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JUDICIAL REVIEW OF ANTIDUMPING AND COUNTERVAILING DUTY DETERMINATIONS BY THE DEPARTMENT OF COMMERCE: NOTEWORTHY CASES IN 2009

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INTRODUCTION

Last year the Court of International Trade (the "Court" or the "CIT") was called upon to address the ramifications of the first Supreme Court decision in decades to arise out of the antidumping ("AD") or countervailing duty ("CVD") laws. If that was not enough excitement for one year, the Court was also drawn into the controversy surrounding the Department of Commerce's ("Commerce") application of the CVD law to China, reversing the agency's longstanding

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position that the CVD law does not apply to non-market economies ("NME").

Because the Court's decision on Commerce's application of the CVD law to China is one of the most important and interesting cases of 2009, this article will begin there. In addition to this landmark case, however, the Court rendered decisions on a host of other issues, both substantive and procedural. This article discusses a number of those cases on a variety of important topics, including the use of adverse facts available, selection of surrogate values in AD NME cases, scope, jurisdiction and judicial process and, finally, administrative process.

I. Countervailing Duty Law

Historically, U.S. industries have sought relief under the CVD law far less frequently than under the AD law. Thus, much of the CVD jurisprudence has grown out of a few large cases such as the steel cases of the 1990s and successive cases against softwood lumber from Canada. In 2009, the Court embarked on what is likely to be a new era in CVD law dominated by cases involving application of the CVD law to NME countries, principally China. We begin with a discussion of the seminal case in this new era, *GPX International Tire Corporation et al v. United States* ("*GPX II*"),[1] which goes to the heart of the debate over the interplay between the CVD law and the special NME provisions in the AD law. Given the likelihood that the upward trend in the number of NME CVD cases is likely to continue, *GPX II* is followed by a discussion of two cases on an important, albeit less controversial topic, the potential ramifications of a government's failure to participate in a CVD case.

A. *Non-Market Economies*

In *GPX II*,[2] the Court addressed Commerce's application of the CVD law to China, particularly what the Court referred to as NME "coordination issues."[3] In a controversial opinion, the Court held that: (1) Commerce is not statutorily barred from applying the CVD law to China, but "Commerce's current interpretation of the NME AD statute

1. *See* GPX In'l Tire Corp. v. United States (*GPX II*), 645 F. Supp. 2d 1231 (Ct. Int'l Trade 2009). This was a consolidated action challenging Commerce's concurrent AD and CVD investigations of certain pneumatic off-the-road ("OTR") tires from China. An earlier decision in this case, *GPX I*, is discussed in the Intervention section below.

2. *See id.*

3. *See id.* at 1234.

in relation to the CVD statute here was unreasonable",[4] (2) Commerce's refusal to consider GPX's request to be treated as a market-oriented industry ("MOI") was contrary to law, and (3) Commerce's adoption of a subsidy cut-off date was impermissibly arbitrary.

Turning to the first issue, for decades Commerce has followed *Georgetown Steel Corporation et al v. United States* ("*Georgetown Steel*"),[5] in which the Court of Appeals for the Federal Circuit upheld Commerce's decision that the countervailing duty law did not apply to NMEs. In 2007, however, Commerce "effected a sea change" when it found that, although China remained an NME, China's economy had advanced beyond a Soviet-style command economy to the point that Commerce could apply the CVD law to its exports.[6] Thus, for the first time, Commerce had concurrent AD and CVD cases against China and was presented with a host of new issues. One of the most hotly contested issues was whether application of the special NME AD methodology captures domestic subsidies, resulting in potential double counting when there is a concurrent CVD case involving the same products.

On that issue, the Court stated that it is not clear "how the CVD and AD law may work together in the NME context, if at all." In the Court's view, the NME AD provision "was designed to account for government intervention in an NME country's economy, including resulting price distortion."[7] Thus, the Court reasoned, "the NME AD statute overlaps with the functioning of the CVD statute, which is to 'counteract any

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4. *See id.*

5. *See* Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).

6. *See GPX II*, 645 F. Supp. 2d at 1237 (citing Memorandum from Shauna Lee-Alaia & Lawrence Norton, Office of Policy, Imp. Admin. to David M. Spooner, Asst. Sec'y Imp. Admin., 10 (March 29, 2007), http://ia.ita.doc.gov/download/nme-sep-rates/prc-cfsp/china-cfs-georgetown-applicability.pdf [hereinafter *Georgetown Steel Memorandum*]). As the Court explained, if the statute is ambiguous, Commerce may adopt a conflicting interpretation of the statute if the new interpretation is reasonable. *See GPX II*, 645 F. Supp. 2d at 1238 ("[A] court's choice of one reasonable reading of an ambiguous statute does not preclude an implementing agency from later adopting a different reasonable interpretation." (quoting United States v. Eurodif S.A., 129 S. Ct. 878, 886 (2009))).

7. *See GPX II*, 645 F. Supp. 2d at 1239. To calculate "normal value" in an NME country, Commerce does not rely on domestic prices and costs, as in market economy cases. Rather, it takes the NME producers' "factors of production" (*e.g.*, raw materials, labor, energy) and values them, to the extent possible, in a surrogate market economy country that is at a comparable level of economic development and a significant producer of comparable merchandise. *Compare* 19 U.S.C. § 1677b(a)(1) (2006) *with* 19 U.S.C. § 1677a(c) (2006).

unfair advantage gained by government intervention.'"[8] That led the Court to conclude that, while Commerce may apply the CVD law to NME countries, it is unclear how Commerce is to account for the overlap when imposing both AD and CVD duties.[9] Given that ambiguity, the Court proceeded to examine whether Commerce's statutory interpretation and resulting methodologies were reasonable.

Commerce argued that, absent a statutory directive, adjustment for "an assumed or undetermined effect" would be inappropriate.[10] There is such a directive in the statute for export subsidies.[11] To understand the directive, it is important to understand Commerce's rules for attributing subsidy benefits. The benefits of export subsidies are attributed only to export sales, and the benefits of all other subsidies (*i.e.*, "domestic subsidies") are attributed to all sales (domestic and export).[12] Inherent in Commerce's attribution rules is an assumption that export subsidies only benefit export sales (export price in an AD context) and that domestic sales ("normal value" in an AD context) are "export subsidy free." Thus, when Commerce compares the subsidized export price to the export subsidy free normal value in a companion AD case, the statute requires that Commerce make an offset (*i.e.*, increase the export price) in the amount of the export subsidy. The offset requirement reflects an inherent assumption that the price comparison in the AD case captures the export subsidy benefits; therefore, the export subsidies would be double counted absent the offset.[13]

Commerce applies its normal subsidy attribution rules in NME cases, *i.e.*, export subsidies are attributed only to export sales while domestic subsidies are attributed to all sales. Under the NME AD methodology, however, Commerce constructs a normal value using surrogate costs of production, overhead and profit from one or more market economies. It is Commerce's practice to calculate a subsidy free normal value by eliminating any surrogate values that might reflect either domestic or export subsidies. Thus, applying the inherent assumptions in Com-

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8. *See GPX II*, 645 F. Supp. 2d at 1239 (quoting Royal Thai Gov't v. United States, 441 F. Supp. 2d 1350, 1365 (Ct. Int'l Trade 2006)).

9. *See GPX II*, 645 F. Supp. 2d at 1240.

10. *See id.* at 1241.

11. *See* 19 U.S.C. § 1677a(c)(1)(C) (2006).

12. *See* 19 C.F.R. § 351.525(b) (2010).

13. *See GPX II*, 645 F. Supp. 2d at 1242 (quoting Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium From France, 69 Fed. Reg. 46,501, 46,506 (Aug. 3, 2004)).

merce's allocation of subsidies, a question arises when comparing the subsidized NME export price with an unsubsidized surrogate normal value in a companion AD case. The question is whether it is reasonable for Commerce not to make an adjustment to avoid double counting domestic subsidies for essentially the same reasons it makes an adjustment for export subsidies.[14]

Commerce argued that Congress's silence when enacting the export subsidy offset "about the plainly related issue of CVDs to offset domestic subsidies . . . implies that no adjustment is appropriate."[15] The Court disagreed. Commerce, the Court explained, has stated that "[d]omestic subsidies presumably lower the price of the subject merchandise both in the home and the U.S. markets, and therefore have no effect on the measurement of any dumping that might also occur."[16] The issue of double counting domestic subsidies therefore only arises in an NME case because of the subsidy-free surrogate normal value. For that reason, the Court found that the dual imposition of CVD and AD law to NME countries "creates issues which do not present themselves when AD margins for market economy ("ME") countries are calculated."[17] Because Commerce did not apply the CVD law to NMEs until 2007, "Congress' silence . . . may well indicate that Congress did not consider this new hybrid when it enacted the export subsidy adjustment," rather than an intention to prohibit such an adjustment.[18] Thus, in the Court's view, there is no statutory bar to some type of adjustment to avoid double counting.

