2016 INTERNATIONAL TRADE LAW DECISIONS OF THE FEDERAL CIRCUIT

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INTRODUCTION

The 2016 term for appeals from the U.S. Court of International Trade (CIT) to the U.S. Court of Appeals for the Federal Circuit was an exciting term. As is the case in most other years, appellants faced the substantial challenge of circumventing the strong deference that the Federal Circuit gives to the U.S. Department of Commerce ("Commerce") in making its dumping determinations or to U.S. Customs and Border Protection (CBP) in making its classification decisions.[1] And with few exceptions, these appeals were unsuccessful for the importers. This Article examines the key precedential cases from the Federal Circuit's 2016 term and organizes them into three Parts: (1) antidumping and countervailing duty cases; (2) classification cases; and (3) procedural cases. The procedural cases category captures all cases that fall outside the scope of the first two categories.

I. ANTIDUMPING AND COUNTERVAILING DUTY CASES

When an imported good is suspected of being sold in the United States at less than fair market value,[2] Commerce may decide to levy an antidumping duty on that good.[3] Similarly, if an imported good is suspected of receiving foreign government support to lower its cost, countervailing duties may be placed on that good.[4] Commerce is responsible for investigating and deciding whether there has been or are likely to be sales by foreign producers at less than fair market value, in the case of dumping, or whether a subsidy has been provided, in the case of

1. Kevin J. Fandl, *2015 International Trade Decisions of the Federal Circuit*, 65 AM. U. L. REV. 997 (2016) [hereinafter Fandl, *2015 International Trade Decisions*]; Kevin J. Fandl, *2013 International Trade Decisions of the Federal Circuit*, 63 AM. U. L. REV. 1375 (2014) [hereinafter Fandl, *2013 International Trade Decisions*]; Kevin J. Fandl, *2010 International Trade Decisions of the Federal Circuit*, 60 AM. U. L. REV. 1121 (2011).

2. Fair Market Value is defined as "the value of property as determined by the marketplace (or objective purchasers) rather than as determined by a subjective individual." Cornell Law Sch., Fair Market Value, Wex Legal Dictionary, www.law.cornell.edu/wex/fair_market_value (last visited May 9, 2018).

3. 19 U.S.C. § 1673(1) (2012). An antidumping duty is a form of relief available for U.S. industries from imports sold in the United States at less than fair value. *Understanding Antidumping and Countervailing Duty Investigations*, U.S. INT'L TRADE COMMISSION, www.usitc.gov/press_room/usad.htm (last visited May 9, 2018).

4. *Id.* § 1671(a)(1). A countervailing duty is a form of relief available to U.S. industries from imports sold in the United States that benefit from foreign government subsidies. *Understanding Antidumping and Countervailing Duty Investigations*, *supra* note 3.

countervailing duties.[5] The U.S. International Trade Commission (ITC) then assesses whether the imported goods cause or threaten to cause material injury to a domestic industry in the United States.[6] If Commerce finds a foreign producer guilty of dumping product into the United States or having its product subsidized by a foreign government—and the ITC determines material injury has occurred or will likely occur due to these violations—Commerce will issue relevant antidumping and countervailing duty orders to address the violations.[7]

Antidumping cases usually begin with a domestic party that has been—or fears being—injured by the imported goods filing a claim.[8] The extent of the investigation is limited by the scope of the alleged dumping or subsidy in the domestic party's complaint.[9] Prior to performing the investigation, Commerce must ensure that the petition was filed on behalf of the relevant domestic industry.[10] Specifically, this is defined as support from producers that represent at least twenty-five percent of the total domestic production of the like product.[11]

In most large antidumping investigations conducted by Commerce, Commerce selects one or more representative foreign exporters for mandatory review and scrutinizes these exporters more carefully than others.[12] Based on the responses gathered, Commerce will establish individual antidumping duty rates for the respondents targeted and establish an "all others rate" for all other exporters meeting the criteria of the order.[13]

Commerce makes a rebuttable presumption that such exporters are operating under government control and that their assertion of price does not reflect the fair market value of the product being investigated.[14] However, individual exporters may challenge this

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5. *Id.* §§ 1671(a)(1), 1673(1); *see also* Fandl, *2013 International Trade Law Decisions*, *supra* note 1, at 1379; Understanding Antidumping and Countervailing Duty Investigations, United States Int'l Trade Comm'n, www.usitc.gov/press_room/usad.htm (last visited May 9, 2018).

6. 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1).

7. Duferco Steel, Inc. v. United States, 296 F.3d 1087, 1089 (Fed. Cir. 2002) (citing §§ 1673d, 1671d).

8. U.S. INT'L TRADE ADMIN., ENFORCEMENT AND COMPLIANCE ANTIDUMPING MANUAL, CHAPTER 1, at 2 (2015), http://ia.ita.doc.gov/admanual/2015/Chapter%2001%20Introduction.pdf.

9. U.S. INT'L TRADE ADMIN., ENFORCEMENT AND COMPLIANCE ANTIDUMPING MANUAL, CHAPTER 2, at 12, 13 (2015), http://ia.ita.doc.gov/admanual/2015/Chapter%2002%20Petitions.pdf.

10. 19 U.S.C. § 1673a(c)(1)(A)(ii), (c)(2).

11. § 1673a(c)(4)(A)(i).

12. 19 U.S.C. § 1677f-1(c)(2).

13. *Id.* § 1673d(c)(1)(B)(i).

14. *Id.* § 1677(18)(A).

rebuttable presumption by proving that the asserted prices are consistent with the fair market value of the goods.[15]

A. Viet I-Mei Frozen Foods Co. v. United States

In *Viet I-Mei Frozen Foods Co. v. United States*,[16] an exporter of certain frozen warmwater shrimp from Vietnam was subject to a larger antidumping duty order on that product than had been determined using non-market economy (NME) analysis.[17] However, the exporter, Grobest, was assigned a separate rate of zero percent during the first three administrative reviews of that order.[18] During the fourth administrative review, Grobest asked to be individually examined by Commerce.[19] First, Commerce refused to individually examine each warmwater shrimp exporter because doing so would have been impractical.[20] Instead, Commerce chose the two largest exporters, as it had done in the three previous reviews.[21] Then, Commerce refused Grobest's individual request for examination.[22] Commerce later explained that it denied the request because it would be "unduly burdensome" and "inhibit timely completion of the review."[23] Grobest challenged Commerce's refusal to provide it with an individual examination pursuant to 19 U.S.C. § 1677m(a)(2).[24] "After nearly two years in litigation," the CIT ordered Commerce to provide Grobest with an individual examination, which Commerce did in 2012.[25]

While Commerce was conducting the individual examination,

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15. *See, e.g.*, Transcom, Inc. v. United States, 294 F.3d 1371, 1373 (Fed. Cir. 2002) (affirming Commerce's use of a non-market economy (NME) presumption and an exporter's right to rebut the presumption by demonstrating independence from the NME entity).

16. Viet I-Mei Frozen Foods Co. v. United States (*Grobest IV*), 839 F.3d 1099 (Fed. Cir. 2016).

17. *Id.* at 1100, 1102, 1104–05. NME refers to "economies where the government has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the state." *Technical Information on Anti-Dumping*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (last visited May 9, 2018).

18. *Grobest IV*, 839 F.3d at 1102.

19. *Id.* at 1103.

20. *Id.* at 1102.

21. *Id.*

22. *Id.* at 1103.

23. *See* Grobest & I-Mei Indus. Co. v. United States, 815 F. Supp. 2d 1342, 1361, 1362 (Ct. Int'l Trade 2012).

24. *Id.*

25. *Id.*; Grobest & I-Mei Indus. (Vietnam) Co. v. United States (*Grobest II*), 853 F. Supp. 2d 1352, 1362 (Ct. Int'l Trade 2012); Grobest & I-Mei Indus. (Vietnam) Co. v. United States (*Grobest I*), 815 F. Supp. 2d 1342, 1361–62 (Ct. Int'l Trade 2012).

