THREE DIFFERENT STANDARDS OF REVIEW IN CIT JURISPRUDENCE: HARD RESULTS, PRACTICE POINTS, AND LESSONS LEARNED

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ABSTRACT

The United States Court of International Trade (CIT) is an Article III court of limited but exclusive jurisdiction encompassing disparate areas of law united by the fabric of international commerce. Frequently the court provides a “second bite at the apple” for plaintiffs who have been unable to convince an underlying federal agency or tribunal that their harms deserve governmental redress. In such circumstances the court’s authority to exercise independent legal judgment depends on the procedural posture of the case as well as the identity of the lower agency or tribunal. The three cases discussed in this article exemplify these crucial dimensions of CIT jurisprudence and offer takeaways for effective advocacy before the court.

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I. Introduction

Where a dispute before the CIT has been previously adjudicated by a federal agency or tribunal, the court’s ability to exercise its independent judgment is circumscribed by statute and judicial constructs requiring various levels of deference to the underlying determination. Thus, where separated workers sought to overturn a finding of the Department of Labor in Former Employees of the Boeing Co. v. U.S. Secretary of Labor, the court operated under the deferential “substantial evidence” standard of review. Likewise, in Best Key Textiles Co. Ltd. v. United States, where the importer contested a ruling issued by Customs and Border Protection (CBP) based on the agency record, the court operated under the minimal “abuse of discretion” standard. However, where a surety sought to avoid paying statutory interest on antidumping duties in United States v. American Home Assurance Co., the court declined to extend any deference to the government’s position because no federal agency had been entrusted with the statute’s interpretation. CIT practitioners must consider and advocate for the appropriate standard of review applicable to any given case or issue, as the outcome may depend on it.

II. The Court’s Trade Adjustment Assistance Decision Under 28 U.S.C. § 1581(d)—The Deferential “Substantial Evidence” Standard of Review

In Former Employees of the Boeing Co. v. U.S. Secretary of Labor, the CIT issued its only decision in 2014 arising under 28 U.S.C. § 1581(d), a statute that provides the court with exclusive jurisdiction to review determinations by U.S. agencies as to whether displaced workers, communities, firms, and agricultural producers can qualify for Trade

4. The Boeing employees filed their suit under 19 U.S.C. § 1581(d)(1) (2012), which provides as follows:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 [19 USCS § 2273] with respect to the eligibility of workers for adjustment assistance under such Act. . . .

Depending on the identity of the 19 U.S.C. § 1581(d) claimant, the agency which rendered the decision under review by the CIT might be the Secretary of Labor as in this case, the Secretary of Commerce, or the Secretary of Agriculture.
Adjustment Assistance (TAA). Unfortunately for the former Boeing employees who brought this action, the Secretary of Labor (Labor) determined that the underlying causes of their unemployment had nothing to do with international trade, and the CIT deferred to Labor’s determination.

The group of former Boeing workers seeking TAA certification had all been separated from a Boeing Defense and Space (BDS) Division plant located in Wichita, Kansas, which was shuttered in 2014 after many years of economic struggle and malaise. The group had petitioned for TAA certification a year prior to the plant’s closure, and Labor then undertook an investigation to determine whether the criteria for TAA assistance were met.

Labor’s investigation revealed that after Boeing sold a different division at the Wichita plant in 2005, its BDS Division was the only remaining business entity at the plant. Moreover, BDS Division employees worked exclusively on military projects and their work was limited to performing modifications on existing military aircraft. However, the well of modification projects often ran dry, and the BDS Division struggled financially. Labor’s investigation determined that Boeing was forced to lay off BDS Division workers periodically and sometimes sent them to a Boeing plant located in Seattle in order to keep them employed. In the end, budget cuts by the U.S. Department of Defense caused Boeing to completely shutter its Wichita facility in 2014.

The death knell for the former Boeing employees’ TAA claim was Labor’s determination that they had been engaged in employment related exclusively to the modification of military aircraft subject to the

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5. According to a White House website on TAA,

Since 1974, 2.2 million American workers have benefited from this program, which provides workers with opportunities to obtain the skills, credentials, resources, and support they need to obtain good jobs in an in-demand occupation—and keep them. For example, in Fiscal Year 2014, nearly 77 percent of TAA participants found a job within 6 months of completing the program, and 90 percent of those who found work retained their jobs 6 months later.