The Court also held that Commerce could not avoid the issue by placing the burden to demonstrate double counting on respondents, which would likely be an impossible burden to meet.[19] Reasoning that there is an assumption that CVD remedies operate by raising prices, the Court concluded that there is a "substantial potential for double counting of domestic subsidies if Commerce applies CVDs to China while continuing to use its current NME methodology" in companion AD cases.[20] As a result, the Court found Commerce's decision unreason-

14. *See id.* at 1241–42.

15. *See id.* at 1241.

16. *See id.* at 1242.

17. *See id.*

18. *See id.*

19. *See GPX II*, 645 F. Supp. 2d at 1242–43 (citing 19 U.S.C. § 1677(5)(C) (2006)).

20. *See id.* at 1243 (quoting U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-474, U.S.-CHINA TRADE: COMMERCE FACES PRACTICAL AND LEGAL CHALLENGES IN APPLYING COUNTERVAILING DUTIES, at 33 (2005), http://www.gao.gov/new.items/d05474.pdf).

able and remanded with instructions for Commerce to make one of two choices: "reasonably . . . do all of its remedying though the NME AD statute, as it likely accounts for any competitive advantages the exporter received that are measurable," or "apply methodologies that make such parallel remedies reasonable."[21]

GPX also challenged Commerce's refusal to consider its request to be treated as a "market-oriented enterprise" ("MOE") in the AD case and have its normal value calculated using the "ME" methodology. Commerce had declined GPX's request on the grounds that there is no defined category of MOEs or qualifying criteria that would enable Commerce to use the ME methodology for an NME company.[22] The Court found Commerce's reason insufficient. Before resorting to a surrogate normal value, the statute requires that Commerce determine both that the subject merchandise was exported from an NME *and* that available information does not permit the calculation of normal value under the ME methodology.[23] The Court held that in refusing to consider GPX's request Commerce failed to meet the latter statutory duty. In addition, the Court noted that Commerce itself acknowledged that applying the CVD law might require modifications to the NME AD methodology and specifically requested comments on the issue of granting an NME respondent ME treatment.[24] Once again the Court underscored the point that Commerce must "fill in the gaps" and determine how to "harmonize" the AD and CVD laws, taking into account that the statute "provides no direction as to how to calculate both NME ADs and CVDs at the same time."[25] The Court therefore remanded to Commerce with instructions that if it decides to impose both the CVD law and the NME AD methodology, it must find a reasonably accurate way of doing so.[26]

The final issue addressed by the Court was Commerce's decision to

21. *See id.* at 1243.

22. *See id.* at 1243–44. The Court noted that Commerce did not reject the request as untimely, and disagreed with defendant-interveners' claim that the untimely submission of GPX's normal value information precluded Commerce from addressing the issue. *See id.*

23. *See id.* at 1245 (citing 19 U.S.C. § 1677b(c)(1)(B) (2006)).

24. *See GPX II*, 645 F. Supp. 2d at 1245.

25. *See id.* at 1245–46.

26. *See id.* at 1246. Note that, although Court discussed this as a harmonization issue, like double counting, it is different in significant respects. The MOE issue, like the CVD issue, arises out of the changes in China's economy. Such changes, however, could potentially give rise to an MOE issue under § 1677b(c)(1)(B) in any NME AD case and, unlike double counting, the statutory obligation to address the issue should be the same regardless of the presence of a companion CVD case.

adopt December 11, 2001 as the cut-off date for measuring subsidies in China. Commerce normally allocates non-recurring subsidy benefits over the average useful life ("AUL") of renewable physical assets.[27] Thus, for example, if the AUL is fifteen years, Commerce will not examine subsidies granted more than fifteen years previously because there would be no residual benefit left to countervail. For China, however, Commerce adopted a rule that it would not countervail subsidies granted prior to the date that China became a member of the World Trade Organization ("WTO"). Commerce reasoned that, at that point, China had implemented significant market reforms in order to accede to the WTO, which makes it possible to apply the CVD law to subsidies granted subsequent to that point, but not before.[28] The Court, however, agreed with petitioners that Commerce's decision to ignore all subsidies granted before the cut-off date was impermissibly arbitrary. The Court recognized that specific findings for each subsidy program may be difficult but again concluded that if Commerce "chooses to recognize a gray area, it must adjust its methodology accordingly."[29]

On remand, Commerce took the view that it had three options to address the Court's decision on double counting: (1) do not apply the CVD law, (2) apply the normal market economy methodology, or (3) offset the entire CVD cash deposit rate (not just export subsidies) against the AD cash deposit rate to guard against double counting. The agency elected option three. The Court rejected that approach, noting that with the offset, the CVD rate and the adjusted AD margin will always equal the unadjusted AD margin.[30] As a result, the Court concluded it was unreasonable to force foreign parties to incur the expense of a concurrent CVD investigation when the same remedial effect can be achieved by the AD investigation alone. More significantly, the Court held that the offset was inconsistent with 19 U.S.C. § 1677a, which lists permissible offsets, including the analogous offset for export subsidies.[31] Of particular note, the Court took Commerce's own list of options on remand as "a tacit admission" the agency is currently unable to address double counting absent a change in the

27. 19 C.F.R. § 351.524(b)(1) (2010); *see GPX II*, 645 F. Supp. 2d at 1246.

28. *See id.* at 1247.

29. *See id.* at 1250.

30. *See* GPX Int'l Tire Corp. v. United States, No. 08-00285, 2009 WL 3057656, at *3 (Ct. Int'l Trade Aug. 4, 2010) [hereinafter *GPX III*].

31. *See id.*

statute.[32] The Court therefore again remanded the matter, this time with instructions that Commerce forego imposing the CVD law on imports of the plaintiff's merchandise.

In sum, while the Court's opinion holds that the statute does not preclude application of the CVD laws to NMEs, it suggests that the statute may not give Commerce all of the tools necessary to do so. This is, however, merely the beginning of this debate. There is little, if any, doubt that Commerce will appeal.[33]

B. *CVD—Adverse Facts Available*

Subsidies are government measures. In CVD cases, therefore, to collect necessary information Commerce relies not only on the participation of respondent exporters, but also on participation by the foreign government. The statute provides that when a party fails to cooperate by not "acting to the best of its ability" to comply with the agency's requests for information, Commerce has the discretion to use an adverse inference when relying on the facts otherwise available to make its determination ("adverse facts available" or "AFA").[34] A comparison of two recent cases, *United States Steel Corp. v. United States* ("*US Steel*")[35] and *United States Steel Corp. et al v. United States* ("*US Steel Corporation*"),[36] provides useful insights into whether and to what extent the government's failure to participate in a CVD case is likely to have an adverse impact on respondent exporters.

In *US Steel* one of the alleged subsidies was the government provision of hot-rolled steel by the Government of China ("GOC") for less than adequate remuneration ("LTAR"). To find and measure the subsidy, Commerce had to determine: (1) whether the GOC provided hot-rolled steel (the "financial contribution"), and (2) if so, whether and to what extent the government price was below market (*i.e.*, LTAR), thus

32. *See id.* at *4.

33. On remand, Commerce also reconsidered each subsidy program individually rather than apply a universal cut-off date. The results of that analysis did not result in changes to the CVD margins. *See id.* at *2. Because the Court instructed Commerce not to apply the CVD law, however, it was unnecessary for the Court to address that remand analysis. Finally, the Court sustained Commerce's decision on remand that MOE treatment was not warranted.

34. 19 U.S.C. § 1677e(b) (2006).

35. *See* U.S. Steel Corp. v. United States, 31 I.T.R.D. (BNA) 2374 (Ct. Int'l Trade Dec. 11, 2009) [hereinafter *US Steel*].