Grobest notified Commerce that it would withdraw its request for an individual examination due to the significant administrative and legal costs involved.[26] Commerce declined to respond to Grobest's withdrawal request and warned Grobest that its failure to provide sufficient information may "result in a finding based on adverse facts available."[27] Commerce then assigned Grobest the adverse facts available rate ("AFA") of 25.76%.[28] Grobest challenged the assignment, arguing that Commerce should not have recalculated Grobest's rate because the company lawfully withdrew its request for an individual examination within the ninety-day deadline.[29]

Upon appeal, the CIT upheld Commerce's decision to recalculate the rate and concluded that Commerce was under no obligation to terminate an individual examination once it had started.[30] The CIT stipulated that while a party can statutorily withdraw from a voluntarily requested examination of its assigned rate, the investigation of Grobest had been court-ordered and thus was not voluntary.[31] The Federal Circuit agreed with the CIT's conclusion that the ninety-day withdrawal deadline applied to voluntary requests for individual examinations, and Commerce was not required by statute or regulation to rescind the court-ordered request merely because Grobest initially requested the individual examination.[32] It asserted that "voluntary respondents, like mandatory respondents, cannot unilaterally dictate their level of participation once accepted for examination."[33] Thus, the AFA duty rate of 25.76% for Grobest was affirmed.[34]

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26. *Grobest IV*, 839 F.3d at 1103 (discussing Grobest's desire to withdraw due to "administrative and legal costs . . . greater than the company wish[ed] to incur" at that time).

27. *Id.* at 1103–04 (summarizing Commerce's assertion that Grobest would be subject to an adverse facts available rate of 25.76%, compared to just 3.92%, if Grobest did not respond to Commerce's investigation).

28. *Id.* at 1104; *see infra* notes 94–97 and accompanying text (describing how Commerce determines an AFA rate for foreign exporters). The AFA rate is based on domestic petitioners' allegations, utilized by Commerce when "foreign firms are deliberately uncooperative." Michael O. Moore, *U.S. Facts Available Antidumping Decisions: An Empirical Analysis*, 22 EUROPEAN J. OF POLITICAL ECON. 639, 641 (2006).

29. 19 C.F.R. § 351.213(d)(1) (2017) (providing that "[t]he Secretary will rescind . . . review . . . if a party that requested a review withdraws the request within 90 days of date of publication of notice of initiation of the requested review"); Viet I-Mei Frozen Foods Co. v. United States, 83 F. Supp. 3d 1345, 1347, 1354–55, 1358, 1363 (Ct. Int'l Trade 2015) [hereinafter *Grobest III*].

30. *Grobest III*, 83 F. Supp. 3d at 1361–63.

31. *Id.* at 1355–57, 1361, 1362.

32. *See Grobest IV*, 839 F.3d at 1108.

33. *Id.*

34. *Id.* at 1110–11.

B. CS Wind Vietnam Co. v. United States

CS Wind Vietnam Co. v. United States,[35] which began as a dumping investigation in 2012, reached its conclusion—barring further appeals—in the 2016 term with this appeal to the Federal Circuit.[36] Commerce determined that CS Wind, a Vietnamese wind tower manufacturer, was selling its products at about 51.5% below the normal value in the United States.[37] In 2012, Commerce published a preliminary determination stating that CS Wind was dumping and the ITC determined that an American industry was being materially injured.[38] CS Wind filed suit in the CIT to challenge Commerce's calculation of the weight of its wind towers and other factors used in calculating the dumping margin. CS Wind had reported the weight of the subject components based upon the total factors of production ("manufacturer's weight"), which Commerce chose to ignore, and instead utilizing the amount reported on the transoceanic packing weight ("packing weights").[39] The CIT initially supported Commerce's decision to use the "packed weights."[40]

The CIT made three rulings. First, it affirmed the use of packing weight rather than manufacturer's weight.[41] Second, it affirmed the decision not to use Korean purchase prices for flanges, welding wire, and wire flux, finding that the Korean exports likely received subsidies and were thus not fair market value cost calculations for those components.[42] Third, it affirmed Commerce's calculation of overhead costs with regard to jobwork charges (including erection and civil expenses).[43]

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35. CS Wind Vietnam Co. v. United States (*CS Wind IV*), 832 F.3d 1367 (Fed. Cir. 2016).

36. *Id.* at 1381.

37. *Id.* at 1369. "Normal value" generally refers to the price at which the product is sold or offered for sale in the exporting country. 19 U.S.C. § 1677b(a)(1)(B) (2012).

38. *CS Wind IV*, 832 F.3d at 1371.

39. CS Wind Vietnam Co. v. United States (*CS Wind I*), 971 F. Supp. 2d 1271, 1288–89 (Ct. Int'l Trade 2014) (explaining that CS Wind used the factors of production weight, which are "drawn from the actual weights of the inputs with no additional packing/transportation equipment added," and Commerce used the packed weight, which are "theoretical weights of all the inputs plus the weights of packing/transportation equipment").

40. *Id.* at 1295–96.

41. CS Wind Vietnam Co. v. United States (*CS Wind II*), No. 13–00102, 2014 WL 5510084, at *7–8 (Ct. Int'l Trade Nov. 3, 2014).

42. *CS Wind I*, 971 F. Supp. 2d at 1291, 1296.

43. CS Wind Vietnam Co. v. United States (*CS Wind III*), 13-00102, 2015 WL 2167462, at *2, *7–9 (Ct. Int'l Trade May 11, 2015) ("Jobwork expenses normally refer to the costs paid to third parties to whom raw materials are sent to manufacture finished goods and thus do not include the cost of raw materials (which are captured elsewhere) or direct labor (which is not utilized because the third party's labor is used).").

On appeal to the Federal Circuit, CS Wind secured a reversal of two of Commerce's determinations.[44] First, the Federal Circuit reversed the CIT's affirmance of Commerce's decision to rely upon "packing weights" rather than "manufacturer's weight," concluding that Commerce had not put forth a reasonable justification for doing so.[45] Second, the Federal Circuit affirmed the CIT's finding that Korean export prices should not be used due to the likelihood of those products being subsidized and thus not representing fair market value.[46] And third, the Court remanded the issue of overhead cost determinations, vacating the CIT's affirmance of Commerce's previous calculations.[47]

When considering the Federal Circuit's holding in *CS Wind*, it is important to take into account the fact that because goods exported from an NME are not considered to reflect fair market value through sales data, Commerce "constructs" the value of those products by assessing the costs of the factors of production.[48] These costs, which may include such factors as the cost of containers or general expenses, are determined by reviewing the exporter's costs.[49] In *U.S. Magnesium v. United States*,[50] the Federal Circuit addressed the question of how to classify the costs of one of the elements of the manufacturing process.[51]

C. U.S. Magnesium v. United States

In 1995, Commerce entered an antidumping order on magnesium metal from China.[52] In 2010, U.S. Magnesium ("USM") and Tianjin Magnesium International ("TMI") requested Commerce review TMI's sales.[53] During the review of TMI's sales, Commerce identified a distinction in magnesium production between TMI and USM.[54] TMI used a process called Pidgeon that requires the use of different materials, more particularly "retorts."[55] Retorts are used in a manner similar to kilns and furnaces in magnesium production, but, unlike

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44. *CS Wind IV*, 832 F.3d 1367, 1369 (Fed. Cir. 2016).
45. *Id.* at 1374.
46. *Id.* at 1374–75.
47. *Id.* at 1376.
48. 19 U.S.C. § 1677b(c)(1)(B) (2012); U.S. Magnesium LLC v. United States (*U.S. Magnesium*), 839 F.3d 1023, 1024 (Fed. Cir. 2016).
49. § 1677b(c)(1)(B); 839 F.3d at 1024.
50. 839 F.3d 1023 (Fed. Cir. 2016).
51. *Id.* at 1025.
52. Notice of Antidumping Duty Orders: Pure Magnesium from the People's Republic of China, the Russian Federation and Ukraine, 60 Fed. Reg. 25691-92 (May 12, 1995).
53. *U.S. Magnesium*, 839 F.3d at 1025.
54. *Id.* at 1025–27.
55. *Id.* at 1024–25.

furnaces or kilns, TMI had not considered them a cost of direct materials but rather a cost of manufacturing overhead.[56] This difference changes the cost structure of the product and also the duty assessed upon the company.[57] The CIT affirmed Commerce's determination that USM's "evidence with respect to industry practice in the accounting treatment of retorts was inconclusive."[58]

U.S. Magnesium makes clear that a substantial evidence standard of review applies to the CIT and Federal Circuit, which are the only courts other than the U.S. Supreme Court to have jurisdiction of this type of dispute.[59] Commerce argued that the retorts do not go into the final product and are "replaced too infrequently to be [considered] direct material."[60] USM argued that TMI committed fraud and that the evidence did not support Commerce's decision to classify retorts as overhead rather than as direct materials.[61]

The Federal Circuit upheld the CIT's judgment, ruling in Commerce's favor and finding that "no industry-wide practice ha[s] been shown" to account for retorts as a direct input as opposed to overhead.[62] This confirmed that USM had been accounting for its product improperly.