See Jeffrey Zients, Trade Adjustment Assistance: What You Need to Know, WHITEHOUSE (June 11, 2015, 6:48 PM), https://www.whitehouse.gov/blog/2015/06/11/trade-adjustment-assistance-what-you-need-know. Nevertheless, TAA remains a politically controversial program and was at the center of political wrangling by Congress and the President while the two branches of government sought to enact crucial trade legislation in the spring and summer of 2015. Eventually the TAA program, which was due to expire in September 2015, was extended to 2021 under the Trade Preferences Extension Act of 2015, H.R. 1295, 114th Cong. (2015).

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International Traffic in Arms Regulations (ITAR). Labor noted that work subject to ITAR controls cannot be completed outside the United States and that workers devoted to ITAR projects therefore cannot meet the TAA eligibility requirements. In other words, the workers did not face competition from imports and foreign labor because no U.S. military aircraft covered by ITAR were modified outside the United States.

Labor also denied TAA certification because the economic hardship suffered by the BDS Division was caused by factors linked to the domestic economy. In that regard, Labor determined that Boeing diverted certain work flow from the BDS Division for reasons unrelated to employment moving overseas.

The CIT began its review of Labor’s determination by explaining the statutory basis upon which TAA benefits may be awarded to displaced workers: “The eligibility criteria for [TAA] certification are met if ‘a significant number or proportion of the workers’ have become or are threatened to become ‘totally or partially separated’ as a result of either increased imports or a shift abroad of production or services.” The court made clear that TAA is not an entitlement, and it does not exist to protect workers whose livelihoods are affected by economic circumstances having nothing to do with international trade:

While the TAA’s assistance provisions “are to be construed liberally,” the “parameters of the statute cannot be ignored” and the “benefits of [TAA] are not universal.” *Former Employees of Hewlett-Packard Co. v. United States*, 17 CIT 980, 986 (1993). Accordingly, some hardship may result. *Id.* Case law has “consistently held that the TAA statute does not apply when a company closes because economic factors make continued operations impractical rather than due to direct import competition.”

Pursuant to 19 U.S.C. § 2395(b), the CIT must utilize the deferential “substantial evidence” standard when reviewing factual findings made

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7. *Id.* at 1352.

8. *Id.* (emphasis added) (citing 19 U.S.C. § 2272(a) (2012)).

9. *Id.* at 1351-52.
by Labor during a TAA investigation. As the court explained,

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951) (internal quotation omitted). “[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.”

Given this deferential standard of review and the strength of the administrative record, the CIT had no difficulty affirming Labor’s findings. Boeing had certified to Labor that the BDS Division was covered by ITAR, and “[t]he Court has previously affirmed that workers of firms whose production or services are covered by ITAR are not eligible for TAA certification.” The court also agreed that there was substantial evidence in the record to support Labor’s denial of certification based on domestic economic causes that were independent of international trade pressures.

Nevertheless, the CIT took care to point out yet again that its decisions denying TAA are not issued in callous disregard of the plight faced by displaced workers: “As stated in Former Employees of Hewlett-Packard, the Court ‘sympathizes with the difficult circumstances plaintiffs’ job loss may have imposed on them, but the court is bound to apply the statute as intended by Congress.’”

10. 19 U.S.C. § 2395(b), which is entitled “Findings of fact by Secretary; conclusiveness; new or modified findings,” provides as follows:

The findings of fact by the Secretary of Labor, the Secretary of Commerce, or the Secretary of Agriculture, as the case may be, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to such Secretary to take further evidence, and such Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.


12. Id. at 1352 (citing Former Empls. of Honeywell Int’l v. U.S. Dep’t of Labor, 33 C.I.T 558 (2009)) (sustaining Labor’s negative determination because of ITAR coverage).

13. Id. at 1353 (quoting Former Empls. of Hewlett-Packard Co. v. United States, 17 C.I.T. 980, 986 (1993)).
III. THE APA’S “ABUSE OF DISCRETION” STANDARD OF REVIEW APPLIES WHEN PLAINTIFFS CHALLENGE THE ADMINISTRATIVE RECORD UNDERLYING AN ADMINISTRATIVE RULING

The court’s decision in Best Key Textiles Co. v. United States (Best Key II), is a fascinating read that involves the first time an importer asked the CIT to increase the duties payable on its own merchandise. Indeed, the plaintiff here, Best Key, brought suit in an attempt to convince the CIT that its polyester yarn should be reclassified as “metalized” yarn, a result which would have increased the duty rate from 8% ad valorem to 13.2% ad valorem.