36. *See* United States Steel Corp. v. United States, 32 I.T.R.D. (BNA) 1037 (Ct. Int'l Trade Dec. 30, 2009) [hereinafter *US Steel Corp.*]. This case was consolidated with Essar Steel Ltd. v. United States, No. 09-00197, 2010 WL 3359368 (Ct. Int'l Trade Aug. 19, 2010).

providing a benefit. The GOC failed to provide ownership information for suppliers of hot-rolled steel, which Commerce needed to determine how much steel was provided by government-controlled suppliers versus private suppliers. Commerce therefore relied on AFA and assumed that all of the hot-rolled steel suppliers were government-owned, except one.[37] Commerce found that the capital verification report provided by a respondent for one of its suppliers corroborated the ownership information in the supplier's business registration. Based on that evidence, Commerce treated that supplier as a private producer and therefore excluded the hot-rolled steel it sold to the respondent from the subsidy calculation.[38] That decision was the sole issue brought before the Court.[39]

When the case reached the CIT, Commerce requested and was granted a voluntary remand.[40] On remand, Commerce found that in fact the GOC had not submitted the requested ownership information for that supplier; therefore "there was nothing on the record to be corroborated by the capital verification report . . . ."[41] In the absence of ownership information from the government, Commerce reversed its decision and, as AFA, assumed that all hot-rolled steel supplied to the respondent came from government-controlled companies.[42] The Court sustained the remand.

The government's failure to cooperate was again at issue in *US Steel Corporation*, but this time there were no adverse consequences for the respondent. In the underlying investigation, the Government of India ("GOI") did not respond to Commerce's requests for information on five subsidy programs, stating the GOI had nothing to add to what the respondent exporter provided. As a result, Commerce assumed as AFA that the government provided a financial contribution and that the subsidy programs met the specificity requirement. On the issue of benefit, however, Commerce relied on the information provided by the respondent exporter to determine that the company had not used the five subsidy programs.

Before the Court, the domestic producers argued unsuccessfully that

37. Memorandum from Stephen J. Claeys, Deputy Asst. Sec'y, Imp. Admin., to David M. Spooner, Asst. Sec'y, Imp. Admin., 35 (Nov. 17, 2008), http://ia.ita.doc.gov/frn/summary/PRC/E8-27889-1.pdf [hereinafter *I & D Memo*].

38. *See I & D Memo* at 39.

39. *See US Steel*, 2009 31 I.T.R.D. (BNA) at 2375.

40. *See id.* at 2375–76.

41. *See* Final Redetermination Pursuant to Remand 3 (Dep't of Commerce Oct. 20, 2009).

42. *See id.*

the GOI's failure to respond to the questionnaires compelled Commerce to find, on the basis of AFA, that the respondent had used the programs.[43] As the Court stated, there is no statutory language "that compels the Department to automatically apply adverse inferences whenever a foreign government fails to respond to an agency questionnaire."[44] The Court therefore endorsed the agency's practice of not applying an adverse inference when a respondent "can establish non-use of a program as a factual matter, without an accompanying or complete government response."[45] The Court found that "rational justification prevents [it] from disturbing this lawful decision.[46]

A comparison of these two cases demonstrates that, logically, the potential impact of the government's failure to cooperate may differ significantly depending upon the nature of the issue. Where the issue is one directly related to government action, such as the question of government ownership of input suppliers, it is highly likely, if not certain, that the government's failure to cooperate will have adverse consequences for respondent exporters, even those who themselves cooperate in providing all requested information. However, where the issue relates directly to the actions of the respondent exporter, such as non-use of a program, the government's failure to cooperate, while still potentially problematic, is less likely to prove fatal to a cooperative exporter.

II. ANTIDUMPING LAW—NME SURROGATE VALUES

In NME AD cases, the selection of surrogate market-economy values drives the dumping calculation[47] and is therefore one of the most hotly contested issues. *Vinh Quang Fisheries Corporation v. United States*[48] provides a useful lesson in the importance of developing the record on surrogate values.

43. *See US Steel Corp.* 32 I.T.R.D. (BNA) at 1047.

44. *See id.* at 1047–48.

45. *Id.* at 1048.

46. *See id.* (citing Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983)). The domestic industry also challenged Commerce's findings that Essar had not used the programs. The Court granted Commerce's request for voluntary remand on two of those issues and found the other decisions were supported by substantial evidence. *See id.* at 1049, 1050–51.

47. *See supra* note 7 (describing the NME surrogate value methodology).

48. *See* Vinh Quang Fisheries Corp. v. United States, 637 F. Supp. 2d 1352 (Ct. Int'l Trade 2009) [hereinafter *Vinh Quang*].

Plaintiff challenged Commerce's selection of a surrogate value for fish waste in a new shipper review of the AD order on frozen fish fillets from Vietnam. In the underlying review, plaintiff argued that Commerce should value fish waste using an average of Bangladesh import prices for fish skin and World Trade Atlas price data for broken fish meat. Instead, Commerce used two price quotes from Indian seafood processors for unprocessed fish waste, which had been submitted by domestic producers.[49] Before the Court, plaintiff claimed Commerce erred in using price quotes because there were better surrogate values available.

At the outset, the Court emphasized that "[the] process of constructing a foreign market value for merchandise produced and/or exported from a non-market economy is necessarily imprecise."[50] Commerce is therefore only required to value the factors of products using the best available information.[51] As the Court further explained, in evaluating available surrogate values, Commerce's normal practice is to consider "reliability, availability, quality, specificity, and contemporaneity," and to use publicly available information when available.[52] The Court agreed with plaintiff that "Commerce prefers publicly available, contemporaneous, tax and duty free values that are representative of the market, specific to the factor of production in question, and from an approved surrogate country."[53] However, the Court pointed out that the degree to which those standards can be met necessarily varies in each case and with each surrogate value.[54] Moreover, a party proposing a surrogate value has the burden to support that value on the record.[55] Here Commerce found that plaintiff's proposed values were for processed fish waste rather than the factor at issue, *i.e.*, unprocessed fish waste. The deficiency in plaintiff's argument, the Court found, was that it assumed but did not demonstrate that Commerce's finding was in error.[56]

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49. *See id.* at 1355.

50. *Id.* at 1356 (citing Sigma Corp. v. United States, 117 F.3d 1401, 1407 (Fed. Cir. 1997)).

51. *See id.* (citing 19 U.S.C. § 1677b(c)(1) (2006)).

52. *See Vinh Quang*, 637 F. Supp. 2d at 1356.

53. *Id.* at 1358.

54. *See id.*

55. *Id.* (quoting Thai I-Mei Frozen Foods Co. v. United States, 477 F. Supp. 2d 1332, 1351 (Ct. Int'l Trade 2007)).

56. *See Vinh Quang*, 637 F. Supp. 2d at 1357. The Court also dismissed plaintiff's claim that the Department's valuation was unreasonable in relation to the values derived for fish waste imports into Indonesia for failure to exhaust administrative remedies.

III. Scope

When seeking relief under the AD/CVD laws, petitioning U.S. producers must necessarily define the imported products that are allegedly dumped or subsidized and injuring the U.S. industry, *i.e.*, the "scope" of the imports at issue. Some scopes are narrowly focused on specific products for certain applications (*e.g.*, standard pipe versus line pipe). Others may cover a broad category of products (*e.g.*, softwood lumber), often with a variety of explicit exceptions. In any event, drafting scope language can be a complex process, reflecting strategic concerns as well as technical challenges, and the end result is often ambiguous in various respects. It is Commerce's responsibility to clarify and interpret the scope of an investigation and subsequent order, a task that is frequently challenging. Moreover, once the scope of an AD/CVD order is defined, there is the potential that products will be altered or new products will be developed that circumvent the scope of an order as defined. Once again it falls to Commerce to determine whether such products should be subject to the AD/CVD order. In this section we examine several recent scope cases, beginning with an interesting case on circumvention.

A. *Circumvention*

The statute gives Commerce the authority to include within the scope of an order "later developed merchandise" that falls within the same class or kind of merchandise covered by the order.[57] In *Target Corporation v. United States*,[58] the Court was called upon for the first time in many years to opine on Commerce's interpretation and application of that provision. At issue was Commerce's determination that mixed-wax candles are later-developed merchandise and fall within the scope of the 1986 AD order on petroleum wax candles from China.[59] The Court's decision not only presents a new later-developed merchandise test, it also gives rise to a potential nexus between the International Trade Commission's ("ITC") five-year sunset reviews and Commerce's scope determinations.

57. *See* 19 U.S.C.A. § 1677j(d)(1) (West 2010).