The outcome of cases such as *U.S. Magnesium* reflect the importance that companies place on ensuring that all costs are properly reflected and accounted for when subjected to antidumping duties. Another approach taken by some companies is to adjust production methods to effectively remove their products from an existing order. That was the approach in *Deacero S.A. DE C.V. v. United States*,[63] but, as the case below explains, adjusting production methods in an attempt to circumvent an antidumping order may be a wasted effort.

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56. *See id.* at 1027 (stating that TMI, through its supplier, believed that retorts were a cost of manufacturing overhead).

57. *Id.* at 1024–26.

58. *Id.* at 1030–31.

59. The standard of review is addressed by statute. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (stating a substantial evidence standard). Further, "Commerce's determinations . . . must be upheld unless they are 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *U.S. Magnesium*, 839 F.3d at 1026 (quoting § 1516a(b)(1)(B)(i)).

60. *U.S. Magnesium*, 839 F.3d at 1026.

61. *See id.* at 1026–27 (arguing that the retorts are direct materials because they were directly included in the calculation of the normal value for magnesium).

62. *Id.* at 1031.

63. 817 F.3d 1332 (Fed. Cir. 2016).

D. Deacero S.A. DE C.V. v. United States

Deacero involved an antidumping duty that Commerce issued on steel wire rod produced in Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine.[64] Commerce assessed a 20.11% duty on wire rods from Deacero, a Mexican manufacturer, with a diameter between five millimeters and nineteen millimeters.[65] Following that antidumping order, Deacero invested in making rods that were 4.75 millimeters in diameter instead of five millimeters in diameter to avoid the 20.11% duty.[66] Two groups of U.S. steel wire rod producers separately requested that Commerce initiate a scope and anti-circumvention inquiry to determine what fell within the order's scope.[67] Commerce decided that the 4.75 millimeter wire rod fell within the scope via an affirmative circumvention.[68] The two groups then requested that Commerce initiate a "circumvention inquiry as to whether 4.75 millimeter steel wire rod constituted a later developed product,"[69] but Commerce refused because "'such small diameter wire rod was commercially available prior to the issuance' of the duty order."[70] One of the groups, Deacero, filed suit to challenge that determination, but the CIT ruled that the 4.75 millimeter rods fell outside the order's scope.[71]

The Federal Circuit reviews CIT decisions de novo, applying substantial deference to Commerce's decisions.[72] On appeal, Commerce argued that

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64. *See id.* at 1335 (summarizing the scope of Commerce's October 29, 2002, antidumping order).

65. *Id.*

66. *Id.*

67. *Id.*

68. *See id.* (explaining Commerce's argument that the 4.75 millimeter and five millimeter steel wire rods were minor alterations of the subject merchandise and therefore should be subject to the duty imposed on steel wire rods).

69. Later-developed merchandise is one of four articles identified in the Tariff Act that permits Commerce to determine that certain articles fall within the scope of a duty order, although it may not fall within its literal scope. *Id.* at 1338–39. When determining whether later-developed merchandise is within the scope of an antidumping or countervailing duty order, the administering authority will consider whether: (1) the later-developed merchandise has the same general physical characteristics as the merchandise with respect to which the order was originally issued (e.g., the earlier product); (2) the expectations of the ultimate purchasers of the later-developed merchandise are the same as for the earlier product; (3) the ultimate use of the earlier product and the later-developed merchandise are the same; (4) the later-developed merchandise is sold through the same channels of trade as the earlier product; and (5) the later-developed merchandise is advertised and displayed in a manner similar to the earlier product. *See* 19 U.S.C. § 1677i(d)(1)(A)-(E) (2012).

70. *Deacero*, 817 F.3d at 1335.

71. *Id.*

72. *Id.* at 1336.

its determination of Deacero's alteration as minor—and therefore an attempt to circumvent the antidumping order—was reasonable and supported by law.[73] In response, Deacero argued that the anti-circumvention determination was not supported by substantial evidence.[74]

The Federal Circuit found that Commerce's initial determination to include Deacero's modified wire rod within the antidumping order's scope was supported by substantial evidence.[75] In reaching this conclusion, the Federal Circuit reasoned that the purpose of Commerce's circumvention inquiries is to "determine whether articles not expressly within the literal scope of a duty order may nonetheless be found within its scope" due to minor modifications of products covered by the investigation.[76] The Federal Circuit reversed the CIT's decision and found Commerce's initial determination to be correct.[77]

E. Jiaxing Brother Fastener Co., Ltd. v. United States

When calculating normal value for products exported from an NME, Commerce selects a third-country—a "surrogate country"—to substitute for the NME.[78] When selecting a surrogate country, Commerce looks for a market economy that is comparable to the NME.[79] Selecting that surrogate country involves a four-step process that has been in place since 2004:

> (1) the Office of Policy assembles a list of potential surrogate countries that are at a comparable level of economic development to the NME country;
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> (2) Commerce identifies countries from the list with producers of comparable merchandise;
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> (3) Commerce determines whether any of the countries which produce comparable merchandise are significant producers of that comparable merchandise; and
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> (4) if more than one country satisfies steps (1)–(3), Commerce will

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73. *Id.*
74. *Id.* at 1337.
75. *Id.* at 1337–39.
76. *Id.* at 1338.
77. *Id.* at 1339.
78. 19 U.S.C. § 1677b(c)(1) (2012); Jiaxing Bro. Fastener Co. v. United States, 822 F.3d 1289, 1292–93 (Fed. Cir. 2016); 19 C.F.R. § 351.408(c)(2) (2017).
79. *See* 19 U.S.C. § 1677b(c)(4) (stating that the surrogate country must have a similar level of economic development to the NME and be a significant producer of like merchandise); *see also Jiaxing*, 822 F.3d at 1292–93 (reiterating Commerce's statutory responsibility when dealing with an NME in the course of a antidumping proceeding); 19 C.F.R. § 351.408(b) (directing Commerce to prioritize per capita GDP in determining economic comparability of a surrogate country).

select the country with the best factors data.[80]

Commerce maintains discretion in selecting the surrogate country.[81] Yet in *Jiaxing Brother Fastener Co., Ltd. v. United States*,[82] Jiaxing challenged the scope of that discretion, arguing that Commerce's selection of Thailand as a surrogate country to China for the determination of input values was improper.[83] Historically, the surrogate country for China has always been India.[84] Due to Commerce's selection of as the surrogate country, an antidumping duty rate of 55.16% was assessed on Chinese firms importing steel rods.[85] On November 28, 2012, Jiaxing appealed Commerce's decision to select Thailand as the surrogate country, as opposed to India or the Philippines.[86]

In Jiaxing's appeal, the Federal Circuit was asked whether Commerce's decision to use Thailand over India as the surrogate nation for China was in accordance with the law.[87] The guiding statute, the Tariff Act,[88] "requires Commerce to calculate normal value of the subject merchandise based on surrogate values offered in a comparable market economy."[89] When dealing with NMEs, "Commerce seeks to construct a hypothetical normal value for the merchandise that is uninfluenced by the [NME]" and finds countries

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80. *Jiaxing*, 822 F.3d at 1293 (citing Vinh Hoan Corp. v. United States, 49 F. Supp. 3d 1285, 1292 (Ct. Int'l Trade 2015) (referencing U.S. DEP'T OF COM., IMPORT ADMIN. POL'Y BULL., NON-MARKET ECONOMY SURROGATE COUNTRY SELECTION PROCESS (2004), https://enforcement.trade.gov/policy/bull04-1.html)).

81. *Id.* at 1293, 1298.

82. 822 F.3d 1289 (Fed. Cir. 2016).

83. *Id.* at 1296; s*ee id.* at 1299 (rejecting Jiaxing's argument that Commerce had to consider India as a surrogate and finding there was no legal requirement that Commerce consider any particular country simply because it has been the traditional choice). During an antidumping review of steel threaded rods from China, Commerce sought to find a surrogate country that was comparable to China. *Id.* at 1294–95.

