1233.
184. *Id.* at 1234.
185. *Id.* at 1233–34.
186. 887 F.3d 1106 (Fed. Cir. 2018).
187. *Id.* at 1108–09.
188. *Id.* at 1109 (quoting Well Luck Co. v. United States, 208 F. Supp. 3d 1364, 1368 (Ct. Int'l Trade 2017)).
189. *Id.* (alterations in original) (quoting HTSUS subheading 2008.19.90).
190. *Id.* (alteration in original) (quoting HTSUS subheading 1206.00.00).
191. *Id.* at 1109–10.

HTSUS [h]eading 1206 does not cover the subject merchandise,"[192] the CIT failed to adhere to the instruction that a court should not apply the limiting characteristics of any applicable ENs to narrow the actual language of a heading classification.[193] Thus, the court concluded that the products at issue are prima facie classifiable under HTSUS heading 1206, but this was not case dispositive, as goods can be prima facie classifiable under multiple headings.[194] Indeed, the court also concluded that the products at issue are prima facie classifiable under HTSUS heading 2008, as they are "seeds" and "fit to be eaten," and are "made ready for consumption or treat[ed] or refrigerat[ed] . . . to prevent . . . decomposition or fermentation."[195] When there are multiple prima facie classifications, GRI 3(a) teaches that the more descriptive heading is the preferred one.[196] The Federal Circuit instructed that the language of the headings, not the subheadings, should guide the analysis, and to "look to the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty."[197] In this situation, the court held that HTSUS heading 2008 for prepared or preserved foods was more specific and more difficult to satisfy than HTSUS heading 1206 covering sunflower seeds generally and, thus, affirmed that heading 2008 was the proper classification.[198]

F. Gerson Co. v. United States

In *Gerson Co. v. United States*,[199] the Federal Circuit affirmed the CIT's summary judgment of its classification for light-emitting diode ("LED") candles.[200] In 2009, Gerson imported decorative LED candles, which CBP classified under HTSUS subheading 9405.40.80 covering "[l]amps . . . not elsewhere specified or included."[201] Gerson challenged this classification, arguing that its LED candles were more accurately classified under HTSUS subheading 8543.70.70 covering

192. *Id.* at 1113 (quoting *Well Luck*, 208 F. Supp. 3d at 1373).
193. *Id.* (citing Sigma-Tau HealthScience, Inc. v. United States, 838 F.3d 1272, 1281 (Fed. Cir. 2016)).
194. *Id.* at 1113–14 (citing GRI 3).
195. *Id.* at 1114–15 (alterations in original) (internal quotations omitted).
196. *Id.* at 1115 (citing GRI 3(a)).
197. *Id.* (quoting LeMans Corp. v. United States, 660 F.3d 1311, 1316 (Fed. Cir. 2011)).
198. *Id.* at 1115–16.
199. 898 F.3d 1232 (Fed. Cir. 2018).
200. *Id.* at 1233–34.
201. *Id.*

"[e]lectrical machines and apparatus," including "[e]lectric luminescent lamps."[202] CBP denied Gerson's protest, and Gerson filed suit with the CIT.[203] The CIT ruled that, although it was "plausible" HTSUS heading 8543 might cover the LED candles, such a reading would "impermissibly expand" that heading and "unduly narrow" HTSUS heading 9405.[204] It would also be discordant with the ENs, which recognize chapter 94 as one for finished household lamps, like Gerson's candles, versus chapter 85 as one for unfinished lamps used with other electric devices.[205]

In affirming the CIT's ruling, the Federal Circuit first looked to the language of the HTSUS headings at issue. HTSUS heading 9405 covers "[l]amps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included,"[206] whereas HTSUS heading 8543 covers "[e]lectrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter."[207] The Federal Circuit observed that the latter heading made no mention of lamps, which both parties agreed Gerson's products were.[208] The candles also did not appear to be "machines or apparatus" encompassed in HTSUS heading 8543, as they were primarily decorative rather than functional.[209] The court's analysis of the context of HTSUS heading 8543 within the HTSUS as a whole supports the interpretation that the appropriate classification is under HTSUS heading 9405, as do the ENs. The Federal Circuit explained that, if HTSUS heading 8543 were read to include the LED candles, it would have to include "*every* electric lamp, because all such lamps use electricity to generate light."[210] This interpretation, according to the court, would nearly moot HTSUS heading 9405 by reducing it to cover only non-electric lamps, which would include the removal of electric searchlights and spotlights referenced specifically in the heading.[211] Such an interpretation also is in discord with the

202. *Id.* at 1234.
203. *Id.*
204. *Id.*
205. *Id.* at 1234–35.
206. *Id.* at 1236 (alteration in original) (quoting HTSUS heading 9405).
207. *Id.* (alteration in original) (quoting HTSUS heading 8543).
208. *Id.*
209. *See id.* (noting that there was a "plausible" argument that the candles were covered by HTSUS heading 8543, but ultimately finding they were decorative items with a functional component and, therefore, outside the scope of the heading).
210. *Id.* at 1237.
211. *Id.*

relevant ENs, which indicate that HTSUS heading 9405 references lamps of any material using any light source, and "suggest that chapter 94 was intended to include at least finished, standalone electric lamps used in the home."[212] The ENs for HTSUS heading 8543, in contrast, describe unfinished goods that are used as a component in other equipment.[213]

In focusing its analysis on the language of the headings, rather than the subheadings, the Federal Circuit reaffirmed that classification takes a "top-down approach," rejecting Gerson's suggestion to look first at the language of the subheadings.[214] The court stated that to adopt Gerson's approach "would effectively divorce the analysis from the necessary context provided by the higher-level headings" and, contrary to precedent, would allow a subheading to expand the scope of one heading and diminish the scope of another.[215] Gerson argued that the Federal Circuit's interpretation had its own flaws—one of which would be to moot subheading 8543.70.70 because no "electric luminescent lamps" would ever fall within the "electrical machines or apparatus" of HTSUS heading 8573.[216] The Federal Circuit found this argument unpersuasive, noting several examples within the relevant EN of items that would fall within HTSUS subheading 8543.70.70 (e.g., "'[e]lectro-luminscent devices, generally in strips, plates, or panels, and based on electroluminescent substances . . . placed between two layers of conductive material')."[217]

G. Sigvaris, Inc. v. United States

In *Sigvaris, Inc. v. United States*,[218] the Federal Circuit affirmed the result (though not the analysis) of the CIT's decision, denying duty free classification for graduated compression hosiery as articles specially designed for the handicapped.[219] Between 2008–2010, Sigvaris imported several entries of compression hosiery, classified by CBP as "[o]ther graduated compression hosiery: . . . [o]f synthetic

212. *Id.*
213. *Id.* at 1237–38. The Federal Circuit also held that the CIT's use of ENs to clarify the scope of ambiguous headings was proper. *Id.* at 1238.
214. *Id.* at 1240.
215. *Id.* (citing Orlando Food Corp. v. United States, 140 F.3d 1437, 1440 (Fed. Cir. 1998); R.T. Foods, Inc. v. United States, 757 F.3d 1349, 1353 (Fed. Cir. 2014)).
216. *Id.*
217. *Id.* at 1240–41 (quoting EN 85.43(16)).
218. 899 F.3d 1308 (Fed. Cir. 2018).
219. *Id.* at 1310.

fibers" under HTSUS subheading 6115.10.40.[220] Sigvaris protested, seeking a "special classification" under HTSUS subheading 9817.00.96 reserved for "[a]rticles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles."[221] After CBP denied the protest in December 2011, Sigvaris paid the liquidated duties based off of CBP's classification and then filed suit in the CIT.[222]

The CIT granted the government's motion for summary judgment.[223] As part of its analysis, the CIT determined that, although the later, more severe stages of Chronic Venous Disorder could constitute a physical handicap, the earlier stages could not, given that early stage sufferers were still "ambulatory and able to perform daily tasks."[224] The CIT then determined that the Sigvaris imports targeted those with early Chronic Venous Disorder only and, thus were not "specially designed for the [use or benefit of the] physically handicapped."[225] Of significance to the CIT's assessment was Sigvaris's own advertising, warning that the products are not for bedridden or immobilized patients.[226] Sigvaris appealed.