58. *See* Target Corp. v. United States, 626 F. Supp. 2d 1285 (Ct. Int'l Trade 2009) [hereinafter *Target II*]; *see also* Target Corp. v. United States, 578 F. Supp. 2d 1369 (Ct. Int'l Trade 2008) [*Target I*].

59. *See* Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order, 71 Fed. Reg. 59,075 (Dep't of Commerce Oct. 6, 2006).

In the underlying circumvention inquiry, Commerce established two criteria to define "later developed" merchandise: (1) a significant technological advancement or significant alteration of the subject merchandise involving commercially significant changes, and (2) the merchandise was commercially unavailable at the time of the investigation.[60] In *Target I*, the Court held that Commerce's requirement of a significant advancement or alteration in every instance was contrary to the statute. The Court then sustained Commerce's decision on remand to abandon the first criteria, leaving the absence of "commercial availability" as the sole defining criteria.[61] The Court remanded again, however, on the grounds that the agency's finding that it could not "definitively conclude" that mixed-wax candles were commercially available at the time of the original investigation "introduced an unexplained, subjective, evidentiary standard," which "almost bespeaks an administrative presumption of commercial unavailability—rebuttable by definitively conclusive evidence (whatever that may be) of commercial availability."[62] The Court instructed Commerce on remand to either make a straightforward finding of commercial unavailability or explain how a "definitive conclusiveness" standard was a reasonable interpretation of the statute.[63]

On remand, Commerce opted for a straightforward finding of commercial unavailability, which was again challenged by plaintiffs. In *Target II*, the Court rejected the argument that Commerce's remand determination again rested on a rebuttal presumption of commercial unavailability and was not supported by substantial evidence. Noting that during the circumvention inquiry Commerce requested the parties submit evidence of commercial availability, the Court found that Commerce had discharged its obligations to the parties. On remand, the Court stated that Commerce was not required to "address again each and every piece of evidence in the record, or explain again why it found some evidence less persuasive than others on the question of commercial availability."[64]

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60. *See Target II*, 626 F. Supp. 2d at 1288.

61. *Id.* The CAFC affirmed, finding that Commerce's test was a reasonable interpretation of the undefined term "later developed" and its finding was supported by substantial evidence. *See* Target Corp. v. United States (*Target III*), 609 F.3d 1352 (Fed. Cir. 2010).

62. *See Target II*, 626 F. Supp. 2d at 1288. Plaintiffs argued that Commerce had, in fact, employed such a rebuttable presumption.

63. *Id.* at 1289.

64. *See id.*

It is also noteworthy that the Court, like Commerce, cited as evidence of commercial unavailability the ITC's revised like product determination in the second sunset review, which was initiated just before the circumvention inquiry was requested. A finding of injury to domestic producers of the "like product" is a prerequisite to imposing AD duties. Thus, the scope of an AD duty order cannot be broader than the like product. The ITC's original 1985 injury determination defined the like product as petroleum wax candles "composed of over 50 percent petroleum wax, [which] may contain other waxes in varying amounts . . . ."[65] Based on that like product determination, Commerce had on many occasions found that mixed-wax candles (*i.e.*, those containing fifty percent or more non-petroleum wax) were outside the scope of the order.[66] Then in the second sunset review, in a decision that was not without controversy, the ITC stated: "The evidence in the record of this review indicates that there was no commercial production in the United States (or elsewhere) of blended candles in 1986, when the Commission made its original determination."[67] The ITC then made a new like product determination that included all candles containing any amount of petroleum wax, except those containing more than fifty percent beeswax.[68]

The CIT implicitly approved of Commerce's reliance on ITC's finding in the second sunset review,[69] and on appeal the CAFC expressly did so, referring to the ITC's finding as "corroborative evidence" and noting "significantly" that no one challenged the ITC's determination.[70] These decisions potentially raise new and interesting questions about the authority of the ITC to alter its like product determinations in sunset reviews and what, if any, impact that may have on future scope determinations by Commerce. While similar circumstances may not arise again soon, this is probably not the last word on the topic.

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65. *See Candles from China*, USITC Pub. 1888, Inv. No. 731-TA-282, LEXIS 268, at *5 (Aug. 1986) (Final).

66. On appeal, the CAFC explicitly stated that these earlier "conventional scope rulings" did not preclude Commerce from finding that mixed-wax candles should be within the scope of the order as later-developed merchandise. *See Target III*, 609 F.3d at 1362.

67. *Petroleum Wax Candles from China*, USITC Pub. 3790, Inv. No. 731-TA-282, LEXIS 632 (July 2005) (Second Review).

68. *Id.* at *17.

69. *See Target II*, 626 F. Supp. 2d at 1291–92, 1294.

70. *See Target III*, 609 F.3d at 1360, 1363.

B. *Scope Exclusions*

In *Ad Hoc Shrimp Trade Action Committee et al v. United States*[71] the Court shed further light on the line between petitioner's right to define the scope of the relief it seeks and Commerce's authority to alter and clarify that scope.

Early in the antidumping investigations of certain frozen warm water shrimp, certain importers requested that Commerce exclude "dusted shrimp" from the scope, arguing that it fell within the explicit exclusion for "breaded shrimp." Petitioner objected, arguing that all warm water shrimp were presumptively in-scope, unless the product fell within one of the "carefully defined and delimited exceptions."[72] Commerce preliminarily included dusted shrimp, but stated it was "unclear where the separation lies between subject merchandise and dusted shrimp."[73] Importers subsequently proposed a definition of "dusted shrimp," which Commerce adopted. Over petitioner's objection, Commerce then excluded dusted shrimp from the final determinations and orders.[74]

In *AHSTAC I*,[75] plaintiff appealed the exclusion of dusted shrimp. The CIT dismissed the action on the grounds that, because ITC's injury determination did not include dusted shrimp and plaintiff had not contested the injury determination, the Court was unable to grant the relief requested.[76] In *AHSTAC II*,[77] the CAFC reversed, holding that the CIT erred in dismissing the case even though the requested relief (amended orders) was unavailable. The CAFC found that, in addition to the requested relief, plaintiff sought a declaratory judgment that Commerce acted unlawfully in excluding dusted shrimp.[78]

On remand to the CIT, Commerce argued that "petitioners are not entitled to deference to proclaim, after initiation, what products they

71. 637 F. Supp. 2d 1166 (Ct. Int'l Trade 2009) [hereinafter *AHSTAC III*].

72. *See id.* at 1171.

73. *See id.* at 1172.

74. *See id.*

75. Ad Hoc Shrimp Trade Action Comm. v. United States, 473 F. Supp. 2d 1336, 1348 (Ct. Int'l Trade 2007).

76. *See AHSTAC III*, 637 F. Supp. 2d at 1173. As discussed above, AD duties may not be imposed unless there is both an affirmative finding of dumping by Commerce and an affirmative finding by the ITC of injury to the domestic industry, *i.e.*, producers of the domestic like product. Thus, the scope of an order cannot be defined more broadly than the domestic like product.

77. Ad Hoc Shrimp Trade Action Comm. v. United States, 515 F.3d 1372, 1375 (Fed. Cir. 2008).

78. *See AHSTAC III*, 637 F. Supp. 2d at 1173–74.

did and did not intend" to cover.[79] The Court disagreed in part, stating, "Commerce owes deference to the intent of the proposed scope of an antidumping investigation as expressed in an antidumping petition."[80] However, the Court agreed that Commerce retains authority to define the scope of the investigation and "may depart from the scope as proposed by a petition if it determines that petition to be 'overly broad, or insufficiently specific to allow proper investigation, or in any other way defective.'"[81] Therefore, in turning to the merits, the Court set forth the order of its analysis as follows: (1) whether the petitions propose to include dusted shrimp in the scope; and (2) if yes, whether Commerce acted according to the law in excluding dusted shrimp.

The Court found that Commerce never decided the threshold issue;[82] therefore, the Court could not conclude that Commerce acted lawfully.[83] Where Commerce erred, the Court explained, was in focusing on development of a definition of dusted shrimp, rather than whether dusted shrimp was within the scope proposed by the petitions.[84] While a clear, administrable definition is a *requirement* for exclusion, it is not a *rationale* for exclusion.[85] The Court further stated that "[a]lthough Commerce has discretion to make exclusions from the scope, even when doing so appears to be contrary to the proposed scope as set forth in a petition, it must exercise this authority reasonably." The Court found Commerce did not do so here.