84. *Id.* at 1298.

85. *Id.* at 1294 (explaining how respondents originally received a 55.16% dumping margin when Commerce used India as the surrogate country). In contrast, when Commerce decided to use Thailand as the surrogate country instead of India, respondents' dumping margins were increased to 206%. Certain Steel Threaded Rod from the People's Republic of China: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review; 2010–2011, 77 Fed. Reg. 67,332, 67,333 (Nov. 9, 2012).

86. *Jiaxing*, 822 F.3d at 1296.

87. *Id.* at 1298.

88. Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 490 (codified as amended in scattered sections of 19 U.S.C.).

89. *Jiaxing*, 822 F.3d at 1292 (citing 19 U.S.C. § 1677b(c)(1) (2012)).

that are economically comparable to assess duty rates.[90] The Federal Circuit ultimately affirmed the CIT's decision to uphold Commerce's selection of Thailand as a surrogate country for China.[91]

F. Nan Ya Plastics Corp. v. United States

An antidumping order can have significant economic ramifications for exporters to the United States. For example, U.S. trade law allows exporters subject to an antidumping order to request an "administrative review" of the assigned duty rate.[92] These "administrative reviews" rely on information submitted by the requesting party to determine whether a different rate is justified.[93] In the event that the party withholds relevant information or submits information that cannot be verified, Commerce may apply an AFA rate on the requesting party.[94]

In making an AFA decision, Commerce may rely upon evidence from multiple sources: (1) the petition filed to initiate the investigation; (2) a final determination in the investigation; (3) a previous administrative review; or (4) any other information placed on the record.[95] If Commerce chooses to rely on secondary information—which is taken from the petition or prior administrative reviews—the statute requires that Commerce corroborate that information to the extent practicable.[96] Such corroboration is not required for primary information obtained from the subject investigation.[97]

In *Nan Ya Plastics Corp. v. United States*,[98] Commerce found that a Taiwan film exporter failed to participate in an administrative review, and thus significantly impeded the proceeding covering Polyethylene

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90. *Id.* at 1292–93 (citing Nation Ford Chem. Co. v. United States, 166 F.3d 1373, 1375 (Fed. Cir. 1999)).

91. *Id.* at 1302.

92. 19 U.S.C. § 1675(a)(1); Nan Ya Plastics Corp. v. United States, 810 F.3d 1333, 1337 (Fed. Cir. 2016).

93. 19 C.F.R. § 351.213(b) (2017); *see* QVD Food Co. v. United States, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (explaining Commerce's statutory duties when conducting an administrative review).

94. 19 U.S.C. § 1677e(a)(2), (b).

95. § 1677e(b).

96. § 1677e(c).

97. *Id.*; Nan Ya Plastics Corp. v. United States, 810 F.3d 1333, 1336, 1348 (Fed. Cir. 2016) ("Commerce properly found that § 1677e(c) unambiguously does not require the agency to corroborate information obtained during the course of the subject segment (i.e., primary information) when it uses that information as facts available, adverse or otherwise.").

98. 810 F.3d 1333 (Fed. Cir. 2016).

Terephthalate Film, Sheet, and Strip ("PET Film").[99] During the anniversary month of a countervailing duty order or antidumping order, an interested party may request that Commerce conduct an administrative review of that order.[100] In December 2010, Nan Ya informed Commerce that it would not submit the documentation required to conduct the review.[101] In this situation, the law permits Commerce to apply an AFA rate against a party that fails to corroborate its data with the required documentation.[102] Upon notification of the AFA assessed duty rates, Nan Ya did not contest Commerce's decision to adverse facts, but it argued that Commerce did not apply the correct legal standard when determining the margin.[103] The CIT remanded the case to Commerce, requesting that Commerce fully explain the corroboration requirements of 19 U.S.C. § 1677e(c).[104] The CIT ruled in Commerce's favor and Nan Ya appealed.[105]

On appeal, the Federal Circuit applied *Chevron* deference.[106] The Federal Circuit stated that it would defer to Commerce's interpretation if there is any unclear statutory language or an unreasonable resolution

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99. *Id.* at 1336, 1338–39. PET Film is also known as Mylar, a kind of polyester "made in extremely thin sheets of great tensile strength and used for recording tapes, insulating film, and manufacturing fabrics. 65 Fed. Reg. 56992 (2000); *Mylar*, COLLINS DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/mylar.

100. *See* U.S. INT'L TRADE ADMIN., ENFORCEMENT AND COMPLIANCE ANTIDUMPING MANUAL 2 (2015), https://enforcement.trade.gov/admanual/2015/Chapter%2021%20Administrative%20Reviews%20and%20Other%20Activities.pdf (outlining Commerce's process for conducting annual reviews of antidumping orders); *see also Understanding Antidumping & Countervailing Duty Investigations*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/press_room/usad.htm (last visited May 9, 2018) (defining antidumping orders and countervailing duty orders as the actions taken by the Secretary of Commerce when USITC determination is affirmative).

101. *Nan Ya Plastics Corp.*, 810 F.3d at 1339.

102. 19 U.S.C. § 1677e(b) (2012).

103. *Nan Ya Plastics Corp.*, 810 F.3d at 1337–38 (determining a dumping margin requires Commerce to consider the amount that the "normal value" exceeds the "export price" or "constructed export price" where the interested parties have the burden of creating an adequate record, but, if those parties fail to meet their burden, allowing Commerce the authority to make its determination based on whatever facts are available, including allowing negative inferences if the interested parties do not act to the best of their ability).

104. *Id.*

105. *Id.* at 1339–41.

106. *Chevron* deference asks whether Congress has directly spoken on the issue, and, if it has not, whether the agency's statutory interpretation is "reasonable" and "binding" and not "procedurally defective, arbitrary or capricious in substance." *See* United States v. Mead Corp., 533 U.S. 218, 227, 229 (2001) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

of language.[107] Nan Ya argued that Commerce violated 19 U.S.C. § 1677e(b) and (c) by applying the AFA rate.[108] Commerce argued that Nan Ya misunderstood the statute and its arguments only applied to one of its subsidiaries, Shinkong Synthetic Fibers Corporation.[109]

The Federal Circuit found that Commerce's interpretation of the investigatory process for administrative reviews was correct.[110] Because Nan Ya failed to submit information during the subject administrative review, Commerce was permitted to proceed with the application of an AFA rate.[111] The determination of that rate did not require corroboration since it was based on the subject investigation and not secondary information.[112] The Federal Circuit also ruled that Commerce has the discretion to apply the highest duty rate without demonstrating that the dumping margin reflects the "commercial reality" of the parties involved.[113]

G. Kyocera Solar Inc. v. United States

The last dumping case of 2016, *Kyocera Solar Inc. v. United States*,[114] was a statutory construction case involving solar panels from Kyocera, an American firm. The firm imported solar panels that consisted of components imported from Taiwan and then constructed in Mexico.[115] The component manufacturers were subjected to a dumping investigation by the ITC, which affected Kyocera's solar panels that were manufactured in Mexico and then imported into the United States.[116] Kyocera contended that its imports should be excluded from the investigation because the solar panels contained negligible amounts of the offending components.[117] The ITC refused to exclude those imports from the scope of its investigation, and Kyocera appealed to the CIT.[118]

The CIT applied *Chevron* deference to assess whether the ITC had properly interpreted its dumping investigation authority.[119] The ITC

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107. *Nan Ya Plastics Corp.*, 810 F.3d at 1339–41.
108. *Id.* at 1341, 1345.
109. *Id.* at 1345.
110. *Id.* at 1345–48.
111. *Id.*
112. *Id.* at 1348–49.
113. *Id.* at 1341–45.
114. 844 F.3d 1334, 1335 (Fed. Cir. 2016).
115. *Id.* at 1336.
116. *Id.*
117. *Id.* at 1337.
118. *Id.* at 1336.
119. Kyocera Solar, Inc., v. United States, 121 F. Supp. 3d 1354, 1358 (Ct. Int'l Trade 2015), *aff'd*, 844 F.3d 1334 (Fed. Cir. 2016).