The first question that comes to mind is why would an importer want to increase duties payable, and the second is whether the court even has jurisdiction to hear such a case. The solution to both riddles hinges on solving a detective’s central inquiry: Cui bono? Answer: certain third party importers not before the court, which ultimately turned out to be the Achilles heel of the clever litigation strategy undertaken here.

Best Key is a Hong Kong-based producer that manufactures polyester yarn containing trace amounts of metals such as zinc, aluminum, and titanium. The yarn is produced from polyester chips melted into a slurry into which nanometal particles are mixed. The slurry is then forced through a spinneret to create the yarn. The inclusion of these metals purportedly confers desirable characteristics, such as UV protection and antimicrobial properties upon the yarn—and any garments manufactured from it.

Coincidentally, various garments constructed from metallic yarn are dutiable at a much lower rate than garments constructed from non-metallic yarn. So, the answer to the first riddle is that this litigation was a gambit at downstream tariff engineering to benefit Best Key’s customers outside the United States who would use Best Key’s yarn to produce finished garments imported into the United States at a very favorable rate of duty.

Best Key plotted its strategy methodically. First, it sent a request for a yarn classification ruling to CBP’s National Commodity Specialist Division in New York. Along with that ruling request Best Key included a laboratory report describing the yarn as having a fiber content of 100% polyester, with one type containing 0.7% metal by weight and a second

type containing 0.74% metal by weight.16 Best Key received New York Ruling N187601 (the “Yarn Ruling”) which classified the merchandise as “metalized” yarn subject to a duty rate of 13.2% ad valorem. So far so good.

Best Key marched right back in to CBP classification specialists in New York, this time with a men’s “Johnny Collar” shirt fabricated from Best Key’s yarns. Based on the Yarn Ruling, Best Key logically argued that the shirt—even though correctly labeled “100% polyester”—should not be classified as a “polyester” men’s shirt subject to a duty rate of 32% ad valorem, but instead should be classified as a shirt made of “other” textile materials and subject to a duty rate of 5.6% ad valorem. After conducting its own laboratory tests which indicated only “trace” amounts of metal in the shirt, CBP issued New York Ruling N196161 (“the Johnny Collar Ruling”), which disagreed with Best Key’s logic and held that the garment was a polyester shirt of non-metalized yarn, dutiable at 32% ad valorem.

Appealing to CBP Headquarters in Washington, D.C., Best Key requested reconsideration of the Johnny Collar Ruling. CBP Headquarters responded by publishing notice that it intended to revoke both the Yarn Ruling and the Johnny Collar ruling. During the statutorily mandated notice and comment period for revocation procedures,17 Best Key submitted additional materials in support of its position, but CBP Headquarters was unconvinced and revoked the Yarn Ruling, reclassifying the yarn as polyester with a duty rate of 8% ad valorem.18 CBP simultaneously revoked the Johnny Collar ruling in order to make technical and conforming changes in light of the revocation of the Yarn Ruling; nevertheless, it came to the same classification conclusion as the original Johnny Collar ruling and restated the 32% ad valorem rate of duty applicable to the garments.19 Best Key’s ingenious strategy had unraveled.

Undeterred, Best Key filed a summons in the CIT challenging CBP’s revocation of the Yarn Ruling,20 asserting jurisdiction under both 28 U.S.C. § 1581(h) and 28 U.S.C. § 1581(i). In its first decision in this case

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16. Best Key Textiles Co. v. United States, 777 F.3d 1356, 1358 (Fed. Cir. 2015).
20. Best Key did not challenge the revocation of the Johnny Collar ruling.
the CIT determined that it lacked jurisdiction under both provisions. Under 28 U.S.C. § 1581(h), the court has exclusive jurisdiction to hear a case brought by a party who can show it will be “irreparably harmed” by a CBP ruling issued prior to importation of the goods. However, because CBP’s revocation of the Yarn Ruling reduced the duties payable on Best Key’s yarn, Best Key I ruled that Best Key suffered no Article III constitutional harm cognizable under Section 1581(h). Likewise, Best Key I rejected the argument that jurisdiction arose under Section 1581(i), the statutory provision conferring various areas of “residual” jurisdiction upon the court. Accordingly, Best Key I concluded:

The plaintiff’s actual injury complaint here is that garment makers will not buy its yarn because importers of those garments will not get a more favorable duty rate for items made of the plaintiff’s yarn. But the duty rate charged to those importers is beyond any of the plaintiff’s interests that the provisions of section 1581 are meant to protect. The essence of the argument

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22. 28 U.S.C. § 1581(h) (2012) provides as follows:
The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.
23. The court’s residual jurisdiction provisions under 28 U.S.C. § 1581(i) read as follows:
In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;
(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.
the plaintiff attempts to put forth amounts to a request for the protection of others’ interests, namely those of importers of garments manufactured by purchasers of the plaintiff’s yarn. Even if the plaintiff is protecting its own financial interests by extension, it has no authority or standing to assert the claims of those remote parties under 1581(i) in its action here . . . .