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79. *AHSTAC III*, 637 F. Supp. 2d at 1174.

80. *Id.* (citing 19 U.S.C. §§ 1673, 1673a(b) (2006)); NTN Bearing Corp. of Am. v. United States (*NTN Bearing*), 747 F. Supp. 726, 730 (1990).

81. *AHSTAC III*, 637 F. Supp. 2d at 1175 (quoting *NTN Bearing*, 747 F. Supp. at 731).

82. *See id.* The court noted that, although the petition did not specifically mention dusted shrimp, it did propose to cover all products meeting the physical description unless explicitly excluded and, by way of example, stated that "minor additions to frozen or canned warm water shrimp are not sufficient to remove the product from the scope of the investigation[s]." *See id.*

83. *See id.*

84. *See id.* It is noteworthy that the Court found that Commerce's failure to incorporate explicitly the Scope Clarification Memorandum by reference into the final determinations raised the question of whether any reasoning set forth in that memorandum was properly before the court as part of the contested determinations. The Court did not reach that issue, however, because it found that the reasoning in the memorandum was, in any event, inadequate to support Commerce's decision to exclude dusted shrimp. *See id.* at 1177.

85. *See id.* at 1178.

C. *Scope—Mixed Media*

The scope of AD/CVD orders cover imports of a single "class or kind" of subject merchandise.[86] When subject merchandise (*e.g.*, tissue paper, pencils or a pad of paper) is imported together with, or as a component of, non-subject merchandise (*e.g.*, a gift wrap set, drawing compass, or padfolio), Commerce faces a unique challenge in determining whether, in that form, the subject merchandise is part of the "class or kind" of merchandise subject to the order. *Walgreen Co. of Deerfield, Ill. v. United States*[87] provides support for Commerce's current approach to such cases.

Commerce may not change the scope of an order or interpret it in a manner contrary to its terms.[88] The framework for interpreting the scope of an order therefore begins with the language of the scope itself, as well as the descriptions in the petition, initial investigation, and determinations of Commerce (including prior scope determinations) and the ITC.[89] If those sources are not dispositive, Commerce examines what are commonly referred to as the *Diversified Products* criteria[90] to determine if the product at issue is sufficiently similar to merchandise unambiguously within the scope of an order to conclude the product falls within the same class or kind.[91] In "mixed-media" cases, Commerce first determines if the imported article is in fact a unique item comprised of both subject and non-subject components, rather than independent items packaged as a group and used in the same manner as when sold separately.[92] If the imported article is a unique mixed-media item, Commerce examines whether the subject merchandise is a

86. *See* 19 U.S.C. §§ 1671, 1673 (2006).

87. 31 I.T.R.D. (BNA) 2241 (Ct. Int'l Trade Oct. 28, 2009) [hereinafter *Walgreens*].

88. *See id.* at 2243 (quoting Allegheny Bradford Corp. v. United States, 342 F. Supp. 2d 1172, 1183 (Ct. Int'l Trade 2004)).

89. *See Walgreens*, 31 I.T.R.D. (BNA) at 2243–44 (citing 19 C.F.R. § 351.225(k)(1) (2007)).

90. *See Walgreens*, 31 I.T.R.D. (BNA) at 2244. The factors are: (1) physical characteristics, (2) purchaser expectations, (3) ultimate use, (4) channels of trade, and (5) manner in which product is advertised and displayed. *See* 19 C.F.R. § 351.225(k)(2) (2007)); *see also* Diversified Prods. Corp. v. United States, 572 F. Supp. 883 (Ct. Int'l Trade 1983).

91. *See Walgreens*, 31 I.T.R.D. (BNA) at 2244 (quoting Novosteel SA v. United States, 128 F. Supp. 2d 720, 723 (Ct. Int'l Trade 2001), *aff'd*, 284 F.3d 1261 (Fed. Cir. 2002)).

92. *See Walgreens*, 31. I.T.R.D. (BNA) at 2245 (citing *Antidumping Duty Order on Certain Cased Pencils from the People's Rep. of China (PRC)—Request by Fiskars Brands, Inc.*, A-570-827 (Dep't of Commerce Jun. 3, 2005)) (final scope ruling); *see also* Memorandum from Demetri Kalogeropoulous, Certain Lined Paper Products from the People's Republic of China—Davis Group of Companies Corp. Scope Ruling (Feb. 21, 2008).

"minor component" of the imported article that, under a *Diversified Products* analysis, is outside the scope.[93]

In *Walgreens*, plaintiff argued that Commerce erred in not treating five gift bag sets containing tissue paper as mixed-media items outside the scope of the AD order on tissue paper from China.[94] Commerce, on the other hand, argued that the gift bag sets were merely several independent items packaged together rather than a unique item of merchandise with various components.[95] The Court, however, did not focus on how the gift bag sets should be characterized. Rather, the Court looked to the "salient issue," *i.e.*, whether Commerce's decision was supported by substantial evidence in the record.[96] On that point, the Court found in the affirmative.[97] On the relevance of prior mixed-media cases, the Court found that Commerce had reasonably looked to its prior scope rulings for guidance in this case. More importantly perhaps, the Court found that Commerce had "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[98]

IV. JURISDICTION & JUDICIAL PROCESS

Before the Court reaches the merits of a case, it must frequently resolve jurisdictional challenges and requests for injunctive relief. In this section we examine noteworthy cases in 2009 on standing, exhaustion of administrative remedies, intervention and the right to a preliminary injunction.

A. *Standing/Exhaustion*

When a respondent exporter withdraws from a review and all its entries are liquidated one might assume that the exporter would lack standing to challenge the results of the review. Not so. As *Asahi Seiko Co.*

93. *See Walgreens*, 31 I.T.R.D. (BNA) at 2245 (discussing *Final Scope Ruling—Antidumping Duty Order on Certain Cased Pencils from the People's Rep.of China (PRC)—Request by Target Corp.*, A-570-827 (Dep't of Commerce Mar. 4, 2005)).

94. *See Walgreens*, 31 I.T.R.D. (BNA) at 2242–43, 2245. The sets contained a gift bag, a bow, and one to six sheets of tissue paper, depending upon the size of the gift bag. *See id.* at 2242–43.

95. *See id.* at 2245.

96. *See id.*

97. The Court pointed out that the tissue paper in question had all of the physical characteristics described in the scope, and noted that the preliminary determination in the original investigation stated that tissue paper is within the scope even if accompanied by non-subject merchandise. *See id.* at 2245–46.

98. *See Walgreens*, 31 I.T.R.D. (BNA) at 2246 (quoting Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983)).

v. United States teaches, there can be more at stake in an administrative review than just the duties on the covered entries.[99]

In the underlying review, Commerce selected two "mandatory respondents" for individual examination; Asahi was not one of them. Months later, Asahi withdrew its request for review and Commerce rescinded the review as to Asahi.[100] Asahi subsequently appealed four aspects of the final results of the review, one of which was Commerce's refusal to select Asahi for individual examination and rate calculation.[101] Commerce moved for dismissal, arguing that the issue was moot because, by that time, all of Asahi's entries had liquidated. Asahi argued, however, that it believed it would have received a zero or *de minimis* margin in the review at issue, and it also believed that its 1.28% margin in the prior review would be reduced to zero or *de minimis* as a result of pending litigation. Two zero or *de minimis* margins would have potentially put Asahi in a position to request revocation on the basis of three consecutive years of no dumping.[102]

The Court sided with Asahi. Citing the CAFC's ruling in *Gerdau Ameristeel Corp. v. United States*,[103] the Court stated that liquidation of entries does not by itself render a case moot, especially where there may be ongoing legal consequences. Given that a zero or *de minimis* margin could, theoretically, contribute to revocation of the AD order with respect to Asahi in the future, the Court held that Asahi had both a legally cognizable interest and a stake in the litigation. Asahi therefore had standing to bring the claim.[104]

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99. 31 I.T.R.D. (BNA) 2295 (Ct. Int'l Trade Nov. 16, 2009).

100. In the final results, Commerce gave the mandatory respondents their individual rates and assigned the seven non-selected respondents a margin based on a simple average of the margins found for the two mandatory respondents. *See id.* at 2297.