The Federal Circuit agreed "that the subject merchandise is not specially designed for the use or benefit of any class of persons, let alone physically handicapped persons," but used a different analytical framework than the CIT to arrive at this conclusion.[227] The court observed that "[t]he plain language of the heading focuses the inquiry on the 'persons' for whose use and benefit the articles are 'specially designed,' and not on any disorder that may incidentally afflict persons who use the subject merchandise."[228] It also noted that the CIT

220. *Id.* at 1310–11 (alterations in original) (quoting HTSUS subheading 6115.10.40).
221. *Id.* at 1311 (quoting HTSUS subheading 9817.00.96).
222. *Id.*
223. *Id.*
224. *Id.* at 1311–12.
225. *Id. at* 1312.
226. *Id.*
227. *Id.* at 1313.
228. *Id.* at 1314.

assumed improperly that the products at issue were "specially designed."[229] They were not, according to the court.[230]

To be "specially designed" for purposes of this inquiry, the Federal Circuit concluded that "the subject merchandise must be intended for the use or benefit of a specific class of persons to an extent greater than for the use or benefit of others."[231] Factors to aid in this assessment, which were employed by CBP, include "the physical properties of the merchandise, whether the merchandise is solely used by the handicapped, the specific design of the merchandise, the likelihood the merchandise is useful to the general public, and whether the merchandise is sold in specialty stores."[232] After engaging in the proper evaluation and relying heavily on Sigvaris's own medical expert and advertising, the court held that the Sigvaris compression hosiery was not specially designed for a specific class of persons, and any incidental benefits of said hosiery for those suffering from Chronic Venous Disorder did not change this result.[233] In light of the holding, the panel did not address whether persons who might use the products at issue are physically handicapped.[234]

IV. ANTIDUMPING AND COUNTERVAILING DUTY CASES

A. *Overview of Antidumping and Countervailing Duty Cases*

American industries may petition for relief from market distortions caused by foreign producers that sell their goods in the United States at less than fair market value, or by foreign producers whose goods are subsidized by foreign governments to lower their costs.[235] To obtain such relief, a U.S. entity or group files an AD or CVD petition, respectively.[236] Before initiating an investigation based on either type of petition, the DOC must confirm that the petition was filed on behalf

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229. *See id.* (explaining that the CIT began its analysis by questioning whether Chronic Venous Disorder constitutes a disability, which "presupposes that the subject merchandise is 'specially designed'").
230. *Id.*
231. *Id.*
232. *Id.* at 1314–15 (quoting Sigvaris, Inc. v. United States, 227 F. Supp. 3d. 1327, 1337 (Ct. Int'l Trade 2017)).
233. *Id.* at 1315.
234. *Id.*
235. 19 U.S.C. §§ 1671, 1673 (2012).
236. Catherine DeFilippo, *Antidumping and Countervailing Duty Handbook*, U.S. INT'L TRADE COMM'N, I-3 (June 2015), https://www.usitc.gov/trade_remedy/documents/handbook.pdf.

of the appropriate domestic industry.[237] A "domestic industry" in this context requires two things. First, "the domestic producers or workers who support the petition account for at least [twenty-five] percent of the total production of the domestic like product."[238] Second "the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition."[239]

The responsibility for evaluating AD/CVD petitions lies with the DOC and the ITC. The DOC must determine whether there is, in fact, unfair pricing and/or unfair subsidies.[240] The ITC must determine whether a domestic industry is being materially injured, or threatened with material injury, due to such actions.[241] If both the DOC and the ITC make affirmative findings, then the DOC may issue AD/CVD orders designed "to level the playing field for U.S. companies injured by these unfair trade practices."[242] The DOC will establish an AD/CVD rate for targeted respondents and an "all-others rate" for exporters not individually investigated as well as for new exporters whose goods prospectively will fall within the scope of the order.[243]

When questions arise as to whether a particular product falls within the ambit of an AD/CVD order, an interested party may request a scope ruling from the DOC.[244] There is no specific statute governing the scope interpretation for AD/CVD orders.[245] The DOC has addressed this dearth through specific regulations that complement

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237. 19 U.S.C. §§ 1671a(c)(1)(A)(ii), 1673a(c)(1)(A)(ii).

238. 19 U.S.C. §§ 1671a(c)(4)(A)(i), 1673a(c)(4)(A)(i).

239. 19 U.S.C. §§ 1671a(c)(4)(A)(ii), 1673a(c)(4)(A)(ii). "Domestic industry" within the context of AD/CVD cases is a collective concept and very different from the individual entity concept of "domestic industry" within the context of Section 337 investigations. *See* 19 U.S.C. § 1337(a)(3) (referencing criteria for a single entity to satisfy domestic industry through expenditures on U.S. plant and equipment, labor and capital, and/or exploitation of the IP).

240. 19 U.S.C. §§ 1671d(a)(1), 1673d(a)(1).

241. 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1).

242. 19 U.S.C. §§ 1671d(c)(2), 1673d(c)(2); *Priority Trade Issue: Antidumping and Countervailing Duties*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/trade/priority-issues/adcvd (last visited May 20, 2019).

243. 19 U.S.C. §§ 1671d(c)(1)(B)(i)(I), 1673d(c)(1)(B)(i)(II); *see* §§ 1677f-1(c)(2), 1677f-1(e)(2).

244. 19 C.F.R. § 351.225(a) (2018).

245. Meridian Prods., LLC v. United States, 851 F.3d 1375, 1381 (Fed. Cir. 2017) (citing Shenyang Yuanda Aluminum Indus. Eng'g Co., v. United States, 776 F.3d 1351, 1354 (Fed. Cir. 2015)).

case law.[246] The DOC must always look first at the text of the order, and, if it is unambiguous, the plain meaning of the language governs.[247] In evaluating the plain language, the DOC must consider "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations), and the Commission."[248] If these sources do not lead to a dispositive result, the DOC may then consider: "[(1)] [t]he physical characteristics of the product; [(2)] [t]he expectations of the ultimate purchasers; [(3)] [t]he ultimate use of the product; [(4)] [t]he channels of trade in which the product is sold; and [(5)] [t]he manner in which the product is advertised and displayed."[249] Scope rulings from the DOC may be challenged at the CIT.[250]

B. Capella Sales & Services, Ltd. v. ITC

In *Capella Sales & Services, Ltd. v. ITC*,[251] the Federal Circuit affirmed the CIT's dismissal of two cases challenging CVD rates on aluminum extrusions imported from China.[252] In May 2011, the DOC issued a CVD order covering such products that included an all-others rate of 374.15 percent.[253] Between November 2011 and June 2012, Capella imported four entries of the subject merchandise.[254] Around the same time period, other entities were contesting the 374.15 percent rate in what became known as the *MacLean-Fogg*[255] litigation, resulting in a determination that the all-others rate was unlawful and establishing a new rate of 7.37 percent.[256] After the DOC issued its *Timken* notice related thereto (effective December 10, 2012), it initiated, upon request by multiple entities, an administrative review of 2011 and 2012

246. *Id.*
247. *Id.*
248. 19 C.F.R. § 351.225(k)(1).
249. 19 C.F.R. § 351.225(k)(2).
250. 19 U.S.C. § 1516a (2012). For more information on the CIT, see *supra* Section III.A.
251. 878 F.3d 1329 (Fed. Cir. 2018).
252. *Id.* at 1330–31.
253. *Id.* at 1332.
254. *Id.*
255. MacLean-Fogg Co. v. United States, 853 F. Supp. 2d 1336 (Ct. Int'l Trade 2012), *rev'd* 753 F.3d 1237 (Fed. Cir. 2014).
256. *Capella*, 878 F.3d at 1332.

entries subject to the relevant CVD order.[257] Capella did not participate, but when CBP subjected Capella's entries to the 374.15 percent rate pursuant to 19 C.F.R. § 351.212(c), Capella refused to pay and filed a complaint in the CIT disputing CBP's imposition of the higher duty rate.[258]

The CIT dismissed Capella's case for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[259] It determined that 19 U.S.C. § 1516a(c)(1) and 1516a(e) clearly state that the original duty rate would apply for entries made before issuance of a *Timken* notice where liquidation was not enjoined by a court or was the subject of administrative review—the situation presented to the CIT.[260] Capella's entries occurred prior to the *Timken* notice, and Capella had neither filed suit nor sought administrative review for its entries. Thus, the original duty rate was appropriate.[261] Capella appealed the dismissals.