Ever persistent, Best Key filed a motion for reconsideration. The court made the rare move to grant it and issued Best Key II. Best Key II found that jurisdiction did indeed lay under Section 1581(i) but also upheld CBP’s revocation of the Yarn Ruling.

A. Standing and Jurisdiction Under 28 U.S.C. § 1581(i)

The specific provision of the court’s residual jurisdiction at issue in Best Key II was Section 1581(i)(4), which confers jurisdiction over the “administration and enforcement” of laws providing for tariffs, duties, quantitative restrictions, and embargoes. Even though the court in Best Key II reversed itself and “presumed” jurisdiction under this statutory provision, it appeared to remain doubtful:

The court agrees it is “highly questionable” whether a Customs’ ruling that lowers the rate of duty on a product the plaintiff has no expressed intention of importing can result in aggrievement or adverse effect to the plaintiff . . . . While the court stands by its prior ruling in general, it is, nonetheless, the plaintiff’s product that is the subject of the ruling at issue, and the court has undoubted exclusive jurisdiction over the general administration and enforcement of this type of matter in 28 U.S.C. § 1581(i)(4). The court will therefore “presume” Customs’ ruling “reviewable” . . . .

Although the Federal Circuit later vacated Best Key II on the basis that Best Key lacked standing to vindicate harm to third parties not before the court (the very reason Best Key I determined jurisdiction was lacking), Best Key II contains an interesting discussion of the appli-

26. Id. at *2 (citations omitted).
27. See Best Key Textiles Co. v. United States, 777 F.3d 1356 (Fed. Cir. 2015).
cable standard of review and other issues surrounding the merits of the case.

B. Standard of Review

The procedural posture in Best Key II was fundamental to the standard of review adopted by the court and the concomitant analysis it undertook to rule on the merits. Because the plaintiff was exclusively challenging the administrative determinations of a federal agency pursuant to a Motion for Judgment on the Agency Record, the court’s standard of review was governed by the Administrative Procedures Act (APA). Thus, when Best Key invoked Jarvis Clark, the Lone Ranger of customs law jurisprudence which requires the CIT to make a “correct decision” in a customs classification case, the court declined any invitation to depart from the constraints of the limited standard of review required by the APA:

The court always endeavors to reach the “correct decision”—even apart from Jarvis Clark—but be that as it may, this is not an “ordinary” classification case. It is, of course, a review of an administrative record involving the administrative interpretation of the tariff statutes and the facts as they have been mustered before the agency. Such a proceeding is clearly governed by the scope and standard of judicial review of the [APA] applicable to the court’s residual jurisdiction . . .

In this case, Section 706 of the APA provided that “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions . . .” and “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” To the extent Jarvis Clark had any bearing on the standard of review, “the ‘correct decision’ is whether Customs’ ruling [on its own administrative record] is arbitrary, capricious, an abuse of discretion, or not in accordance with law.” To emphasize just how fettered its standard of review was in this case, the court noted it is “well-settled that the

32. Best Key II, 2014 Ct. Intl. Trade LEXIS 22 at *6 n.3 (citations omitted).
arbitrary and capricious standard of review is not merely deferential to agency action, but the most deferential of the APA standards of review.”

C. Decision on the Merits

Harmonized Tariff Schedule of the United States (HTSUS) Heading 5605 covers “[m]etalized yarn, whether or not gimped, being textile yarn, or strip or the like of heading 5404 or 5405, combined with metal.” The Yarn Ruling revoked by CBP Headquarters had concluded that Best Key’s yarn was a “metalized” yarn of HTSUS Heading 5605, and not a polyester yarn of HTSUS Heading 5402. As noted by the court, “[t]he obvious question Customs had to address was whether the product contemplated for importation is a textile-yarn-metal combination in the sense contemplated by heading 5605.”