101. The other three contested issues were: (1) Commerce's decision to assign the seven non-selected respondents a 10% rate based on a simple average of the margins for the two examined respondents, (2) aspects of Commerce's sampling technique, and (3) whether Commerce's decision to refrain from conducting individual examinations of "non-producing exporters" was contrary to its own policy. *See Asahi*, 31 I.T.R.D. (BNA) at 2297. The Court dismissed these claims for lack of standing. *Id.* at 2297–98. The Court found that the complaint failed "to allege any facts from which the court could conclude that Asahi was affected in any way" by the rate Commerce assigned to the non-selected respondents. *Id.* at 2297–98. The Court also concluded that Asahi did not have standing to assert the rights of non-producing exporters since it was not itself a non-producing exporter. *See id.*

102. *See id.* at 2298.

103. 519 F.3d 1336, 1341–42 (Fed. Cir. 2008).

104. Commerce also argued that Asahi's claim should be dismissed for failure to exhaust its administrative remedies. *See Asahi*, 31 I.T.R.D. (BNA) at 2299. Although Commerce acknowl-

B. *Standing—Preliminary Injunction: Importer*

Foreign and domestic producers may have the starring roles in antidumping proceedings, but it is the importers of the subject merchandise who ultimately must pay the duties. In *Union Steel v. the United States* ("*Union Steel*"),[105] the Court provided additional guidance on the requirements for importers to invoke the jurisdiction and equitable powers of the Court.

In *Union Steel*, the Court considered the level of activity in the administrative proceeding that is sufficient for an importer of the subject merchandise to acquire status as a "party to the proceeding," and whether an importer's request for a preliminary injunction would impermissibly enlarge the issues pending before the Court.

Whirlpool Corporation ("Whirlpool"), an importer of the subject merchandise,[106] had requested an administrative review of its foreign suppliers[107] and applied for access to business proprietary information under an Administrative Protective Order (APO).[108] Whirlpool also made a submission to the Department that included a Customs entry summary (Form 7501) covering one of its imports during the period of review to establish that it was in fact an importer and therefore an "interested party."[109] That document was subsequently cited by Commerce in explaining its selection of mandatory respondents.[110]

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edged that Asahi had filed a case brief raising the issues appealed, Commerce stated it did not address the issues because Asahi withdrew from the review. *Id.* Essentially, in Commerce's view, Asahi had to be a respondent throughout the review to exhaust its administrative remedies. *Id.* This was an interesting proposition, but one that, for the time being at least, remains untested. The Court deferred the exhaustion issue until adjudication on the merits, when it would have the benefit of consideration of the full administrative record and briefing by the parties. *See id.*

105. *See* 617 F. Supp. 2d 1373 (Ct. Int'l Trade 2009).

106. This case arose out of an administrative review of the antidumping duty order on imports of certain corrosion-resistant carbon steel flat products from the Republic of Korea.

107. *See Union Steel*, 617 F. Supp. 2d at 1375 (citing Letter from Drinker Biddle Gardner Carton to Sec'y of Commerce (Aug. 30, 2007) [hereinafter *Whirlpool's Letter Requesting Review*] (on file with author)).

108. *See Union Steel*, 617 F. Supp. 2d at 1376 (citing Letter from Drinker Biddle Gardner Carton to Sec'y of Commerce 1 (Oct. 31, 2007) [hereinafter *Whirlpool's APO Application*] (on file with author)).

109. *See Union Steel*, 617 F. Supp. 2d at 1376 (citing Letter from Drinker Biddle Gardner Carton to Sec'y of Commerce 1 (Nov. 9, 2007) [hereinafter *Whirlpool's Submission on Resp't Selection*] (on file with author)).

110. *See Union Steel*, 617 F. Supp. 2d at 1376 (citing Mem. on Selection of Resp'ts for Individual Review 5 & n.5 (Dec. 6, 2007) [hereinafter *Dep't's Resp't Selection Mem.*] (on file with author)). For the sake of clarity, we note that, while Commerce considered this information in the context of respondent selection, the subject of the November 9th submission was identified as: "Interested Party Status of Whirlpool Corporation ("Whirlpool") in the Administrative Review of Corrosion-Resistant Carbon Steel Flat Products

Before the CIT, Whirlpool moved to intervene as a matter of right. Commerce opposed on the grounds that Whirlpool was not a "party to the proceeding" below.[111] Commerce's regulations define a "party to the proceeding" as an interested party that "actively participates, through written submissions of factual information or written argument, in a segment of a proceeding."[112] Commerce argued that Whirlpool did not meet that definition because its three written submissions "communicated nothing of substance to Commerce."[113] The Court disagreed.

In granting Whirlpool's motion to intervene, it is noteworthy that the Court relied not only on Whirlpool's three written submissions but also on the fact that "Commerce acted upon the information Whirlpool submitted."[114] The Court found that in citing to Whirlpool's submission in the respondent selection memo, Commerce "acknowledged implicitly Whirlpool's participation in the proceeding." Thus, the Court concluded, "it would be an odd result for the court now to hold that Whirlpool may not intervene."[115] Given the nature and purpose of Whirlpool's submissions, described above, the fact that Commerce referenced one of the documents in its respondent selection decision appears to have been a significant factor in the Court's finding that Whirlpool's submissions were not "purely procedural."[116]

Turning to the preliminary injunction, Commerce argued that, because Whirlpool sought to enjoin liquidation of its own entries, which were not the subject of plaintiffs' complaint, the injunction would violate the principle that an intervenor "is not permitted to enlarge [the pending issues] or compel an alteration of the nature of the proceeding."[117] An intervenor, Commerce argued, "is limited to supporting plaintiff in asserting its own claims for relief."[118] In reply,

from Korea." Whirlpool presented the Form 7501 to demonstrate that it was an importer of record and therefore an interested party. Thus, the particular issue Whirlpool was commenting on was its interested party status, not respondent selection.

111. To intervene as a matter of right, a party must be both: (1) an interested party, and (2) a "party to the proceeding" below. *See Union Steel*, 617 F. Supp. 2d at 1378–79 (citing 28 U.S.C. § 2631(j) (2006)).

112. *See Union Steel*, 617 F. Supp. 2d at 1348 (quoting 19 C.F.R. § 351.102(b) (2010)).

113. *See Union Steel*, 617 F. Supp. 2d at 1348.

114. *See id.*

115. *Id.* at 1378–79.

116. *Id.* at 1379.

117. *Id.* 617 F. Supp 2d at 1382 (quoting Vinson v. Wash. Gas Light Co., 321 U.S. 489, 498 (1944)).

118. *Union Steel*, 617 F. Supp. 2d at 1382 (quoting Laizhou Auto Brake Equip. Co. v. United States, 477 F. Supp. 2d 1298, 1299–1301 (Ct. Int'l Trade 2007)).

Whirlpool cited *NSK Corp. v. United States* ("*NSK*"),[119] in which the CIT held that an intervenor was entitled to an injunction against liquidation of its own entries because a challenge to a specific determination encompassed all entries covered by the determination, and the legal theories and arguments would remain unchanged.[120]

The Court came down on the side of Whirlpool and *NSK*. Noting that Whirlpool's motion did not signify any intent to raise additional substantive issues, the Court concluded an injunction against the liquidation would not enlarge the issues.[121] Likewise, the Court rejected the notion that the nature of the proceeding would be altered because the injunction "need do no more than allow the final judicial determination resulting from this litigation to govern entries" that were the subject of the administrative review.[122]

C. *Preliminary Injunction: Exporter*

In *Since Hardware (Guangzhou) Co. v. United States* ("*Since Hardware*"),[123] the Court was presented with the opposite side of the coin—where is the irreparable harm for an exporter who is not obligated to pay the duties? Defendant-intervenor opposed plaintiff's request for an injunction arguing that as a foreign manufacturer, not an importer, plaintiff pays no duties and therefore will not suffer irreparable injury as a result of the liquidation of importers' past entries.[124] Defendant-intervenor also argued there was a low likelihood of success on the merits due to an "overwhelming case against the plaintiff" based on Commerce's decision to apply total adverse facts available.[125]

Given that exporters are the very targets of AD/CVD investigations, it is difficult to quarrel with the Court's rejection of defendant-intervenor's position on irreparable harm. The Court stated that no

119. 547 F. Supp. 2d 1312 (Ct. Int'l Trade 2008).

120. *See Union Steel*, 617 F. Supp. 2d at 1382.