In affirming the CIT, the Federal Circuit held that 19 U.S.C. § 1516a(c)(1), in particular its use of the term "entries," was not ambiguous and applied to Capella.[262] It was undisputed that Capella's entries were made before the *Timken* notice in December 2012 and were not enjoined by the CIT in a § 1516a suit.[263] Capella's claims to the contrary were unpersuasive to the court. First, Capella argued that "entries" in § 1516a(c)(1) was ambiguous because it was not modified by "all."[264] As the panel observed, Capella offered no case law to support this interpretation—and for good reason, as this would have meant that Congress intended § 1516a(c)(1) to apply only on occasion.[265]

Second, Capella argued that the legislative history and the purpose of the statute rendered "entries" ambiguous.[266] The court disagreed and identified examples from the statute itself demonstrating that Congress understood how to except certain types of entries from the rate calculated by CBP, as it did for entries made subsequent to a

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257. *Id.* at 1331–32. The term "*Timken* notice" refers to the Federal Register notice required by *Timken Co. v. United States* for decisions "not in harmony with" an existing DOC determination. *See* 893 F.2d 337, 341 (Fed. Cir. 1990).
258. *Capella*, 878 F.3d at 1332.
259. *Id.*
260. *Id.*
261. *Id.* at 1332–33.
262. *Id.* at 1333.
263. *Id.* at 1334.
264. *Id.*
265. *Id.*
266. *Id.*

Timken notice.[267] Moreover, the discussion of "usual" liquidation situations in the legislative history only contrasted the "extraordinary circumstances" already outlined in the statute (e.g., the § 1516a(c)(2) suspension of liquidation during litigation), nothing more.[268] Because it was clear Congress "knew how to create exceptions" to CVD assessments and "explicitly did so" when it desired, the Federal Circuit "decline[d] to create further non-statutory exceptions based on the extrinsic factors cited by Capella."[269] Accordingly, the court concluded that "an ordinary reading of the statute indicates that only in certain specified cases may [the DOC] apply a rate different from its final determination rate. Interpreting the statute consistently with the legislative history does not permit, much less require, [the Federal Circuit] to devise a non-statutory exception to § 1516a(c)(1)."[270]

Even if "entries" could be deemed ambiguous, the Federal Circuit indicated that, exercising *Chevron*[271] deference, it agreed that the DOC's interpretation of § 1516a(c)(1) was within the range of permissible construction.[272] The court found that the DOC "sensibly assesses CVDs on nonreviewed entries in accordance with the final determination in effect at the time of entry."[273] The court recognized that "[t]his is consistent with the limited time CBP has to liquidate entries, . . . provides certainty to both [the DOC] and affected parties of the applicable rate for non-reviewed entries, and encourages affected parties to exercise the statutory avenues for challenging [the DOC's] determined rate."[274]

C. Changzhou Trina Solar Energy Co. v. ITC

In *Changzhou Trina Solar Energy Co. v. ITC*,[275] the Federal Circuit affirmed the imposition of AD/CVD orders concerning CSPV cells and modules from China.[276] In 2011, SolarWorld Americas, Inc. filed a

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267. *Id.*
268. *Id.* at 1335.
269. *Id.* at 1334–35.
270. *Id.* at 1335.
271. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (setting forth test to determine whether a governmental agency's interpretation of a statute warrants deference, whereby a court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by . . . an agency").
272. *Capella*, 878 F.3d at 1335 (referencing *Chevron*, 467 U.S. at 842–43 & n.9).
273. *Id.*
274. *Id.* (citation omitted).
275. 879 F.3d 1377 (Fed. Cir. 2018).
276. *Id.* at 1379–80.

petition seeking such orders.[277] In 2012, the DOC determined that CSPV products from China were being sold in the United States at less than fair value and were being subsidized by the Chinese government.[278] In tandem, the ITC found that those same imports were materially injuring a domestic industry.[279] Chinese producers and U.S. importers of CSPV products, including Changzhou, challenged the ITC's conclusions, filing suit in the CIT and arguing "that the Commission had not properly found the required causal connection between the unfairly priced or subsidized imports and the weakened state of the domestic industry that it identified as 'materially injured by reason of' the imports."[280] The CIT rejected this argument and determined that the ITC's analysis was properly supported.[281] The Chinese producers and U.S. importers appealed.[282]

In order to determine whether a domestic industry was "materially injured" by the CSPV imports from China, the Federal Circuit employed a two-part test: (1) whether "present material injury" exists; and (2) whether that injury is "by reason of" the imports in question.[283] The court also noted there were certain statutorily delineated economic factors that must be considered, including the volume of imports at issue, the effect of those imports on U.S. prices for like domestic products, and the impact of those imports on U.S. production operations of domestic producers of like products.[284] The opinion carefully laid out precedent from the U.S. Supreme Court, the Federal Circuit, and other appellate bodies, along with relevant legislative history, teaching that the statutory phrase "by reason of" should be interpreted as requiring, at a minimum, but-for causation.[285] How that standard is best applied, the court explained, may be fact-dependent, and the ITC is given broad discretion regarding the methodology it exercises.[286] "[T]he Commission need not isolate the

277. *Id.* at 1379.
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.* at 1380.
284. *Id.* at 1380–81.
285. *Id.* at 1381–83.
286. *Id.* at 1383.

injury caused by other factors from injury caused by unfair imports, nor demonstrate the subject imports are the 'principle' cause of injury."[287]

The Federal Circuit held that, contrary to appellants' arguments, the ITC properly addressed but-for causation—that is, the ITC determined "that there is a causal nexus between subject imports and the poor conditions of the domestic industry[,] and that the domestic industry is materially injured by reason of subject imports."[288] More specifically, the court recognized the comprehensive assessment made by the ITC, as set forth below:

> [T]he picture emerges of a domestic industry (1) with a steadily declining market share despite phenomenal demand growth, (2) that has lost market share due primarily to the significant and increasing volume of subject imports from China, (3) that has faced significant underselling by subject imports from China and depressed and suppressed prices, (4) that consistently lost money throughout the POI [period of investigation] despite the tremendous demand growth and significant cost reductions, (5) that by the end of the POI experienced declines even in many of the performance indicators that previously had shown some improvement, and (6) that reported recognizing asset write-offs and/or costs related to the closure of production facilities, revalued inventories, and/or asset impairments.[289]

Notwithstanding these findings, appellants argued that the ITC failed to adequately consider other factors as causes for the challenges faced by the domestic industry, such as competition from cheap natural gas, the decline in government subsidies for solar energy products (making it more difficult to sell those products at low prices), and the increase in demand from the utility segment of the market, as compared to other segments.[290] With the definition of "material injury" in mind (i.e., "harm which is not inconsequential, immaterial, or unimportant"), these factors, appellants maintained, materially injured the domestic industry, even in the absence of Chinese imports.[291] The court, however, rejected each of these arguments. It found that "the impetus toward grid parity" could not fully account for the underselling of the CSPV imports.[292] It further found that there

287. *Id.*
288. *Id.* at 1384.
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.* at 1385.

remained available a mix of favorable and demand-stimulating subsidies during the POI.[293] Finally, it found that, although the U.S. utilities market was experiencing high demand, that phenomenon still did not explain the declining share of the CSPV domestic industry in the residential and non-residential markets, caused by "consistent and substantial underselling" of the import products at issue.[294]

The Federal Circuit observed that:

> [The ITC's summary] rested on detailed findings about demand conditions and the business cycle in the domestic market, the roles of conventional and renewable sources of electricity, government incentives and regulations at federal, state, and local levels, domestic consumption trends, market segments, who was supplying the domestic market, what happened to prices and market shares during the POI, and the ways in which "the domestic industry's financial performance was very poor and deteriorating." The findings rested on various types of evidence, including the answers to questionnaires addressed to market participants such as purchasers.[295]

In deciding that each of the factors identified by appellants "did not account for (materially) all of the domestic industry's weakening during the POI," the court held that the ITC "in substance made the required determination of but-for causation."[296]