possesses the authority to investigate "subject merchandise" which, in this case, were components imported from Taiwan, regardless of the fact that they were integrated into solar panels manufactured in Mexico.[120] The CIT found that the statute—19 U.S.C. § 1573—was clear on its face and left no room for additional interpretation.[121] That statute provided Commerce with the discretion to determine the scope of the investigation and which products and manufacturers would be subject to such an investigation.[122] The CIT found that the statute plainly required that Commerce make its determination regarding the scope of the investigation.[123]

On appeal, Kyocera argued that the statute required Commerce to conduct a negligibility analysis that would exclude imports that account for less than three percent of the volume of those imports into the United States.[124] However, the Federal Circuit disagreed with that interpretation, found that the negligibility analysis is done by the ITC in its determination of domestic injury, and found that Commerce's role of determining the scope of the investigation allows it to capture all of the subject merchandise that it deems appropriate.[125] In this case, Commerce concluded that the solar panels assembled in Mexico using components from Taiwan were subject to the order.[126] Thus, the Federal Circuit affirmed the CIT's decision.[127]

Antidumping cases constituted the bulk of Federal Circuit decisions this term, as they have done in years past and will likely do into the future.[128] These cases are increasing in number, reflecting an increasing trend toward protectionism in the United States.[129] In the

120. *Id.* at 1360.
121. *Id.* (holding that "Congress' intent is clear in this regard").
122. *Id.*
123. *Id.*
124. Kyocera Solar, Inc. v. U.S. Int'l Trade Comm'n., 844 F.3d 1334, 1337 (Fed. Cir. 2016).
125. *Id.* at 1339.
126. *Id.* at 1339–40.
127. *Id.* at 1340.
128. *See* Fandl, *2015 International Trade Decisions*, *supra* note 1, at 998 (discussing that most of the significant cases of 2015 focused on dumping); Jennifer S. Huber and Simon G. Courtman, *2014 International Trade Decisions of the Federal Circuit*, 64. AM. U. L. REV. 899, 903 (2015) (listing seventeen Federal Circuit cases addressing antidumping duty and countervailing duty orders).
129. *See, e.g.*, J. Scott Maberry and Lisa Mays, *The Revival of the Age of Antidumping and Countervailing Duty Cases*, SHEPPARD MULLIN (Aug. 17, 2016), https://www.globaltradelawblog.com/2016/08/17/the-revival-of-the-age-of-antidumping-and-countervailing-duty-cases; *see also* Chad P. Brown, *Protectionism is on the Rise: Antidumping Import Investigations*, BROOKINGS (Mar. 5, 2009), https://www.brookings.edu/opinions/protectionism-is-on-the-rise-antidumping-import-investigations.

majority of its cases, the Federal Circuit defers to Commerce's interpretations, but reviews most CIT decisions de novo, allowing it to add its own interpretation of key trade statutes and cases affecting antidumping law.[130] We can expect this trend to continue under the Trump Administration, as it appears interested in finding mechanisms to protect American industry,[131] and antidumping is a notable option.

II. CLASSIFICATION CASES

CBP determines the proper classification and necessary duty rate of an imported good. CBP uses the U.S. Harmonized Tariff Schedule (HTSUS) to classify goods. The HTSUS is comprised of a series of numerical rates separated by category of good. To determine classification, CBP cross-references the product to the HTSUS and—once the product has been classified—determine its duty rate.[132] Title VI of the North American Free Trade Agreement Implementation Act of 1993—known as the Customs Modernization Act—placed the ultimate burden on classification of goods on the importer.[133] This information is provided to CBP prior to entry of the goods.[134] However, the CBP officer has ultimate discretion to inspect and—if necessary—reclassify goods that appear to be misclassified.[135] The following cases address disputes over the classification of goods by CBP.

A. Tyco Fire Products v. United States

In *Tyco Fire Products v. United States*,[136] the Federal Circuit addressed the classification of glass bulbs. Tyco Fire Products imported liquid-filled glass bulbs into the United States from two German manufacturers.[137] The bulbs were components of Tyco's fire suppression sprinkler systems or shut-off valves for water heaters.[138] CBP

130. *Kyocera Solar, Inc.*, 844 F.3d at 1338.

131. Jacob M. Schlesigner et al., *Trump to Impose Steep Aluminum and Steel Tariffs*, WALL ST. J. (Mar. 1, 2018), https://www.wsj.com/articles/trump-wont-quickly-announce-new-tariffs-on-aluminum-steel-1519921704.

132. *See* Fandl, *2015 International Trade Decisions*, *supra* note 1, at 1012.

133. North American Free Trade Agreement Implementation Act, Pub. L. 103-182, § 638, 107 Stat. 2057, 2170, 2203 (1993) (codified as amended at 19 U.S.C. § 1500(b) (2012)).

134. 19 U.S.C. § 1481.

135. § 1500.

136. 841 F.3d 1353 (Fed. Cir. 2016).

137. *Id.* at 1355 ("The issue in this case is the proper classification of certain liquid-filled glass bulbs according to the HTSUS. Each bulb consists of a sealed, hollow glass tube that is filled with colored liquid and an air bubble.").

138. *Id.*

classified the bulbs as "other articles of glass" under HTSUS subheading 7020.00.60 ("heading 7020"), which carries a five percent duty.[139] Tyco protested that classification and claimed that the tubes should be classified under subheading 8424.90.90, which includes "Other" "Parts" of mechanical appliances under heading 8424 and would be duty-free.[140] CBP denied Tyco's request, and the CIT agreed.[141] Tyco appealed.[142]

In classification cases, the Federal Circuit follows a two-part test whereby it reviews—without deference—the meaning of the HTSUS heading, and then determines whether the item falls within the meaning of that heading under a clear error standard:[143]

> Absent contrary legislative intent, HTSUS terms are to be construed according to their common and commercial meanings, which are presumed to be the same. A court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources.[144]

Tyco had two arguments. First, it argued that the glass bulbs were an exception to the 7020 heading that excluded combinations of static with mechanical elements.[145] Second, Tyco appealed CBP's determination that the glass tubes did not contain a high proportion of non-glass materials.[146] The CIT determined that "high proportion" referred to whether the item was made mainly of glass.[147] In this case, no more than thirty-one percent of the bulbs were made of non-glass material; therefore, the CIT concluded that they were indeed glass products.[148] Finally, applying the essential character test, the Federal Circuit concluded that CBP's determination that the items were essentially glass products was reasonable.[149] Even though the liquid inside the bulbs

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139. *Id.* at 1356.
140. *Id.*
141. *Id.*
142. *Id.* at 1357.
143. *Id.* (citing Alcan Food Packaging (Shelbyville) v. United States, 771 F.3d 1364, 1366 (Fed. Cir. 2014)).
144. Carl Zeiss, Inc. v. United States, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing Simod Am. Corp. v. United States, 872 F.2d 1572, 1576 (Fed. Cir. 1989)).
145. *Tyco Fire Products*, 841 F.3d at 1357.
146. *Id.* at 1356, 1358.
147. Tyco Fire Prods., Ltd. P'ship v. United States, 82 F. Supp. 3d 1340, 1346–47 (Ct. Int'l Trade 2015), *aff'd*, 841 F.3d 1353.
148. *Tyco Fire Prods.*, 841 F.3d at 1358, 1360.
149. *Id.* at 1360–61 (explaining that the "essential character" of a good may be determined "by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods").

played a key role in operating the systems in which they were installed,[150] the essential nature of the bulbs was a glass article.[151]

B. Sigma-Tau HealthScience, Inc. v. United States

Sigma-Tau HealthScience, Inc. v. United States[152] addressed the proper classification of vitamin exports.[153] Sigma exported Carnitine—otherwise known as vitamin Bt, which was classified under a dutiable heading in the HTSUS.[154] The CIT found that these products can be classified as both vitamins and quaternary ammonium salts.[155] In such cases, the HTSUS General Rules of Interpretation ("GRI")[156] require CBP to select the classification with the most specific description.[157] Sigma challenged the classification of two products—L-Tauro and GlycoCarn—each of which had been classified as dutiable quaternary ammonium salts—subheading 2923.90.00—rather than duty-free vitamins—subheading 2936.29.50.[158] The former subheading refers to chemicals used largely in products such as shampoo, fabric softeners and disinfectants, whereas the latter category refers to provitamins and related supplements.