121. *See id.*

122. *Id.* The Court also dismissed Commerce's argument that the motion for injunction was untimely under USCIT Rule 56.2(a), which states that a motion to enjoin liquidation of entries that are the subject of the action must be filed within 30 days after service of the complaint. *See Union Steel*, 617 F. Supp. 2d at 1383. The Court stated that Commerce "reads too much into" the Rule. *Id.* The "overly broad construction" proposed by Commerce would, the Court reasoned, "diminish the significance of the intervention procedure established" by Congress. *See id.*

123. Since Hardware (*Guangzhou*) Co. v. United States, 31 I.T.R.D. (BNA) 1270 (Ct. Int'l Trade Mar. 27, 2009).

124. *See id.* at 1270.

125. *See id.* at 1270–71.

"extraordinary showing" of irreparable harm is required.[126] Given the competitive impact on foreign producers, plaintiff could, as a legal matter, establish irreparable harm despite the fact that it was not itself an importer of subject merchandise and therefore not responsible for payment of duties.[127] The Court also noted that it is well settled that the greater the potential harm, the lower the standard for likelihood of success on the merits will be. The Court then concluded that the likelihood standard in this case was "relatively low" in view of the potential harm from liquidating entries prior to a decision on the merits.[128] The Court also emphasized the public interest in permitting "the court to reach a considered decision regarding the agency's determination as to whether, and in what amount, duties are owed, before precluding the parties from litigating the issue."[129] In short, the Court declined to deny an injunction where doing so would deny a party the benefit of its day in court.

D. *Intervention*

In *GPX International Tire Corp. v. United States* ("*GPX I*"),[130] the Court declined to relieve a litigant of the consequences of their strategic choices. The Government of China ("GOC") moved to intervene in the case approximately four months after the complaint was filed. Commerce opposed on the ground that the motion was time-barred under USITC Rule 24(a)(3), which requires that motions to intervene be filed no later than thirty days after service of the complaint, absent a showing of good cause for filing later based on (1) mistake, inadvertence, surprise or excusable neglect, or (2) circumstances in which by due diligence a motion to intervene could not have been made within the thirty-day period.[131]

126. *See id.* at 1271 (quoting Qingdao Taifa Group Co. v. United States (*Qingdao Taifa*), 30 I.T.R.D. (BNA) 2279 (Ct. Int'l Trade Nov. 4, 2008)).

127. *See Guangzhou*, 31 I.T.R.D. (BNA) at 1271 (quoting *Qingdao Taifa*, 30 I.T.R.D. (BNA) at 2279).

128. *See Guangzhou*, 31 I.T.R.D. (BNA) at 1271.

129. *See id.* (quoting *Qingdao Taifa*, 30 ITRD (BNA) at 2279).

130. GPX Int'l Tire Corp. v. United States (*GPX I*), 41 I.T.R.D. (BNA) 1144 (Ct. Int'l Trade Feb. 12, 2009). The case on the merits, *GPX II*, is discussed in the CVD section. *See supra* Part I.A.

131. In assessing a claim of excusable neglect, the Court considers "all relevant circumstances," including "the danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *See id.* at 1145 (quoting Siam Food Prods. Pub. Co. v. United States, 24 F. Supp. 2d 276, 279 (Ct. Int'l Trade 1998)).

The GOC argued its neglect was excusable because it believed that, if the Court granted plaintiffs' motion for preliminary injunction, the companies would have the financial ability to pursue the appeal. Thus, the need to intervene, the GOC argued, became apparent only after the preliminary injunction was denied and the GOC learned that plaintiffs lacked the financial means to effectively engage in the appeals process. The GOC also argued that the decision to intervene was deferred until the Court ruled on the injunction because the GOC's internal process to obtain authorization to file the motion was so complex and time consuming. Finally, the GOC claimed its involvement would not prejudice other parties, "as it [intended] to address only those issues already set forth in plaintiffs' amended complaints."[132]

The Court was not persuaded. While finding that there would likely be some prejudice to the defendant,[133] the Court was more disturbed by the GOC's deliberate decision to delay a pending decision on the preliminary injunction. The decisive factor was the Court's finding that the circumstances giving rise to the late motion were not "genuinely outside the reasonable control" of the GOC.[134] Rather, this was a case of "a conscious decision not to intervene timely."[135]

V. Administrative Process

As discussed below, 2009 also presented new cases on some old favorites in the area of administrative process—if and when Commerce is required to accept new information and the timing of liquidation instructions.

A. *Record—New Information*

Thai I-Mei Frozen Foods Co. v. United States[136] involved a request by Commerce for an extension to file the results of a second remand in

132. *GPX I*, 41 I.T.R.D. (BNA).

133. Commerce argued that it would be prejudiced by the need to devote additional resources to analyzing different portions of the record to respond to China's brief.

134. *Id.* (citing Home Prods. Int'l, Inc. v. United States, 521 F. Supp. 2d 1382, 1385 (Ct. Int'l Trade 2007)).

135. *GPX I*, 41 I.T.R.D. (BNA) at 1146 (citing Siam Food Prods. Pub. Co. v. United States, 24 F. Supp. 2d 276 (Ct. Int'l Trade 1998)).

136. 31 I.T.R.D. (BNA) 1092 (Ct. Int'l Trade Jan. 21, 2009) [hereinafter *Thai I Mei III*].

which Commerce had reopened the record for new information.[137] The case is noteworthy for what it says (and does not say) about the rules on submission of rebuttal information.

During the remand proceeding, Thai I-Mei and petitioner, the Ad Hoc Shrimp Trade Action Committee, timely submitted new factual information. Then, availing itself of the ten-day rebuttal rule, Thai I-Mei subsequently submitted additional factual information it stated was "to clarify, rebut and correct" the information submitted by petitioner.[138] Commerce rejected that additional information as untimely.

On appeal, Thai I-Mei requested that, if the Court granted Commerce's extension request, it should also order Commerce to accept for the record the information it had rejected as untimely. Commerce did not object to "examining" the information but argued that it should not actually be used in the calculations on the ground that to do so would violate unidentified "statutory procedures."[139]

The Court disagreed, finding no reason to limit Commerce's use of the additional information. The Court reasoned that the intent of the remand was for Commerce to use a reasonable method to calculate CV profit and concluded that admitting the evidence would provide Commerce with a more complete record from which to do so.[140] The Court further stated that to impose the proposed limitation would not only "require the Court to delve into the merits of the remand proceeding prematurely, before the remand results are completed and filed with the Court . . . [but also] require the Court to examine the factual information in question, which [was] not appropriate at this stage of the remand proceeding."[141] Any issues arising from the newly submitted information, the Court stated, could be adequately addressed after remand results were before the Court.

It is also noteworthy that the court found "no need to resolve, at this time, the implied question to which defendant's proposed limitation appears to be directed."[142] The "implied question" relates to application of the ten-day rebuttal rule in 19 C.F.R. § 351.301(c)(1). Apparently, the Court saw in Commerce's requested limitation an implicit argument either that the regulation was inapplicable under the circum-

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137. *See* Thai I-Mei Frozen Foods Co., v. United States, 477 F. Supp. 2d 1332 (Ct. Int'l Trade 2007) [hereinafter *Thai Mei I*].

138. *See* 19 C.F.R. § 351.301(c)(1) (2009).

139. *See Thai I-Mei III*, 31 I.T.R.D. (BNA) at 1093.

140. *See id.* at 1093–94.

141. *Id.* at 1094.

142. *Id.* at 1094 n.2.

stances of this case or perhaps that the regulation itself limits the use of rebuttal information. The ten-day rebuttal rule is used routinely, therefore any limitations on its applicability could have significant ramifications in practice. For now, however, the "implied question" remains unanswered. In the second remand, while continuing to disagree with the Court, Commerce used the previously rejected information. It was therefore unnecessary for the Court to reach this issue.

B. *Liquidation Instructions—Timing*

U.S. Customs and Border Protection ("CBP") is required to liquidate AD/CVD entries within six months after the suspension of liquidation is lifted following completion of an administrative review. If it fails to do so, the entries are deemed liquidated at the rate in effect at the time of entry rather than the rate determined in the review.[143] This rule creates tension between two important interests: giving effect to the results of a review through timely liquidation (avoiding "deemed liquidation") versus giving parties time to exercise their rights to judicial review and injunctive relief. In *SKF USA Inc. v. United States,*[144] the Court overruled a Commerce policy intended to balance those interests, and in doing so perhaps tilted the scales slightly in favor of preserving the right to judicial review.