D. Glycine & More, Inc. v. United States

Glycine & More, Inc. v. United States[297] explored the degree of judicial deference that should be afforded to government agencies. The specific question the Federal Circuit had to address was whether "an agency regulation, previously adopted by formal notice-and-comment rulemaking procedures pursuant to the [Administrative Procedure Act], [could] be amended by a guidance document that is not so enacted."[298] The court, affirming the CIT, held that it could not.[299]

By statute, the DOC is required upon request to review a previously issued antidumping ("AD") order, and then must conduct such a review at least once a year at prescribed times.[300] The statute, however,

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293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.* at 1386.
297. 880 F.3d 1335 (Fed. Cir. 2018).
298. *Id.* at 1336.
299. *Id.* at 1336–37.
300. *Id.* at 1337 (citing 19 U.S.C. § 1675(a)(1) (2012)).

does not tell the DOC how it should treat requests for review that are withdrawn.[301] To bridge this gap, the DOC adopted a regulation, which, inter alia, instructs the DOC Secretary to "rescind an administrative review . . . , in whole or in part, if a party that requested a review withdraws the request within [ninety] days of the date of publication of notice of initiation of the requested review."[302] The regulation further allows filing an extension "if the Secretary decides that it is reasonable to do so."[303] The history of this provision, set forth in detail in the opinion, reflects the DOC's understanding of reasonable grounds to extend a deadline for filing a withdrawal, such as to prevent waste of departmental resources, to allow parties time to learn the results of prior administrative reviews, and to avoid conducting undesired reviews.[304]

In August 2011, the DOC issued a "Notice" that dramatically changed how the DOC approached requests for extensions of time to file withdrawals. The Notice stated, inter alia, that:

> In order to provide parties additional certainty with respect to when the Department will exercise its discretion to extend this [ninety]-day deadline, interested parties are advised that, with regard to reviews requested on the basis of anniversary months on or after August 2011, the Department will not consider extending the [ninety]-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request. Determinations by the Department to extend the [ninety]-day deadline will be made on a case-by-case basis.[305]

In 2012, two producers of glycine—one from China (Baoding Mantong Fine Chemistry Co., Ltd. ("Baoding")) and the other from the United States (GEO Specialty Chemicals, Inc. ("GEO Specialty"))—asked the DOC to review a 1995 AD order on glycine imported from China.[306] GEO Specialty withdrew its request on the last day of the applicable ninety-day period, but Baoding made its withdrawal request after the deadline had expired.[307] Baoding argued that extraordinary circumstances existed, offering that its withdrawal would have had no effect prior to GEO Specialty's withdrawal, and that Baoding did not

301. *Id.*
302. *Id.* (quoting 19 C.F.R. § 351.213(d)(1) (2018)).
303. *Id.* (quoting 19 C.F.R. § 351.213(d)(1)).
304. *Id.* at 1338–40.
305. *Id.* at 1340.
306. *Id.* at 1336–37, 1340–41.
307. *Id.* at 1341.

learn of GEO Specialty's actions until after the ninety-day period had expired.[308] In addition, Baoding suggested that granting its withdrawal would preserve DOC resources, as Baoding had not yet submitted its questionnaire responses.[309] The DOC Secretary declined to grant the extension.[310] Glycine & More, a U.S. importer of Baoding's glycine, objected to the DOC's rejection of Baoding's request to withdraw as well as to the dumping duty margin assigned to Baoding, which ultimately led Glycine & More to file suit in the CIT.[311]

The CIT determined that the DOC's interpretation of the 2011 Notice was unreasonable, and that the DOC's rejection of Baoding's withdrawal request was improper.[312] Accordingly, the CIT remanded the matter to the DOC.[313] In doing so, the CIT told the DOC to consider that "[Baoding's] request occurred only days after the [ninety]-day deadline expired; that the review was in an early stage with no questionnaire response being submitted; that [Baoding] could not have known the final results of the prior review; and that all parties who had requested the review wanted it rescinded."[314] The CIT made clear its opinion that unless the DOC identified "new and compelling circumstance[s]," it "appears likely" that an extension of the ninety-day period should be allowed.[315] On remand, the DOC granted the requested extension under protest, as it could not find any "new and compelling circumstance[s]" to justify a second denial.[316] The CIT affirmed the DOC's extension.[317] GEO Specialty appealed.[318]

The Federal Circuit held that, because the regulation was unambiguous (which is the first inquiry that must be made), no deference to the DOC's interpretation of the rule was warranted.[319] The court concluded that:

308. *Id.*
309. *See id.* (finding that Baoding had failed to show extraordinary circumstances sufficient for the DOC to grant an extension).
310. *Id.* at 1337, 1342.
311. *Id.* at 1342.
312. *Id.*
313. *Id.* at 1342–43.
314. *Id.* at 1343.
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.* at 1344.
319. *Id.* at 1344–45.

> [T]he meaning of the 2011 Notice is plain, and the difference between what the sentence at issue meant before and after the Notice is equally plain. Before the Notice, the regulation was understood to provide the Secretary with wide discretion, to use judgment regarding the facts and circumstances presented, and to apply a reasonableness test in making the decision whether to extend the deadline for filing a withdrawal notice. After the 2011 Notice, only "extraordinary circumstances" would do, and the Secretary's discretion was to be applied narrowly to the case, and only when an applicant for extension could prove such extraordinary circumstances exist. Thus, the Notice represented an incompatible departure from the clear meaning of the regulation. It was not simply an interpretive statement regarding an ambiguity in the regulation or a general statement of policy.[320]

The court explained further that to give deference to the DOC's position "would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation" without going through the appropriate process.[321] "Since the 2011 Notice was intended to effectively rewrite the substantive meaning of the regulation without going through the necessary notice-and-comment rulemaking," the court held the Notice "has no legal standing, and thus provides no basis upon which the Secretary could make his decision. That was the ruling made by the CIT, and it is correct."[322]

E. ThyssenKrupp Steel North America, Inc. v. United States

In *ThyssenKrupp Steel North America, Inc. v. United States*,[323] the Federal Circuit addressed CBP's refusal to apply DOC liquidation instructions to ThyssenKrupp's entries of corrosion-resistant ("CORE") steel.[324] The court determined that the CIT had subject matter jurisdiction over the case, and that application of the DOC instructions was a non-ministerial task requiring the implementation of new law.[325] Accordingly, the court reversed in part, vacated in part, and remanded for further proceedings.[326]

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320. *Id.* at 1345.
321. *Id.* (quoting Christensen v. Harris Cty., 529 U.S. 576, 588 (2000)).
322. *Id.*
323. 886 F.3d 1215 (Fed. Cir. 2018).
324. *Id.* at 1220–21.
325. *Id.* at 1220–21, 1225.
326. *Id.* at 1228.

In 1993, the DOC issued an AD order on imports of CORE from Germany.[327] In March 2013, the DOC revoked this order, retroactively effective to February 14, 2012.[328] The DOC issued instructions to CBP in April 2013 ("April Instructions") regarding this revocation, providing, inter alia, that:

> [CBP] is directed to terminate the suspension of liquidation for all shipments of CORE from Germany which were entered, or withdrawn from warehouse, for consumption on or after 02/14/2012. All entries of CORE from Germany that were suspended on or after 02/14/2012 should be liquidated without regard to antidumping duties (i.e., release all bonds and refund all cash deposits with interest). . .
>
> Liquidation instructions covering certain entries of CORE from Germany during the period 08/01/2011 through 07/31/2012 were issued under message number 2291302, dated 10/17/2012. However, as noted [sic] paragraph 1 above, this order has been revoked, effective 02/14/2012. Accordingly, *all unliquidated entries* of CORE from Germany entered, or withdrawn from warehouse, for consumption on or after 02/14/2012 should be liquidated without regard to antidumping duties.[329]