The Federal Circuit is tasked with determining whether a product has been properly classified by: (1) determining the proper meaning of the tariffs in question; and (2) determining the heading the products fall under.[159] In *Sigma Tau HealthScience*, the Federal Circuit was asked to evaluate CBP's classification of certain amino acid derivatives that the

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150. *Id.* at 1361 (recognizing that the liquid component of the bulb is the "brains behind the operation" because of its "critical role[] in the proper functioning . . . 1) the response time required, 2) the load the filled bulb will have to bear, 3) the environmental conditions the bulb will be placed into, and 4) the temperature rating").

151. *Id.*

152. 838 F.3d 1272 (Fed. Cir. 2016).

153. *Id.* at 1275.

154. *Id.* ("Carnitine is a naturally occurring amino acid derivative and an important nutrient in the human body, where it serves to transport long-chain fatty acids into mitochondria, the centers for energy production within each cell."). Carnitine is derived from meat-based products and is naturally occurring in most humans. *See Carnitine—Fact Sheet for Health Professionals*, NAT'L INSTS. OF HEALTH, https://ods.od.nih.gov/factsheets/Carnitine-HealthProfessional (last updated Oct. 10, 2017).

155. *Id.* at 1276.

156. *See Rules of Interpretation*, GLOBAL TARIFF, http://www.globaltariff.com/RulesofInterpretation.cfm (last visited May 9, 2018) (explaining that the GRI are used to interpret and apply the Harmonized Tariff System of the United States).

157. *Id.*; *see also Sigma Tau HealthScience, Inc.*, 838 F.3d at 1276.

158. *Id.*

159. *Id.* (citing Deckers Corp. v. United States, 532 F.3d 1312, 1314–15 (Fed. Cir. 2008)) (describing how courts decide proper product classification).

importer wanted to classify as vitamins. These derivatives are stabilized forms of carnitine.[160] "Carnitine is a naturally occurring amino acid derivative and an important nutrient in the human body, where it serves to transport long-chain fatty acids into mitochondria, the centers for energy production within each cell."[161] It is derived from meat-based products and is naturally occurring in most humans.[162]

Sigma Tau argued that the carnitine should be classified as vitamins because HTSUS GRI 3 states that when "goods are, prima facie, classifiable under two or more headings . . . [t]he heading which provides the most specific description shall be preferred to headings providing a more general description."[163] CBP contended the definition of vitamins as "organic compounds which are essential for human health, but must be provided or supplemented from an exogenous source because the human body cannot normally synthesize the compounds, either sufficiently or at all."[164]

The Federal Circuit found—and the Government conceded—that the more appropriate rule of interpretation for a case in which two possible classifications exist for a single product is that found in note 3 to this GRI, which states, "Goods which could be included in two or more of the headings of this chapter are to be classified in that one of those headings which occurs last in numerical order."[165] In this instance—because the subheading for vitamins occurs last in numerical order—CBP should have applied that classification.[166]

The Federal Circuit reversed and remanded the CIT's decision.[167] Sigma products and carnitine were prima facie classified as vitamins under subheading 2936.29.50, as opposed to quaternary ammonium salts in subheading 2923.90.00.[168]

C. Otter Products, LLC v. United States

In a case addressing the classification of cellular phone cases, *Otter*

160. *Id.* at 1277.
161. *Id.* at 1275.
162. *Carnitine—Fact Sheet for Health Professionals*, *supra* note 154.
163. *Sigma Tau HealthScience, Inc.*, 838 F.3d at 1277.
164. *Id.* at 1281–82.
165. *Id.* at 1277.
166. *Id.* (noting that "if Sigma-Tau's merchandise is prima facie classifiable as both a quaternary ammonium salt (HTSUS heading 2923) and as a vitamin (HTSUS heading 2936), Chapter Note 3 dictates that it be classified as the latter, as 2936 occurs last in numerical order").
167. *Id.* at 1283.
168. *Id.*

Products, LLC v. United States,[169] OtterBox contested the CBP's decision to classify its "Commuter and Defender" series phone cases as "similar products" to those found in heading 4202, which refers to items such as "trunks, suitcases, vanity cases, attache cases, [and] briefcases."[170] OtterBox's products were classified as "other" under subheading 4202.99, and, as such, were assessed a twenty percent duty rate.[171] OtterBox argued that its products should have been classified under subheading 3926.90.99.80 as articles of plastics with an ad valorem rate of 5.3%, instead of twenty percent.[172] The CIT granted OtterBox's motion for summary judgment, holding that OtterBox's products should have been classified under heading 3926.[173] CBP appealed the CIT's decision.[174]

The Federal Circuit's standard of review is the same as the CIT's. To classify the product, the Federal Circuit must first distinguish the meaning of the terms in the provisions.[175] Second, the Federal Circuit must determine whether the product in question matches the description of those terms.[176] When there is no question as to the nature of the products in question, the analysis collapses.[177] Here, the Federal Circuit assessed the common characteristics and purpose of the products listed in HTSUS headings 4202 and 3926.[178]

CBP argued that the CIT erred by restricting the definition of the term "container."[179] CBP argued that the CIT should view the term "container" according to the dictionary, stating that it must "requir[e] a concurrent and simple physical action to gain access."[180] It further argued that the CIT "effectively imposed" the requirement that products under HTSUS heading 4202 satisfy all four of the ejusdem generis factors.[181] To qualify products as ejusdem generis, "the merchandise must possess the same essential characteristics or purposes that unite the listed exemplars

169. 834 F.3d 1369 (Fed. Cir. 2016).

170. Otter Prods., LLC v. United States, 70 F. Supp. 3d 1281, 1284, 1287 (Ct. Itl. Trade 2015) (quoting HTSUS heading 4202), *aff'd*, 834 F.3d 1369.

171. *Id.* at 1284, 1287.

172. *Id.* at 1284, 1295; *see also Glossary*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm (last visited May 9, 2018) (defining "ad valorem tariff" as "[a] tariff rate charged as [a] percentage of the price").

173. *Otter Prods., LLC*, 70 F. Supp. 3d at 1284, 1295.

174. *Otter Prods., LLC*, 834 F.3d at 1372.

175. *Id.* at 1375.

176. *Id.*

177. *Id.*

178. *Id.* at 1376.

179. *Id.*

180. *Id.*

181. *Id.*

preceding the general term or phrase."[182] Going further, under ejusdem generis, "[c]lassification of imported merchandise . . . is appropriate only if the imported merchandise shares the characteristics or purpose and does not have a more specific primary purpose that is inconsistent with the listed exemplars."[183] According to HTSUS heading 4202, the essential characteristics of products are to "organize, store, protect, or carry."[184] Finally, CBP contended that the CIT "erred by requiring that they satisfy the additional characteristic of preventing anything from being operational while in the containers," thus adding a fifth factor/element to HTSUS 4202.[185] OtterBox argued that the products in question are not "containers," fail the ejusdem generis analysis, and serve a purpose that is different from the listed products.[186]

The Federal Circuit affirmed the CIT's findings.[187] It held that the products in question have different purposes than products classified under HTSUS heading 4202.[188] With regard to the arguments made by CBP, the Federal Circuit held that the products in question were not "containers" and were not similar to "containers" because the OtterBox phone case only met one of the four unifying characteristics to qualify as a "similar container" under heading 4202."[189] The Federal Circuit did not add a fifth element to the ejusdem generis analysis. Finally, the Federal Circuit ruled that, because the product could not be classified under subheading 4202, it must be classified under subheading 3926.90.99.[190]

Classification cases are often less exciting than antidumping and countervailing duty cases. Disputes in this area of trade law often include reference to dictionaries and other sleepy sources. Yet the proper classification of a good can make or break an exporter trying to get a foothold in the American marketplace. In 2004, CBP released a guidance document explaining that the classification process and how the burden of properly classifying a good rest largely on the

182. *Id.* (quoting Aves. in Leather, Inc. v. United States, 423 F.3d 1326, 1332 (Fed. Cir. 2005)).
183. *Id.* at 1376 (quoting Avenues in Leather, Inc. v. United States, 178 F.3d 1241, 1244 (Fed. Cir. 1999)).
184. *Id.* at 1377–78.
185. *Id.* at 1376.
186. *Id.*
187. *Id.* at 1381.
188. *Id.* at 1379.
189. *Id.* at 1378–80 (holding that the OtterBox case clearly protects, but does not organize, story, or carry).
190. *Id.* at 1381.

importer.[191] The guidance document also explained that CBP possesses the tools to challenge those classifications when in doubt, leading to cases as we have seen in the 2016 term.[192]

III. PROCEDURAL CASES

The following cases address issues related to antidumping and classification generally, but are focused more specifically upon procedural rules affecting those petitions. Administrative agencies have some flexibility in the development and application of procedural rules.[193] However—as the cases this term illustrate—the Federal Circuit plays an important role in validating those procedures in the face of protest.