In its revocation ruling CBP Headquarters observed that “[t]he instant product is not a textile yarn or strip combined with metal powder. The yarn itself contains metal, but it was not combined with metal in any way; the polyester slurry was combined with metal prior to the spinning of the yarn.” Best Key objected to this interpretation of the tariff language, but while the CIT recognized the term “combined with metal” is ambiguous insofar as it could refer to either (1) the combination of a yarn and a metal, or (2) a manufacturing process using textile and metal to produce a yarn, the APA’s highly deferential “arbitrary and capricious” standard of review foreclosed that avenue of attack: “[t]he plaintiff opted for this route of administrative and judicial process, and it is not the court’s function in this proceeding to resolve that ambiguity but only determine whether Customs’ ruling has ‘power to persuade’ . . . .”

37. Id. at *25 (quotations omitted) (citing United States v. Mead Corp., 533 U.S. 218 (2001) and Skidmore v. Swift & Co., 323 U.S. 134 (1944)). In Mead, the Supreme Court ruled that tariff classification rulings are not entitled to the level of “Chevron” deference accorded to agency interpretations of statutes they are entrusted to administer. Whereas a responsible agency’s interpretation of a statute is entitled to substantial deference under the doctrine of Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984), Mead held that “[t]ariff classification rulings are best treated like interpretations contained in policy statements, agency manuals, and enforcement guidelines [that . . . are beyond the Chevron pale.” Mead, 533 U.S. at 220 (quotation and citation omitted). As such, Mead held that tariff classification rulings are only entitled to a level of deference proportional to their “power to persuade,” a minimal level of deference.
The administrative record and revocation ruling also demonstrated that CBP Headquarters examined the common and commercial meaning of “metalized” yarn; conferred with outside industry experts; analyzed the relevant but non-binding Harmonized Commodity Description and Coding System Explanatory Notes; and concluded that HTSUS Heading 5605 was not intended to encompass every possible form of yarn with metal added. Best Key countered the administrative record with its own interpretations and outside expert but the court was not persuaded.  

In the course of its decision the court parried a broad arsenal of arguments Best Key proffered in an effort to have its beloved Yarn Ruling reinstated. However, Best Key’s efforts failed in part due to the effete standard of review mandated by the APA. There is no mistaking the common thread the court used to weave the deferential fabric of Best Key II: “Customs’ construction is not unlawful, and the court must defer to the agency’s reasonable factual conclusion on whether the [yarn] does or does not meet the statutory definition of ‘metalized yarn’ as lawfully construed”; “Custom’s factual finding on this issue in the Revocation Ruling, and more broadly that the [yarn] is not a metalized yarn of heading 5605, was therefore not arbitrary or capricious, and the court may not substitute judgment therefor.”

What could Best Key have done to avoid taking a back seat to its own jurisprudential destiny? Had it begun by importing a Johnny Collar garment that CBP classified as a garment of polyester rather than one made of “other” textiles, it could have protested that classification, paid the higher duties, filed suit under 28 U.S.C. § 1581(a), and received more meaningful judicial review. However, that strategy would have required Best Key to commence its plan with an expensive front-loaded lawsuit in the speculative hope of winning a case that would possibly benefit its customers years down the line. On the other hand, filing previously articulated by the Supreme Court in Skidmore, Mead, 533 U.S. at 219. In Heartland By-Products, Inc. v. United States, 264 F.3d 1126 (Fed. Cir. 2001), the Federal Circuit ruled that the “Skidmore” deference utilized by Mead “app[plies] to all Customs classification rulings” including revocation rulings issued pursuant to formal notice and comment procedures. See Heartland By-Products, 264 F.3d at 1135.

38. The court observed, “By the plaintiff’s literal reasoning, even a barely measurable amount of metal—a couple of atoms?—‘intentionally’ introduced and dispersed into a slurry would suffice for a ‘metalized’ yarn of heading 5605. That is, quite literally, reductio ad absurdum.” Best Key II, 2014 Ct. Intl. Trade LEXIS 22 at *42.
39. Id. at *29-30.
40. Id. at *44.
requests for tariff classification rulings is comparatively simple and inexpensive, and the favorable Yarn Ruling was an auspicious beginning.

For those readers who might question the very premise that a yarn accurately labeled “100% polyester” might properly be classified as a metalized yarn, there is still an important practice lesson residing in Best Key II: although CIT judges have taken an oath of office to render impartial justice, their ability to use independent legal judgment is significantly diminished when their responsibility is limited to reviewing agency action.