After the February 14, 2012, revocation effective date, but before the DOC announced the revocation in March 2013, ThyssenKrupp imported several entries of CORE from Germany.[330] The DOC announced its liquidation calculation for six of these entries on November 16, 2012, and on December 21, 2012, for the remaining two.[331] After the DOC published the revocation notice of the 1993 AD order, ThyssenKrupp protested these liquidations, arguing that each was subject to the April Instructions that eliminated the AD duties on those entries.[332] The Port of Philadelphia denied ThyssenKrupp's protest, maintaining that the revocation notice applied only to "unliquidated entries."[333] The Port of Mobile took a very different position, referring the protest to CBP headquarters "because that Port believed that ThyssenKrupp's 'arguments regarding liquidation finality raise questions of interpretive application'"—that is, the protest

327. *Id.* at 1218.
328. *Id.* at 1219.
329. *Id.* at 1219–20 (alterations in original).
330. *Id.* at 1218–19.
331. *Id.* at 1219.
332. *Id.* at 1220.
333. *Id.*

required more than a "ministerial reaction."[334] Ultimately, CBP determined that the April Instructions unambiguously applied only to unliquidated entries and, because each of ThyssenKrupp's entries were liquidated before the April Instructions issued, ThyssenKrupp was still subject to the AD duties.[335] CBP also stated that its "refusal to reliquidate [ThyssenKrupp's] entries pursuant to the [April 4] revocation instructions is not protestable" because that refusal was a merely ministerial act.[336] ThyssenKrupp filed suit in the CIT.[337]

The CIT granted the government's motion to dismiss for lack of jurisdiction under 19 U.S.C. § 1581(a) and its motion for judgment on the pleadings under 19 U.S.C. § 1581(i).[338] The CIT determined that: (1) ThyssenKrupp's protest was not timely filed; (2) CBP's disposition of the protest did not constitute a "denial" of a protest under 19 U.S.C. § 1581(a); and (3) the liquidations in November and December 2012 were not "decisions of the [CBP]," but rather were purely ministerial.[339] ThyssenKrupp appealed.[340]

In its opinion, the Federal Circuit dealt with each of the CIT's determinations in turn. First, the court held that ThyssenKrupp's protest had been timely filed during the 180-day window prescribed in 19 U.S.C. § 1514—a fact acknowledged by CBP.[341] ThyssenKrupp submitted its protests in April and May 2013 in response to CBP actions that took place in November and December 2012.[342]

Second, the panel held that CBP's actions regarding ThyssenKrupp's protests qualified as denials pursuant to 19 U.S.C. § 1514(a), as CBP used a form to respond to ThyssenKrupp's protests, deeming them "non-protestable."[343] The government did not argue to the contrary.[344]

Third, the court held that ThyssenKrupp's claims did not pertain to purely ministerial acts of CBP, but rather required CBP to apply new law to ThyssenKrupp's entries.[345] Indeed, the panel drew attention to the six-page opinion letter CBP issued interpreting the April

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334. *Id.*
335. *Id.*
336. *Id.* (alterations in original).
337. *Id.*
338. *Id.* at 1221.
339. *Id.* at 1222.
340. *Id.* at 1221.
341. *Id.* at 1222.
342. *Id.* at 1224.
343. *Id.* at 1222–23.
344. *Id.* at 1223.
345. *Id.* at 1223–25.

Instructions, which invoked statutory language, regulations, and case law.[346] CBP had defined "unliquidated," applied that interpretation to ThyssenKrupp's protests, and then left standing the liquidation decisions.[347] Thus, the court concluded, CBP "made a determination that embodied meaningful judgments about what was required," which was "hardly a ministerial act."[348]

After holding that "unliquidated" was ambiguous, the Federal Circuit went on to reject CBP's interpretation thereof in favor of a definition that included "entries covered by liquidation determinations that are still subject to alteration through ordinary direct review mechanisms."[349] This definition, according to the court, takes into account regulations reflecting that "liquidation" often is not final.[350] In sum, the Federal Circuit stated that:

> The government cites nothing in the statute or legislative history that supports its view that the revoked antidumping duties continue to apply to entries that occurred after the revocation date, just because there was an initial liquidation determination as to those entries, even when that determination is subject to a timely filed protest. Nor does the government's view make sense in terms of the basic policy: [the DOC] has determined that entries made on or after the revocation date do not [warrant] antidumping duties, yet the government's view would apply such duties to those entries.[351]

The court concluded that because the April Instructions "do not plainly exclude ThyssenKrupp's entries, [CBP's] interpretation and application of the term 'unliquidated' are reviewable under 28 U.S.C. § 1581(a)."[352] In light of this conclusion, the court did not address ThyssenKrup's alternative arguments that subject matter jurisdiction existed under 19 U.S.C. § 1581(i), or that the April Instructions were contrary to law.[353]

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346. *Id.* at 1225.
347. *Id.*
348. *Id.*
349. *Id.* at 1226.
350. *Id.*
351. *Id.* at 1227.
352. *Id.*
353. *Id.* at 1227–28.

F. Bell Supply Co. v. United States

In *Bell Supply Co. v. United States*,[354] the Federal Circuit vacated and remanded a CIT determination that Chinese oil country tubular goods ("OCTG"), the processing for which is finished in third countries, did not circumvent AD/CVD orders directed to such goods from China.[355] OCTG are steel pipes and tubes used in conjunction with oil and gas wells.[356] They are produced by first making a "green tube," which is a steel tube that must undergo some type of "finishing" (e.g., heat treatment, threading, coating, etc.) before it can be used in its intended applications.[357] In 2010, the DOC issued AD/CVD orders on OCTG from China that included both finished and unfinished tubes, including green tubes.[358]

Subsequently, CBP determined that unfinished OCTG from China that is finished in a third country before being imported into the United States was considered to have a country of origin of that third country.[359] Specifically, the DOC indicated that "heat treating has been held to substantially transform green tubes into oil well tubing."[360] This determination prompted requests for clarification of the orders by multiple domestic steel companies.[361] In 2014, in response to those requests, the DOC issued a final scope ruling that took a position opposite to that of CBP by treating Chinese OCTG finished in third countries as still being subject to the orders.[362] The DOC made clear "that green tubes are not substantially transformed during the finishing process, even if that process includes heat treatment."[363] Bell Supply, a U.S. steel importer that purchased green tubes from China and then had them heat treated and finished in Indonesia, contested the DOC's scope ruling.[364]

The CIT determined that the DOC's interpretation was not supported by the words of the orders, and that the substantial transformation test should not have been used to analyze whether

354. 888 F.3d 1222 (Fed. Cir. 2018).
355. *Id.* at 1224–25.
356. *Id.* at 1225.
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.*
361. *Id.* at 1225–26.
362. *Id.* at 1226.
363. *Id.*
364. *Id.*

OCTG imported from Indonesia fell within the ambit of the orders.[365] Rather, if the DOC believed the orders were being circumvented, the CIT instructed that 19 U.S.C. § 1677j was designed for this specific inquiry and thus must be employed.[366] Accordingly, the CIT remanded the matter.[367]

On remand, the DOC, again, concluded that green tubes from China were covered by the orders, even if they were finished in a third country, but, this time, the DOC did not rely on the substantial transformation test.[368] Instead, the DOC reasoned that "the plain language of the scope of the Orders expressly covers unfinished Chinese OCTG, and that language can reasonably be interpreted to include unfinished OCTG [from China], even when finished in a third country."[369] The CIT rejected the DOC's reasoning, stating that the orders contained no specific language about third country processing, and that such silence could not be interpreted as support for the DOC outcome.[370]

In its third consideration of the case, the DOC, relying on factors contained in 19 C.F.R. § 351.225(k), ruled that OCTG from China, which is finished in third countries, did not fall within the scope of the orders.[371] The DOC also ruled that OCTG imported from Indonesia did not satisfy the circumvention standards within 19 U.S.C. § 1677j, as the activities conducted in Indonesia are not "minor [or] insignificant," but rather "add[] significant value to the final value of the finished OCTG."[372] The CIT sustained this last round of DOC rulings, and the domestic steel companies appealed.[373]

On appeal, the Federal Circuit first dealt with the question of whether the products at issue could be considered *unfinished* OCTG from China. The court held they could not, as the OCTG "unquestionably" arrives in the United States as a finished product.[374] The domestic steel companies claimed that "the merchandise can still be categorized as unfinished OCTG because that is how it left China, and the Orders do not require the unfinished OCTG to be 'directly