A. JBLU, Inc. v. United States

In *JBLU, Inc. v. United States*,[194] the Federal Circuit determined that trademark protection applies to both common law and federally registered trademarks.[195] JBLU challenged CBP and its definition of trademarks, which rejected common law marks.[196] JBLU Jeans sells its product by the names of "JBLU," "C'est Toi Jeans USA," and "CT Jeans USA."[197] Its products are manufactured and imported from China.[198] Between September 11 and October 20, 2010, JBLU imported over 350,000 pairs of jeans, all of which either featured the "C'est Toi Jeans USA," "C'est Toi Jeans Los Angeles," or "CT Jeans USA" name on them.[199] JBLU filed trademark applications for the above listed brand names with the U.S. Patent and Trademark Office in 2010, although it had already been using the marks since 2005.[200]

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191. *See* U.S. CUSTOMS AND BORDER PROT., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: TARIFF CLASSIFICATION 8 (2004), https://www.cbp.gov/sites/default/files/documents/icp017r2_3.pdf.

192. *Id.* at 39.

193. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 543 (1978) ("Absent constitutional constraints or extremely compelling circumstances[,] the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.").

194. 813 F.3d 1377 (Fed. Cir. 2016).

195. *Id.* at 1380 (accepting JBLU's argument that "trademark . . . unambiguously includes federally registered and common law trademarks").

196. *Id.* at 1378; *see also* Anita B. Polott & Rachel E. Fertig, *2016 Trademark Law Decisions of the Federal Circuit*, 67 AM. U. L. REV. 1411, 1413–16 (2018).

197. *JBLU*, 813 F.3d at 1378.

198. *Id.*

199. *Id.*

200. *Id.*

CBP determined that many of the jeans imported between September 11, 2010 and October 20, 2010 violated section 304 of the Tariff Act, as well as CBP regulations found at 19 C.F.R. §§ 134.46 and 134.47.[201] Under § 134.46, "words, letter, or names" that appear on a product and refer to a geographical location may "mislead or deceive" the consumer about the product's country of origin.[202] And under § 134.47, when the name of a location in the United States or "United States" or "America" is used as part of a trademark, "the article shall be legibly, conspicuously, and permanently marked to indicate the name of the country of origin of the article."[203] CBP argued that JBLU did not meet federally mandated marking requirements because its "USA" and "Los Angeles" labels were larger than the "Made in China" labels, thus violating section 304 of the Tariff Act.[204] JBLU argued that the marks in dispute were trademarks subject to and in conformance with the more lenient standards governing federal marking requirements for souvenirs.[205]

The Federal Circuit examined the common law definition of trademark as well as the definition in the Lanham Act to assess whether CBP's interpretation was reasonable.[206] The Federal Circuit concluded that labels were considered trademarks so long as they were "adopted and used by a manufacturer or merchant in order to designate his goods and to distinguish them from any others."[207] The court instead held that the definition and statutory relevance of the term "trademark" was self-evident, not limited to those marks registered or subject to pending application.[208] The trial court's decision was

201. *Id.*

202. *Id.* at 1379.

203. *Id.* at 1378–79.

204. 19 C.F.R. § 134.47 (2017).

205. *JBLU*, 813 F.3d at 1379–80 (clarifying that the more stringent 19 C.F.R. § 134.46 standards governing markings naming a country other than country of origin would place the imported items in violation of the Tariff Act, while the 19 C.F.R. § 134.47 standards applying to souvenirs marked with trademarks would not run afoul of the statute).

206. *Id.* at 1381. *Compare* Planetary Motion, Inc. v. Techplosion, Inc., 261 F.3d 1188, 1193 (11th Cir. 2001) (discussing common law trademark rights), *with* San Juan Prods., Inc. v. San Juan Pools of Kan., Inc., 849 F.2d 468, 474 (10th Cir. 1988) (discussing unregistered trademarks under the Lanham Act). Trademarks do not have to be registered with federal or state governments to be valid. *San Juan Prods.*, 849 F.2d at 474 ("Nor is a trademark created by registration . . . . The Lanham Act protects unregistered marks as does the common law.").

207. *JBLU*, 813 F.3d at 1381 (quoting THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1501 (1966)).

208. *Id.* at 1381–82 (describing a more expansive definition of the term "trademark" placing emphasis on use rather than formal registration).

reversed and remanded.[209]

B. Best Key Textiles Co. v. United States

Best Key Textiles Co. v. United States[210] has been in and out of the CIT for approximately three years.[211] In February 2015, the Federal Circuit ruled that the CIT erred in asserting subject matter jurisdiction over a suit filed by Best Key Textiles.[212] The Federal Circuit remanded to the CIT, instructing that the case be dismissed for lack of jurisdiction.[213] When the case returned to the CIT in June 2015, Best Key Textiles filed a motion to transfer to the U.S. District Court for the District of Columbia.[214] The CIT denied the motion and Best Key Textiles appealed.[215]

The Federal Circuit is reviews an inferior court's interpretation of its remand instruction de novo.[216] That rule, established in the earliest days of the common law, states that, "an inferior court has no power or authority to deviate from the mandate issued by an appellate court."[217] Best Key Textiles made three critical arguments. First, the mandate rule binding an appellate court to adhere to its own remand ruling should not be interpreted as precluding the CIT's consideration of a transfer motion because the CIT's authority derived not from the appellate mandate, but from 28 U.S.C. § 1631.[218] Second, because the Federal Circuit allowed the CIT to consider transferring an action to a federal court, it must do so on remand.[219] And third, judicial review under § 1581(a) is inadequate, so the CIT should have decided whether to transfer to the D.C. District Court.[220]

The Federal Circuit affirmed the CIT's decision and found that, "[b]ecause the CIT would possess exclusive jurisdiction over any such

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209. *Id.* at 1382.

210. Best Key Textiles Co. v. United States (*Best Key III*), 660 F. App'x 905 (Fed. Cir. 2016).

211. *See id.* at 905–06 (discussing the case's procedural history). The case was filed in the CIT in 2013, whereby Best Key Textile sought a pre-importation declaratory judgment that a CBP Ruling Letter exceeded its agency authority. Best Key Textiles Co. v. United States, No. 13-00367, 2013 WL 6511985, at *1 (Ct. Int'l Trade Dec. 13, 2013).

212. Best Key Textiles Co. v. United States (*Best Key I*), 777 F.3d 1356, 1363 (Fed. Cir. 2015); *see also* Fandl, *2015 International Trade Decisions*, *supra* note 1, at 1012–14.

213. *Best Key I*, 777 F.3d at 1357.

214. Best Key Textiles Co. v. United States (*Best Key II*), No. 13-00367, 2015 WL 3798041, at *1 (Ct. Int'l Trade June 18, 2015).

215. *Best Key III*, 660 F. App'x at 906.

216. *Id.*

217. *See* Briggs v. Pa. R.R., 334 U.S. 304, 306 (1948) (explaining the history of the Supreme Court's interpretation of appellate courts' mandates).

218. *Best Key III*, 660 F. App'x at 906.

219. *Id.* at 907.