In 2014, the CIT issued a captivating decision falling under its 28 U.S.C. § 1582 “collection case” jurisdiction in an action captioned United States v. American Home Assurance Co. (AHAC). AHAC involved an importer of crawfish tail meat who failed to pay over $1 million in antidumping duties assessed more than two years after it imported the goods and an unwitting surety who was left holding the bag.

AHAC’s procedural history was unusually complicated. While the gravamen of the case was the straightforward question of whether the surety was liable for the importer’s unpaid antidumping duties, to reach that issue the CIT had to adjudicate the subtle interplay of (1)...

41. Collection cases are instituted by the Government to recover customs duties, penalties, or liquidated damages that the defendant refused to pay notwithstanding a demand issued by CBP. The collection statute reads as follows:

The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States—

(1) to recover a civil penalty under section 592, 593A, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930;

(2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or

(3) to recover customs duties.


43. Crawfish are also known in various parts of the country as “crayfish,” “crawdads,” or “mudbugs”. They have even been passed off as “freshwater lobsters” to unwary consumers. See James Barron, Lobster Salad, but a Key Ingredient Was Missing, N.Y. TIMES (Aug. 11, 2011), http://www.nytimes.com/2011/08/12/nyregion/sold-as-lobster-salad-but-a-key-ingredient-was-missing.html.
timely and untimely liquidations by the government, (2) the surety’s failure to file summonses challenging the liquidations, and (3) the statutory provision that gives rise to “deemed” liquidations when the government fails to act.

Aside from the fundamental merits of the case, another interesting aspect of the AHAC decision is its analysis of whether antidumping duties are “normal” customs duties—an issue ostensibly bland on its face, yet one that has spiced the conceptual halls of customs and international trade lawyers for decades.

The government brought this collection action against American Home Assurance Co. (AHAC) based upon a continuous bond AHAC underwrote in the amount of $600,000. As AHAC would later regret, the bond covered two entries of crawfish tail meat imported from China in November 2001 that turned out to be subject to astronomical 223% antidumping duties years later when the importer—who had entered the merchandise duty free—was nowhere to be found. Thus, when the importer failed to pay more than $1 million in antidumping duties and interest assessed against it pursuant to an antidumping administrative review published by the U.S. Department of Commerce (Commerce) in February 2004, the government proceeded against AHAC and the $600,000 bond it executed.

Before turning to the court’s legal analysis, it is interesting to consider various fishy aspects of this case that lend it an element of intrigue. First, what happened to the importer, one “JCOF (USA) International, Inc.”? Unfortunately for AHAC and the government, records from the New York Department of State show that a company with that exact name conveniently dissolved in June 2002—roughly

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Importers must generally post security before U.S. Customs and Border Protection . . . will release imported merchandise from its custody. Hartford Fire Ins. Co. v. United States, 648 F.3d 1371, 1372 (Fed. Cir. 2011). Importers often use surety companies to post the required security. Id. A “surety bond creates a three-party relationship, in which the surety becomes liable for the principal’s debt or duty to the third party obligee.” Ins. Co. of the W. v. United States, 243 F.3d 1367, 1370 (Fed. Cir. 2001).

AHAC, 964 F. Supp. 2d at 1345. In functional terms, the bond provides comfort to the government that a sum certain will be paid by the surety if the importer fails to pay customs duties or liquidated damages.

45. The government began proceedings against AHAC after the importer failed to pay $1,157,898.22 in antidumping duties and interest. Id. at 1346. While the importer was liable under the law for that full amount, AHAC’s liability for the principle amount of antidumping duties was limited to the face amount of the bond.
eight months after the two “duty free” entries were made and twenty months before Commerce published its administrative review announcing they were actually subject to 223% antidumping margins. 46

Second, why was JCOF so deftly able to create more than one million dollars’ worth of peril for AHAC and the government? After all, even though crawfish tail meat enters duty free under the HTSUS with respect to “normal” customs duties, 47 the antidumping duty order covering crawfish tail meat from China has been in effect since 1997 48 and has imposed very significant antidumping margins on various foreign shippers since its inception. One might suspect the culprit was the controversial “new shipper bonding privilege,” which allows importers to post a bond instead of depositing cash to cover estimated antidumping duties when goods are imported from a “new shipper” who has not previously shipped goods subject to an antidumping order. 49 Yet, something quite different occurred here. The Chinese entity that sold the crawfish tail meat to JCOF was a company named

46. The record of JCOF’s dissolution can be found online at the New York Department of State Division of Corporations Entity Information database located here: http://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=1944083&p_corpid=1883531&p_entity_name=jcof&p_name_type=%25&p_search_type=BEGINS&p_srch_results_page=0.