365. *Id.*
366. *Id.* (citing 19 U.S.C. § 1677j (2012)).
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.* at 1227.
371. *Id.* (citing 19 C.F.R. § 351.225(k) (2018)).
372. Id.
373. *Id.*
374. *Id.* at 1227–28.

imported.'"[375] The court, however pointed to precedent teaching that the mere absence of a direct importation requirement in the orders does not expand their scope.[376] The DOC "cannot find authority in an order based on the theory that the order does not deny authority."[377]

The Federal Circuit next dealt with the question of whether the products at issue could be considered *finished* OCTG from China.[378] The parties disagreed over the test to employ in making this assessment. The domestic steel companies maintained a substantial transformation analysis is appropriate to determine the legal country of origin of imported merchandise.[379] "A substantial transformation occurs where, 'as a result of manufacturing or processing steps . . . [,] the [product] loses its identity and is transformed into a new product having a new name, character and use.'"[380] Bell Supply contended the circumvention test under 19 U.S.C. § 1677j should be used.[381] This provision is intended to stop importers from avoiding a duty order by routing products through a third country not subject to the order where only "minor or insignificant" processing occurs.[382]

The Federal Circuit held that the DOC "is entitled to use the substantial transformation analysis to determine country of origin before resorting to the circumvention inquiry."[383] The court reasoned that, to evaluate whether a duty order is being circumvented, it must begin by determining where an imported article is legally from, which can be ambiguous given that a single product can be manufactured from various components from various countries and require multiple processing steps.[384] If the application of the substantial transformation test shows that a product has a country of origin that is identified in the duty order at issue, then no further inquiry is needed.[385] If, however, the substantial transformation test shows that a product has a country of origin that is *not* identified in the duty order at issue, that product can only fall within the ambit of the order if circumvention is

375. *Id.* at 1228.
376. *Id.*
377. *Id.* (quoting Duferco Steel, Inc. v. United States, 296 F.3d 1087, 1096 (Fed. Cir. 2002)).
378. *Id.*
379. *Id.*
380. *Id.* (quoting Bestfoods v. United States, 165 F.3d 1371, 1373 (Fed. Cir. 1999)).
381. *Id.* at 1228–29.
382. *Id.* at 1229 (quoting 19 U.S.C. § 1677j(a)(1)(C) (2012)).
383. *Id.*
384. *Id.*
385. *Id.* at 1230.

found under 19 U.S.C. § 1677j.[386] This order of application does not render § 1677j superfluous, as the CIT contended. Even if a product is transformed into something new, the court noted, the process for such transformation still may be insignficant and carried out in an attempt to sidestep a duty order.[387] The Federal Circuit also pointed to the provision's legislative history in support of this interpretation, as it "indicates that § 1677j can capture merchandise that is substantially transformed in third countries."[388] Accordingly, the Federal Circuit remanded the case to the CIT to determine whether the DOC had done a proper substantial transformation analysis.[389]

G. Meridian Products, LLC v. United States

Meridian Products, LLC v. United States[390] is another decision addressing AD/CVD orders for aluminum extrusions from China. In this matter, as it did in *Whirlpool Corp. v. United States*[391] (discussed below), the Federal Circuit reversed the CIT's determination that aluminum kitchen appliance door handles were outside the scope of those orders.[392] The orders encompassed "parts for final finished products that are assembled after importation."[393] Included were "aluminum extrusion components that are attached (e.g., by welding or fasteners) to form subassemblies, i.e., partially assembled merchandise."[394] There were two exclusions to this scope: one for finished merchandise and one for finished goods kits.[395] "A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication . . . ."[396] A product could not be excluded as a finished goods kit "merely by including fasteners such as screws, bolts, etc. in the packaging with an aluminum extrusion product."[397]

386. *Id.* at 1230.
387. *Id.* at 1230–31.
388. *Id.* at 1231.
389. *Id.*
390. 890 F.3d 1272 (Fed. Cir. 2018).
391. 890 F.3d 1302 (Fed. Cir. 2018).
392. *Meridian*, 890 F.3d at 1274. For a discussion of *Whirlpool*, see *infra* Section IV.H.
393. *Meridian*, 890 F.3d at 1274 (quoting Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order, 76 Fed. Reg. 30,650 (May 26, 2011)).
394. *Id.* (quoting 76 Fed. Reg. at 30,650–51).
395. *Id.* at 1274–75.
396. *Id.* at 1275 (quoting 76 Fed. Reg. at 30,651).
397. *Id.* (quoting 76 Fed. Reg. at 30,651).

In January 2013, Meridian requested a scope ruling from the DOC on whether its merchandise was subject to the orders, and, a few months later, the DOC determined that it was.[398] The inclusion of plastic end caps, according to the DOC, did not provide a basis to rely on the finished goods kit exclusion, as they were "fasteners" for purposes of the scope ruling.[399] The DOC explained that the language in the orders supported this conclusion (i.e., that "fasteners" include items "such as screws, bolts, etc."), as did Meridian's description of its own products (i.e., "[t]he end caps are used to *fasten* the handle to the door").[400] As such, the finished goods kit exclusion did not apply because the orders made clear that the inclusion of such fasteners in the packaging did not render the product a finished goods kit.[401] Moreover, the DOC found that Meridian's merchandise was covered by the orders because their "scope expressly includes aluminum extrusions which are identified by reference to their end use," such as, oven door handles.[402] Thus, "the handles are included with[in] the scope regardless of whether or not they are ready for use 'as is' before importation."[403]

Meridian challenged the DOC's ruling, and the CIT reversed.[404] The CIT determined that the plastic end caps were *not* fasteners, but rather "components of a complete handle assembly."[405] Further, the CIT determined that Meridian's products qualified under the finished merchandise exclusion because the oven door handles were ready for use "as is" in their imported state.[406] The CIT remanded the case to the DOC, which, under protest, redetermined that the oven door handles were not within the scope of the orders.[407] The CIT affirmed, and the Aluminum Extrusions Fair Trade Committee appealed to the Federal Circuit.[408]

The Federal Circuit held that the DOC had demonstrated by substantial evidence that the oven door handles "alone consist of extruded aluminum products that meet the physical descriptions of merchandise subject to the order," and that they did not satisfy the

398. *Id.*
399. *Id.* at 1278–79.
400. *Id.* at 1279.
401. *Id.* at 1275.
402. *Id.*
403. *Id.* at 1280.
404. *Id.* at 1276.
405. *Id.* (quoting Meridian Prods., LLC v. United States, 125 F. Supp. 3d 1306, 1314 (Ct. Int'l Trade 2015)).
406. *Id.*
407. *Id.*
408. *Id.* at 1277.

finished goods kit exclusion.[409] In reversing the CIT's determination, the court stated that the CIT had "improperly narrowed the scope of the antidumping duty order by finding that the [oven door] handles are 'assemblies' that are not covered by the general scope description."[410] As it was unclear whether Meridian's handles were "fully and permanently assembled at the time of entry," the court remanded the matter for clarification.[411] If the handles are found to be imported unassembled, then the DOC's original scope ruling controls, and the matter ends.[412] If the handles are found to be imported "fully and permanently assembled," then a determination must be made as to whether the finished merchandise exclusion is applicable.[413]

H. Whirlpool Corp. v. United States

Like *Meridian*, which issued just one day prior, *Whirlpool* is another appeal involving AD/CVD orders issued in 2011 for aluminum extrusions imported from China.[414] As outlined above, extrusions subject to the orders were "parts for final finished products that are assembled after importation," or parts "that are attached (e.g., by welding or fasteners) to form subassemblies, i.e., partially assembled merchandise."[415] There are two exclusions to the general scope of the orders: (1) a finished merchandise exclusion, covering products "containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels";[416] and (2) a finished goods kit exclusion that is "a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication."[417]

In December 2013, Whirlpool requested a scope ruling that its kitchen appliance door handles with end caps were not covered by the

409. *Id.* at 1278, 1281.
410. *Id.* at 1280.
411. *Id.* at 1281–82.
412. *Id.* at 1282.
413. *Id.*
414. Whirlpool Corp. v. United States, 890 F.3d 1302, 1305 (Fed. Cir. 2018); *see Meridian*, 890 F.3d at 1274.
415. *Whirlpool*, 890 F.3d at 1305 (quoting Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order, 76 Fed. Reg. 30,650 (May 26, 2011)).
416. *Id.* at 1305–06 (quoting 76 Fed. Reg. at 30,651).
417. *Id.* at 1306.