At issue was Commerce's policy of issuing liquidation instructions to CBP within fifteen days of publishing the final results of reviews of an AD or CVD order ("fifteen-day policy").[145] Plaintiffs asked the Court to declare the policy "unlawful and void"[146] on the grounds that it violated 19 U.S.C. § 1516a(a)(2), which allows parties thirty days within which to commence an action by filing a summons, and another thirty days within which to file the complaint.[147] Plaintiffs further alleged that the

143. 19 U.S.C. § 1504(d) (2006).

144. 611 F. Supp. 2d 1351 (Ct. Int'l Trade 2009) [hereinafter *SKF*]. This case also presented the Court with another challenge to Commerce's controversial practice of "zeroing" when calculating dumping margins. Although the CAFC has held that "zeroing" is consistent with the U.S. antidumping law, plaintiff presented new legal arguments, but to no avail. The Court's latest decision on this issue should leave little doubt that, unless and until Congress or Commerce act to eliminate the practice, zeroing is here to stay.

145. *See id.* at 1354 (citing DEP'T OF COMM., ANNOUNCEMENT CONCERNING ISSUANCE OF LIQUIDATION INSTRUCTIONS REFLECTING RESULTS OF ADMINISTRATIVE REVIEWS, AUG. 9 2002 (2002), http://ia.ita.doc.gov/download/liquidation-announcement.html (updated Aug. 14, 2002)).

146. The Court construed this as a request for declaratory judgment. *See SKF*, 611 F. Supp. 2d at 1361.

147. In the instant case, Commerce published the Final Results on July 14, 2006, and issued liquidation instructions to Customs on July 31 and August 1, 2006. *See id.* 1355. CBP forwarded the liquidation instructions to the ports on August 10, 2006. *See id.* Thus, there was

fifteen-day policy violated the CIT rule granting parties a period of up to thirty days after filing their complaint to move for a preliminary injunction. In effect, plaintiff took the view that Commerce must wait sixty days or longer before issuing liquidation instructions.

The Court took issue with plaintiff's line of reasoning, noting that Congress made compliance with the requirements of § 1516a(a)(2) essential to invoking the jurisdiction of the CIT, but "gave no indication of an intent to affect the time period under which a party may seek an injunction" under § 1516a(c)(2).[148] The Court reasoned further that, depending on the nature of the claim, a plaintiff could obtain some form of relief even though the entries have liquidated; therefore, an injunction is not always essential to the exercise of the Court's jurisdiction.[149] The Court also found plaintiffs' reliance on the CIT's rules unpersuasive, stating Rule 56.2(a) does not address either the minimum time for requesting an injunction or how long Commerce must wait before issuing liquidation instructions.[150] Thus, the Court concluded that plaintiffs were not entitled to the declaratory judgment they sought. But that was not the end of the matter.

The Court decided, in its discretion, to consider a facial challenge to the fifteen-day policy.[151] Commerce defended the policy as consistent

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some possibility that liquidation could have occurred less than thirty days following publication of the results of review, although the probability of that happening is certainly open for debate. When plaintiff commenced this action on August 14, 2006, it moved for both a temporary restraining order ("TRO") and preliminary injunction to prevent liquidation of entries during the period of review. *Id.* The Court granted both motions. *See id.* at 1354–55.

148. *SKF*, 611 F. Supp. 2d at 1362.

149. *See id.* (citing Gerdau Ameristeel Corp. v. United States, 519 F.3d 1336, 1341 (Fed. Cir. 2008)).

150. *See SKF*, 611 F. Supp. 2d at 1362.

151. *See, id.* at 1363 (citing U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 447 (1993)). Before proceeding to the merits, the Court first considered whether the Article III standing requirements were fulfilled, "[b]ecause standing is 'an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *See SKF*, 611 F. Supp. 2d at 1363. (quoting Canadian Lumber Trade Alliance v. United States, 517 F.3d 1319, 1331 (Fed. Cir. 2008)). The three requirements are: (1) injury in fact or threat thereof, (2) a causal connection between the injury and the agency action at issue, and (3) redressability. *SKF*, 611 F. Supp. 2d at 1363. Based on the costs and inconvenience associated with additional motions and early pleadings to prevent premature liquidation, and the threat of premature liquidation in future proceedings, the Court found the first requirement was met. *See id.* There was little question that the causal nexus was present as well because, as the Court stated, the policy itself and the agency's stated intent to follow it in all administrative reviews gave rise to the injury. *See id.* at 1364. Redressability was satisfied because if "the fifteen-day policy were held to be unlawful, liquidation instructions could no longer be issued lawfully pursuant to the policy. . . ." *Id.* In

with the *International Trading* decisions[152] in which the CAFC held that suspension of liquidation terminates upon publishing the final results of a review. Publication starts the six-month clock that culminates in deemed liquidation at the duty rate in effect at the time of entry. In the Court's view, however, the *International Trading* decisions did not compel the conclusion that a policy allowing for immediate liquidation of entries is permissible. The Court also found that neither the *Mukand* nor *Mittal Steel Galati I* decision supported Commerce's position.[153] The Court viewed the decision in *Mukand* as "not a broad holding that the fifteen-day policy . . . is invariably permissible under 19 U.S.C. § 1516a(c)(2)."[154] Regarding *Mittal*, the Court noted that, although the CIT declined to declare the fifteen-day policy "unreasonable," it nevertheless recognized that there existed a possibility that Commerce and Customs could act so quickly as to foreclose judicial review and such foreclosure "would render Commerce's policy unreasonable."[155]

The Court concluded that the fifteen-day policy "induces an absurd, and unnecessary, 'race to the courthouse' that burdens impermissibly the right of a prospective plaintiff to seek the injunction" and "frustrates the purpose" of § 1516a(c)(2).[156] Drawing a distinction between *issuance* of instructions and *commencement of liquidation*, a key factor in the Court's reasoning was that Commerce implemented the fifteen-day policy "together with a practice of issuing liquidation instructions that are effective immediately, *i.e.*, they do not instruct Customs to wait any period of time before commencing liquidation of the affected entries."[157] Issuing liquidation instructions with a delayed commencement date might advance the goal of avoiding deemed liquidation by at

addition, the Court considered the prudential standing requirement applicable to cases under the Administrative Procedures Act. Prudential standing exists where the plaintiff's interest in the litigation falls within the zone of interests protected by the statute. In the present case, the Court found, "the plaintiff's interest lies in the statutory right to obtain meaningful judicial review," which right arises out of both the right in § 1516a(a)(2) to invoke the jurisdiction of the CIT, and the right to injunctive relief in § 1516a(c). *See id.*

152. *See id.* at 1365 (citing Int'l Trading Co. v. United States, 412 F.3d 1303, 1313 (Fed. Cir. 2005); Int'l Trading Co. v. United States, 281 F.3d 1268, 1273 (Fed. Cir. 2002)).

153. *See SKF*, 611 F. Supp. 2d at 1366 (citing Mukand Int'l Ltd. v. United States (*Mukand*), 452 F. Supp. 2d 1329, 1334 (Ct. Int'l Trade 2006) (holding that, on the facts of that case, issuance of liquidation instructions within 60 days was not unlawful); Mittal Steel Galati S.A. v. United States (*Mittal Steel Galati I*), 491 F. Supp. 2d 1273, 1281 (Ct. Int'l Trade 2007)).

154. *SKF*, 611 F. Supp. 2d at 1366.

155. *Id.* at 1367.

156. *Id.* at 1365.

157. *Id.* at 1364.

least enabling CBP to begin preparations for liquidation, thereby minimizing any delay in the actual commencement of liquidation. Only time will tell whether such a theory will actually work in practice, however. Thus, we must wait to see whether the Court's decision produces an eloquent solution to ease the tension between the goals of timely liquidation and a reasonable opportunity to invoke the jurisdiction of the Court.

Conclusion

In 2009, some old controversies, like zeroing, continued but new controversies, particularly NME CVD, took center stage. *GPX* is undoubtedly just the beginning of the debate over concurrent application of the CVD law and the AD NME provisions of the statute. In addition, new NME CVD issues will certainly arise. Thus, there will likely be a significant expansion of CVD jurisprudence. Similarly, some recent cases suggest a trend toward broader and more complex scopes and continuing concerns over circumvention. Thus, we are likely to see further developments on these issues, building on cases such as *Target*, *ASHTAC III* and *Walgreens*. Moreover, the cases discussed above, such as *SKF* and *Thai I-Mei* raise new questions on old topics and leave some questions unanswered. In short, there is unlikely to be a shortage of important and interesting cases in the coming year.