47. Freshwater crawfish tail meat subject to the antidumping order is currently classifiable under HTSUS Subheadings 1605.40, 0306.19, and 0306.29. See, e.g., Freshwater Crawfish Tail Meat From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2012-2013, 79 Fed. Reg. 75535 (Dec. 18, 2014). Insofar as “normal” customs duties are concerned, all three subheadings have been duty free provisions since at least 2001. See HTSUS 2001-2015.


49. As explained by the General Accounting Office in a 2011 publication calling for legislative reform, “[i]mporters purchasing from ‘new shippers’—shippers who have not previously exported products subject to AD/CV duties—are allowed to provide a bond in lieu of cash payment to cover the initial AD/CV duties assessed, which is known as the new shipper bonding privilege.” See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-693T, ANTIDUMPING AND COUNTERVAILING DUTIES—OPTIONS FOR COLLECTION ii (2011). Strikingly, “Importers that purchased goods from companies undergoing a new shipper review are responsible for approximately 40 percent of uncollected AD/CV duties.” Id. at 9. Furthermore, the GAO’s investigation found that crawfish imports purchased from new shippers resulted in a catastrophic loss of revenue and widespread abuse of U.S. trade laws:

We previously reported that over $613 million in AD/CV duties from fiscal years 2001 through 2007 went uncollected, with the uncollected duties highly concentrated among a few industries, products, countries of origin, and importers. Recent CBP data indicate that uncollected duties from fiscal year 2001 to 2010 have grown to over $1 billion and
Yangzhou Lakebest and Commerce had finalized its new shipper review of Yangzhou Lakebest prior to JCOF’s November 2001 entries. In fact, Commerce had determined that Yangzhou Lakebest’s antidumping margin was zero for the 1998-1999 period. Under the antidumping duty regime that zero rate carried forward in provisional fashion until a retrospective review of the facts established that goods shipped by Yangzhou Lakebest were actually sold at less than fair value during a specific period under review. Thus, when Yangzhou Lakebest refused to cooperate in the administrative review covering the later 2001 period, Commerce assumed adverse facts and retroactively wallop JCOF’s 2001 entries with the 223% country-wide antidumping duty rate on shipments of Chinese crawfish tail meat.

It might also seem puzzling that AHAC managed to get itself into such a terrible mess in the first place. Underwriting a bond in the face amount of $600,000 for an apparently small company creates significant liability in an overtly uncertain arena. While the public record does not reveal why AHAC underwrote a bond for JCOF in this rather large sum, the face value of the bond itself suggests AHAC had some awareness that JCOF’s operations might create very substantial duty liability. In any event, whether or not AHAC knowingly assumed the are still highly concentrated. For example, according to CBP, five products [including crawfish] from China account for 84 percent of uncollected duties.

Id. at 3. A somewhat troubling case illustrating the “new shipper” trap is Hartford Fire Ins. Co. v. United States, 772 F.3d 1281, 1287 (Fed. Cir. 2014), where the surety was left holding the bag for eight entries of Chinese crawfish tail meat. In Hartford the importer posted $1.8 million in bonds underwritten by the surety, deposited no estimated antidumping duties thanks to the “new shipper” loophole, and then saw the antidumping rate on its entries later escalate to the 223% “country wide rate” for China. Unbeknownst to the surety, at the time it underwrote the bonds the importer was under investigation by CBP for customs fraud in connection with other shipments of Chinese crawfish tail meat, and one of the importer’s principals was later convicted. After the importer failed to pay the antidumping duties owed on the eight shipments, the Government filed a collection action at the CIT seeking $1.8 million plus interest from the surety. See United States v. Hartford Fire Ins. Co., No. 1:11-cv-00052.


52. Importers typically take out a “continuous bond” that covers all import transactions over the course of a year, and is calculated at 10 percent of the prior year’s duties (or $50,000, whichever is greater). See Monetary Guidelines for Setting Bond Amounts, Directive 99-3510-004, U.S. CUSTOMS & BORDER PROT. (July 23, 1991), http://www.cbp.gov/sites/default/files/documents/
risks associated with importations of Chinese crawfish tail meat potentially subject to astronomical antidumping duties, it was in for a perfect mudbug storm when the levee broke.