orders.[418] The DOC determined in August 2014 that Whirlpool's handles did not satisfy the exclusion criteria for finished merchandise and, thus, were subject to the orders.[419] In doing so, the DOC also found that the fasteners exception applied to both the finished goods kit exclusion as well as to the finished merchandise exclusion.[420] Accordingly, the DOC stated that "the mere inclusion of fasteners, in this case the plastic end caps, does not result in the extruded aluminum handles falling outside the scope of the Orders as extruded finished merchandise."[421]

Whirlpool filed suit in the CIT, which remanded the matter on two bases. First, the CIT held that the general scope language of the orders could not be read to include Whirlpool's handles.[422] Second, the CIT held that the DOC "erroneously determined that the assembled handles do not qualify for the finished merchandise exclusion because the fasteners exception does not apply to the finished merchandise exclusion."[423] On remand, the DOC redetermined, under protest, that Whirlpool's products were outside the scope of the orders, and the CIT affirmed that second DOC ruling.[424] In August 2016, the Aluminum Extrusions Fair Trade Committee, the same appellant as in *Meridian*, appealed to the Federal Circuit.[425]

The Federal Circuit first held that Whirlpool's assembled handles were covered by the general scope language of the orders.[426] Contrary to the CIT's finding, the court observed the orders' "general scope language unambiguously includes aluminum extrusions that are part of an assembly" as they "explicitly include aluminum extrusions 'that are assembled after importation' in addition to 'aluminum extrusion components that are attached (e.g., by welding or fasteners) to form subassemblies.'"[427]

The Federal Circuit next ruled on the applicability of the exclusions and exceptions to Whirlpool's products. Agreeing with the CIT, the court held that the finished goods kit exclusion did not apply because Whirlpool's handles were not imported in disassembled form.[428]

418. *Id.*
419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.* at 1307.
423. *Id.*
424. *Id.*
425. *Id.* at 1305, 1307; *see* Meridian Prods., LLC v. United States, 890 F.3d 1272, 1274 (Fed. Cir. 2018).
426. *Whirlpool*, 890 F.3d at 1308–09.
427. *Id.* at 1309.
428. *Id.*

The court also agreed with the CIT that the exception for fasteners unambiguously pertained only to the finished goods kit exclusion, but not the finished merchandise exclusion.[429] The sole sentence referencing the fastener exception mentions finished goods kits, but not finished merchandise.[430] Further, that same single sentence references "packaging," invoking the definition of the finished goods kit exclusion (i.e., "a packaged combination of parts").[431] Such language has nothing to do with finished merchandise, which is "fully and permanently assembled and completed at the time of entry."[432] Further still, the court opined that if the DOC "had actually intended to sweep into the scope all finished merchandise consisting solely of aluminum extrusion components and fasteners, it would have done so in the scope language rather than expressly confining its fasteners exception to the finished goods kit exclusion."[433]

The Federal Circuit remanded the case to the CIT to determine whether Whirlpool's handles met the requirements for the finished merchandise exclusion.[434] Judge Reyna dissented on this procedural course of action, however, as he considered that question to have been answered.[435] He noted "[t]he Orders define 'finished merchandise' as merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass or vinyl, picture frames with glass pane and backing material, and solar panels."[436] The DOC, as Judge Reyna highlighted, already had found Whirlpool's products to have been covered by the orders because, inter alia, "there are no components or parts included, whether loose or attached."[437] The DOC also already had "determined that if a product that only consists of aluminum extrusions and fasteners, as in this case, satisfies the finished merchandise exclusion, the exclusion would swallow the scope 'because any aluminum extrusion products, as long as it can be

429. *Id.* at 1310.
430. *Id.*
431. *Id.* (quoting Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order, 76 Fed. Reg. 30,650, 30651 (May 26, 2011)).
432. *Id.* (quoting 76 Fed. Reg. at 30,651).
433. *Id.*
434. *Id.* at 1311–12.
435. *Id.* at 1312–13 (Reyna, J., concurring-in-part and dissenting-in-part).
436. *Id.* at 1313 n.2.
437. *Id.* at 1312–13.

identified by end use, could be considered a finished product.'"[438] Thus, the DOC "reasoned that this cannot be the correct interpretation because it is contrary to the scope itself, which covers aluminum extrusions."[439] Accordingly, Judge Reyna would have affirmed the DOC's determination that Whirlpool's handles did not fall within the finished merchandise exclusion.[440]

I. Sunpreme Inc. v. United States

In *Sunpreme Inc. v. United States*,[441] the Federal Circuit held that the CIT lacked subject matter jurisdiction over the case and, therefore, reversed the CIT's determination.[442] Sunpreme is a U.S. company that imported from a Chinese entity solar modules composed of "several layers of amorphous silicon less than one micron in thickness."[443] A dispute arose regarding whether Sunpreme's products were subject to the AD/CVD orders issued in 2012 covering CSPV cells from China.[444] Those orders explicitly excluded from their scope "*thin film photovoltaic products* produced from amorphous silicon."[445] Ultimately, this dispute prompted Sunpreme to request a scope ruling from the DOC, which was initiated on December 30, 2015.[446]

Twenty-two days beforehand, however, on December 8, 2015, Sunpreme filed suit in the CIT, challenging CBP's collection of cash deposits and suspension of liquidation, as well as seeking a preliminary injunction to prevent further collections.[447] Sunpreme claimed CBP "acted ultra vires and exceeded its ministerial task of collecting antidumping and countervailing duties by interpreting the CSPV Orders to cover Sunpreme's solar modules, despite that thin film products were expressly excluded from the coverage" thereof.[448] The government moved to dismiss Sunpreme's complaint for lack of subject matter jurisdiction, asserting that Sunpreme had failed to

438. *Id.* at 1313.
439. *Id.*
440. *Id.*
441. 892 F.3d 1186 (Fed. Cir. 2018).
442. *Id.* at 1188.
443. *Id.* at 1189.
444. *Id.* at 1190.
445. *Id.* at 1189 (quoting Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Countervailing Duty Order, 77 Fed. Reg. 73,017, 73,017 (Dec. 7, 2012)).
446. *Id.* at 1190.
447. *Id.*
448. *Id.*

exhaust its administrative remedies by preemptively filing a complaint with the CIT without first obtaining a scope ruling from the DOC.[449] The CIT granted Sunpreme's preliminary injunction, denied the government's motion to dismiss (determining that jurisdiction existed under 28 U.S.C. § 1581(i)), and ordered CBP to return already paid duties to Sunpreme (that were the fruit of CBP's ultra vires acts).[450]

The Federal Circuit, in addressing the government's appeal from the CIT's decision, focused on the singular issue of jurisdiction.[451] The CIT had relied on 28 U.S.C. § 1581(i) to support its jurisdiction over Sunpreme's complaint.[452] This provision, according to the court, "embodies a 'residual' grant of jurisdiction, and may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate."[453] The Federal Circuit held that the CIT did not have jurisdiction under 28 U.S.C. § 1581(i) because jurisdiction was available under 28 U.S.C. § 1581(c), which governs challenges at the CIT to DOC scope rulings.[454]

Moreover, the court held that relief under 28 U.S.C. § 1581(c) was not "manifestly inadequate."[455] The fact that Sunpreme might suffer severe financial hardship did not alter this result, as "mere allegations of financial harm do not render a remedy established by Congress manifestly inadequate."[456] Rather, to be "manifestly inadequate," a remedy must be, for example, "an exercise in futility," or "useless."[457] Delay also is insufficient to demonstrate that a remedy is "manifestly inadequate."[458] The court concluded that Sunpreme had made no such showing with regard to the relief offered by 28 U.S.C. § 1581(c).[459]

In addition, the court held that "Sunpreme was required to exhaust the administrative remedies available to it in the form of a scope ruling