220. *Id.* at 908.

denied protest, the CIT did not err in finding Best Key's transfer request implicitly foreclosed by *Best Key I*."[221] Second, the CIT has "*exclusive jurisdiction* over the harm alleged in Best Key's action pursuant to § 1581(a)."[222] Additionally, because the third argument was addressed in *Best Key I*, the Federal Circuit declined to revisit it.[223] Finally, the Federal Circuit stated that Best Key did not "identif[y] a valid reason for revisiting [the] determination."[224]

C. Hutchison Quality Furniture, Inc. v. United States

In *Hutchison Quality Furniture, Inc. v. United States*,[225] Chinese manufacturer Orient International filed a protest following the issuance by CBP of a 216.01% duty on its furniture exports.[226] In 2009, Orient International (Hutchison), the importer, filed suit in the CIT "contesting the results of the third administrative review [of an antidumping order] and obtained an injunction against liquidation of its entries."[227] In June 2013, the injunction was dissolved.[228] A few weeks after the injunction was dissolved, Commerce issued instructions to CBP to "liquidate entries of furniture exported by Orient International . . . at a final rate of 83.55%."[229] In September 2013, CBP liquidated Hutchison's entries at 83.55%.[230] Hutchison challenged the liquidation ordered by the CBP, claiming jurisdiction under 28 U.S.C. § 1581(i)(4), which provides last resort jurisdiction when no other section of § 1581 applies.[231] However, as the court noted, it is "well-settled" that a party may not invoke jurisdiction under subsection (i) where jurisdiction in another subsection of that statute is available.[232]

The CIT dismissed Hutchison's claim because the proper procedure would have been a protest filed with CBP following liquidation rather than a direct appeal to the CIT.[233] Hutchison challenged that dismissal

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221. *Id.* at 907.
222. *Id.* (emphasis in original).
223. *Id.* at 908.
224. *Id.*
225. Hutchison Quality Furniture, Inc. v. United States (*Hutchison II*), 827 F.3d 1355 (Fed. Cir. 2016).
226. *Id.*
227. Hutchison Quality Furniture, Inc. v. United States (*Hutchison I*), 71 F. Supp. 3d. 1375, 1377 (Ct. Int'l Trade 2015).
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 1377–78.
232. *Id.* at 1378.
233. *Id.* at 1380.

at the Federal Circuit.[234] The court, as a threshold matter, resolved to review the CIT's decision to grant the Government's motion to dismiss for lack of subject matter jurisdiction de novo as a question of law.[235] To do this, the Federal Circuit looked at the "true nature of the action" by the CIT.[236] Hutchison argued that the CIT erred in its claim that the matter lacked subject matter jurisdiction because the CIT misunderstood the true nature of its action.[237] Hutchison argued that its claim was brought due to an untimely protest by Commerce and not CBP.[238] However, the Federal Circuit concluded that Hutchison's actual claim was to challenge the liquidation of its entries.[239]

The Federal Circuit affirmed the CIT's decision to dismiss due to lack of subject matter jurisdiction.[240] The Federal Circuit noted that "jurisdiction under subsection 1581(i) may not be invoked if jurisdiction under another subsection of section 1581 is or could have been available, unless the other subsection is shown to be manifestly inadequate."[241] Hutchison should have sought a remedy from CBP and not from Commerce.[242] If it had sought relief from CBP in a timely manner, subject matter jurisdiction could have been available.

D. Ford Motor Co. v. United States

In a case brought by Ford, with a long history behind it, Ford challenged a decision by CBP that recalculated a refund of excess duties paid by Ford.[243] In 2004 and 2005, Ford imported Jaguar cars from the United Kingdom to the United States, but later realized that it had overpaid on its duties.[244] Ford filed nine reconciliation entries between June 2006 and October 2006 seeking about $6.2 million in refunds.[245] Ford further claimed that, since CBP had not filed for an extension of time to liquidate its claims, it had to follow the duty

234. *Hutchison II*, 827 F.3d 1355, 1359 (Fed. Cir. 2016).
235. *Id.* (quoting Juice Farms, Inc. v. United States, 68 F.3d 1344, 1345 (Fed. Cir. 1996)).
236. *Id.* at 1360 ("The true nature of Hutchinson's action is a challenge to Custom's September 2013 liquidation of its entries.").
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 1362.
241. *Id.* (quoting Hartford Fire Ins. Co. v. United States, 544 F.3d 1289, 1292 (Fed. Cir. 2008)).
242. *Id.*
243. Ford Motor Co. v. United States, 811 F.3d 1371, 1374 (Fed. Cir. 2016). The case concerned the importation of Jaguar-branded cars. *Id.*
244. *Id.*
245. *Id.*

calculation of the importer.[246] CBP, on the contrary, claimed that it had filed for a liquidation extension in order to recalculate the duty owed because it believed the original amount paid was correct and that upon recalculation of Ford's claims, Ford was not owed any refund.[247] On April 15, 2009, Ford filed suit in the CIT, arguing that CBP failed to properly file for the extension and should not be able to recalculate the duties paid.[248]

The Federal Circuit faced three tasks. First, to determine whether the statute of limitations under 28 U.S.C. § 2636(i) was jurisdictional.[249] Second, addressing whether the CIT abused its power by declining to use discretionary jurisdiction over the first-filed suits.[250] And third, whether CIT's reasoning for not using its discretionary jurisdiction was reasonable.[251]

The Federal Circuit affirmed the findings of the CIT with respect to the statute of limitations, which upheld the reasoning of CBP.[252] First, the court disagreed with both parties and stated that "§ 2636(i) [was] not jurisdictional" because the statute did not clearly make it jurisdictional.[253] Second, the court stated, "the CIT did not abuse its discretion in declining to issue declaratory relief" because Ford's filing of a protest, which could lead to an appeal, provided an adequate avenue for relief on its claims.[254] Likewise, the court found that the same reasoning applied to the remaining claims by Ford, upholding the CIT's decision to deny declaratory relief.[255]

E. International Custom Products, Inc. v. United States

In a similarly long-running dispute, *International Custom Products, Inc. v. United States*[256] stems from years of litigation over the classification of exports of a certain white sauce. The sauce was originally classified as "sauces and preparation" under heading 2103.90.9060.[257] It was then reclassified as "butter and dairy spreads" under subheading

246. *Id.* at 1375.
247. *Id.* at 1374–75.
248. *Id.* at 1374.
249. *Id.* at 1376.
250. *Id.* at 1378.
251. *Id.* at 1380–81.
252. *Id.* at 1374.
253. *Id.* at 1378.
254. *Id.* at 1374.
255. *Id.* at 1380.
256. 843 F.3d 1355 (Fed. Cir. 2016).
257. *Id.* at 1357.

0405.20.3000.[258] The reclassification yielded a 2400% increase in duties owed.[259] ICP sued CBP over its process for reclassifying the article, which it claimed was improper.[260] The CIT ultimately agreed with ICP, reverted to the original classification, and ordered CBP to reliquidate.[261] Pursuant to the Equal Access to Justice Act of 2012, the government is responsible for paying the attorneys' fees of a prevailing party unless the United States was "substantially justified" in its position or "special circumstances would make an award unjust."[262]

The CIT chose to award attorneys' fees to ICP in this case and the government appealed that decision.[263] On review, the Federal Circuit held that it could only reverse the CIT's decision if it was based on an erroneous interpretation of the law, clearly erroneous fact finding, or "irrational judgment in weighing the relevant factors."[264] Here, the CIT had concluded that the government's position was not substantially justified because it was based upon a desire to avoid the lengthy Notice of Action process, which may have justified the Government's reclassification.[265] Accordingly, the Federal Circuit found that the CIT did not abuse its discretion by choosing to award attorney's fees to ICP.[266]

The procedural decisions discussed in this Section reflect the long-established principles of judicial deference to the executive agencies responsible for implementing U.S. trade statutes. Though this term saw many cases in which Commerce or CBP actions were overturned by the courts, there is no doubt that those actions are given strong deference upon review.

CONCLUSION

The 2016 term for the Federal Circuit with respect to trade appeals was active and has established important precedent. Among others, the Federal Circuit made clear that a trademark can be considered established by statutory definition or by common law, overruling a determination by CBP.[267] The Federal Circuit also clarified the

258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.* at 1358.
262. 28 U.S.C. § 2412(d)(1)(A) (2012).
263. *Int'l Custom Prods.*, 843 F.3d at 1357.
264. *Id.* at 1358 (quoting Chiu v. United States, 948 F.2d 711, 713 (Fed. Cir. 1991)).
265. *Id.* at 1357–59.
266. *Id.* at 1363.
267. JBLU, Inc. v. United States, 813 F.3d 1377, 1382 (Fed. Cir. 2016).

requirements for participation in an administrative antidumping case review to avoid the risk of an AFA rate.[268] And it further confirmed the discretion of Commerce to select a reasonable surrogate country for imports from an NME.[269] These, and other important cases this term, continue to reaffirm the importance of paying close attention to the analyses of the Federal Circuit.

268. Nan Ya Plastics Corp. v. United States, 810 F.3d 1333, 1350 (Fed. Cir. 2016).
269. Jiaxing Bro. Fastener Co. v. United States, 822 F.3d 1289, 1292 (Fed. Cir. 2016).