449. *Id.* at 1191.
450. *Id.*
451. *Id.*
452. *Id.*
453. *Id.* (citing Fujitsu Gen. Am., Inc. v. United States, 283 F.3d 1364, 1371 (Fed. Cir. 2002)).
454. *Id.* at 1191–92 ("[W]hen relief is prospectively and realistically available under another subsection of 1581, invocation of subsection (i) is incorrect.") (alteration in original) (quoting Chemsol, LLC v. United States, 755 F.3d 1345, 1354 (Fed. Cir. 2014))).
455. *Id.* at 1192.
456. *Id.* at 1193 (citing Int'l Custom Prods., Inc. v. United States, 467 F.3d 1324, 1327 (Fed. Cir. 2006)).
457. *Id.* at 1193–94 (citations omitted).
458. *Id.* at 1194.
459. *Id.*

inquiry and scope ruling determination."[460] "The problem Sunpreme c[ould not] overcome is that it failed to wait until it had a formal scope ruling in hand prior to filing suit."[461] Such a requirement is appropriate, the court explained, because "[p]ermitting such circumventions would discourage importers from seeking scope rulings and undermine the remedial scheme establish by Congress."[462] Sunpreme's attempt to sidestep this procedural problem through "creative pleading" was unavailing.[463] Although Sunpreme had cast its complaint as one addressing CBP's ultra vires acts, the panel recognized the relief Sunpreme sought as being properly afforded by a scope ruling from the DOC and, thus, subject to the CIT's jurisdiction under 28 U.S.C. § 1581(c).[464]

J. SolarWorld Americas, Inc. v. United States

In yet another opinion involving duty orders covering CSPV cells from China, the Federal Circuit in *SolarWorld Americas, Inc. v. United States*[465] affirmed the CIT's determination as to the correct AD margin calculation related thereto.[466] The AD order in question issued in December 2012, and, pursuant to a timely request, an administrative review of the order was initiated.[467] The focus of the review was limited to the two largest Chinese exporters of those products—Wuxi Suntech Power Co., Ltd. and Yingli Energy (China) Co., Ltd. ("Yingli").[468] In July 2015, the DOC issued its opinion, which, inter alia, calculated a weighted-average AD margin for Yingli of 0.79 percent.[469] To arrive at this percentage, the DOC relied in part on a selection of surrogate values for each of Yingli's production factors, including aluminum frames and semi-finished polysilicon ingots and blocks.[470] The

460. *Id.* at 1192.
461. *Id.*
462. *Id.* at 1193.
463. *Id.*
464. *See id.*
465. 910 F.3d 1216 (Fed. Cir. 2018).
466. *Id.* at 1220.
467. *Id.* at 1221.
468. *Id.*
469. *Id.*
470. *Id.* As the court explained:

> [I]f [the DOC] determines the exporting country is a "nonmarket economy country" and "finds that available information does not permit the normal value of the subject merchandise to be determined under [§ 1677b(a)]," then [the DOC] calculates normal value by valuing the "factors of production" used

calculation for aluminum frames used a value from the Thai Harmonized Tariff Schedule heading 7604 for "[a]luminum bars, rods[,] and profiles" under subheading 7604.29 that included such products other than those already specified in subheadings at a comparable level, including "non-hollow profiles."[471] The calculation for semi-finished polysilicon ingots and blocks used a value from the world market price for polysilicon.[472] SolarWorld, a domestic producer of the products at issue, brought suit in the CIT, claiming that the DOC undervalued the surrogate values for Yingli's inputs and, consequently, calculated an improperly low AD duty margin for Yingli.[473]

The CIT disagreed. It determined that the surrogate value the DOC chose for aluminum frames was more specific than Thai HTS subheading 7616.99 covering, inter alia, "articles of aluminum [not elsewhere specific or included]," for which SolarWorld advocated.[474] The CIT also determined that the surrogate value the DOC chose for semi-finished polysilicon ingots and blocks was "the best available information on the record for that factor of production, in part because it was the only surrogate value of record."[475] SolarWorld appealed.[476]

The Federal Circuit affirmed the CIT's determination.[477] With regard to the surrogate value for aluminum frames, the court found

> in producing the merchandise in comparable "market economy country or countries." Specifically, [the DOC] must value the factors of production "to the extent possible . . . in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." Accordingly, in selecting these so-called surrogate values to represent the factors of production, [the DOC] "attempts to construct a hypothetical market value of that product in the nonmarket economy."

Id. at 1220–21 (third and sixth alternations in original) (citations omitted). A "nonmarket economy country" is defined as "any foreign country that [the DOC] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." *Id.* at 1220 n.3 (alteration in original) (quoting 19 U.S.C. § 1677(18)(A) (2012)). China is categorized as a nonmarket economy country, and, thus, the DOC, typically does not deem credible sales in China and financial data received from Chinese producers for calculating the normal value of subject merchandise under § 1677b(a). *Id.*

471. *Id.* at 1222–23 (alterations in original).
472. *Id.* at 1221.
473. *See id.*
474. *Id.* at 1221–22 (alteration in original).
475. *Id.* at 1222.
476. *Id.* at 1219–20.
477. *Id.* at 1220.

that "[s]ubstantial evidence supports [the DOC's] finding that import data under Thai HTS [h]eading 7604 constitutes the best available information from which to value Yingli's aluminum frames."[478] Yingli, in its questionnaire, described its products as "'alloyed *aluminum profiles*' that are '*not hollow*,'" which tracks the language in the Thai HTS subheading the DOC chose.[479] Any potential discordance between the ENs for heading 7604 (describing a uniform cross-section) and SolarWorld's contention that some of the Yingli products at issue contain corners (meaning that some of those products do not have uniform cross-sections) is unavailing.[480] The court concluded that Thai HTS heading 7604 still constituted the best available information, given the similarities identified by the DOC. "[The DOC] is 'not required to engage in a classification analysis' but instead is 'required to determine which of the competing subheadings constituted the best available information.'"[481] Indeed, the DOC is imbued by statute with broad discretion in choosing the best available information to use for valuing factors of production.[482] Although CBP classification rulings can be considered in calculating surrogate value choices, "[the DOC] is not bound by [CBP] rulings on imports for purposes of a best available information determination."[483]

With regard to the surrogate value for semi-finished polysilicon ingots and blocks, the Federal Circuit also found that substantial evidence existed to support the DOC's selection of a surrogate value.[484] The world market price that the DOC used came from two different data sources, it accounted for processing costs Yingli was expected to have, and no other surrogate value could be identified.[485] The DOC was not required to construct a surrogate value from scratch for these goods, and it is not the practice of the DOC to do so.[486]

478. *Id.* at 1223.
479. *Id.*
480. *Id.*
481. *Id.* (quoting Downhole Pipe & Equip., L.P. v. United States, 776 F.3d 1369, 1379 (Fed. Cir. 2015)).
482. *Id.* at 1224.
483. *Id.* at 1225.
484. *Id.*
485. *Id.* at 1225–26.
486. *Id.* at 1226.

CONCLUSION

Trade has been of perennial importance to the development of the American economic and legal systems. As the CIT recounted, "[t]he first case tried before the first judge appointed to the first court organized under the Constitution of the United States involved a dispute arising from an importation into the new nation."[487] With over $2 trillion dollars of imports coming into the country annually, the delivery of predictable, measured, and fair redress for the myriad disputes that come with this level of activity is as challenging as it is critical.[488] Each decision in the Federal Circuit's 2018 international trade jurisprudence, from the most granular (i.e., classifying varieties of screws)[489] to the most sweeping (i.e., defining the limits of Presidential power to implement tariffs),[490] reflects the same deliberate, thoughtful expertise that further strengthens the U.S. trade enforcement regime.

487. *About the Court*, U.S. COURT OF INT'L TRADE, https://www.cit.uscourts.gov/about-court (last visited May 20, 2019).

488. *United States Imports*, WORLD INTEGRATED TRADE SOLUTION, https://wits.worldbank.org/CountryProfile/en/Country/USA/StartYear/2013/EndYear/2017/TradeFlow/Import/indicator/MPRT-TRD-VL (last visited May 20, 2019).

489. *See supra* Section III.C (reviewing GRK Canada, Ltd. v. United States, 885 F.3d 1340 (Fed. Cir. 2018)).

490. *See supra* Section II.A (reviewing Silfab Solar, Inc. v. United States, 892 F.3d 1340 (Fed. Cir. 2018)).