Although Commerce’s “new shipper” review had determined that JCOF’s cash deposit rate at the time of entry in November 2001 was zero, liquidation of the two entries was suspended under the antidumping order pending Commerce’s retroactive administrative review to determine a final antidumping rate. After Commerce published its final determination and removed the suspension of liquidation, CBP liquidated the entries at the 223% rate as instructed by Commerce and issued a bill for $1,157,898.22 in antidumping duties and interest (“June 2004 liquidations”). When JCOF failed to answer the collector’s knock on the door, CBP made a formal demand against AHAC under its bond.

AHAC timely protested the June 2004 liquidations and the ensuing demands for payment. However, before CBP denied AHAC’s protest, something highly unorthodox occurred: CBP reliquidated the two entries at the 223% rate (“June 2005 reliquidations”) and sent AHAC a second set of bills and demands.\(^{53}\) CBP then denied AHAC’s protest of the June 2004 liquidations. For its part, AHAC proceeded to timely protest the June 2005 reliquidations.

CBP eventually denied AHAC’s protest of the June 2005 reliquidations, but AHAC declined to file suit in the CIT challenging its denied protests. Instead, AHAC waited for CBP to bring its collection action. This strategic decision may have been prompted by the requirement for a plaintiff to pay all duties owing before filing suit under 28 U.S.C. § 1581(a), the CIT’s protest jurisdiction.\(^{54}\) In other words, by waiting

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\(^{53}\) CBP’s erroneous June 2005 reliquidations arose because CBP had mistakenly believed that JCOF’s entries were covered by a CIT injunction imposed and then lifted in connection with a lawsuit brought by a completely different crawfish exporter from China. In fact, that case and injunction had no direct application to crawfish sold by Yangzhou Lakebest and the entries at issue in AHAC.

\(^{54}\) Under 28 U.S.C. § 2637 (2012), duties must be paid prior to filing suit under 28 U.S.C. § 1581(a) (2012). Subsection 2637(a) provides:

A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced, except that a
for CBP to initiate an action under 28 U.S.C. § 1582, AHAC avoided the need to post seven-figure antidumping duties to secure its day in court.

A. Deemed Liquidation

After the government commenced suit against AHAC’s bond, the parties filed cross motions for summary judgment. With over $1 million of liability at issue, AHAC creatively sought to leverage the unorthodox June 2005 reliquidations to escape all liability. AHAC proffered an interesting theory that the entries should be deemed liquidated by operation of law at the rate JCOF declared upon entry, i.e., zero percent. As explained by the CIT,

AHAC essentially argues that the untimely June 2005 reliquidations superseded and canceled the timely June 2004 liquidations . . . . Because the reliquidations occurred more than ninety days after the June 2004 liquidations, AHAC further avers that the June 2005 voluntary reliquidations were invalid under 19 U.S.C. § 1501 [which allows CBP to voluntarily reliquidate entries only “within ninety days from the date on which notice of the original liquidation is given or transmitted to the importer”] . . . . As a result, AHAC believes there were no valid liquidations.55

Absent any valid liquidations, so the theory went, JCOF’s entries would have liquidated by operation of law at the zero rate declared on entry. This is because 19 U.S.C. § 1504(d) provides that an entry will be deemed liquidated “at the rate of duty, value, quantity, and amount of duty asserted by the importer of record” unless “[CBP] liquidate[s] previously suspended entries ‘within 6 months after receiving notice of the removal [of the suspension] from the Department of Commerce.’”56 Since the June 2005 reliquidations annihilated the June 2004 liquidations under AHAC’s theory, the six-month clock for deemed liquidations began ticking in February 2004 when Commerce published the final results of its administrative review and time ran out for CBP to liquidate in August 2004. Accordingly, AHAC argued that with

surety’s obligation to pay such liquidated duties, charges, or exactions is limited to the sum of any bond related to each entry included in the denied protest.


56. Id.
no valid liquidations occurring between February 2004 and August 2004 it should escape liability in light of deemed liquidations arising in August 2004 at the zero rate of antidumping duties JCOF declared on entry. 57

There were a couple major problems with this theory. First, the June 2004 liquidations at the 223% rate were timely made within six months of Commerce publishing its administrative review in February 2004. Thus, the only way the entries could have liquidated by operation of law under 19 U.S.C. § 1504(d) at zero percent would have been if the June 2005 reliquidations effectively rendered the June 2004 liquidations non-existent. While the court agreed that “Customs’ untimely [June 2005] reliquidations vacated and ‘substituted for the collector’s original [June 2004] liquidation,” 58 it was not willing to embrace the legal fiction that the June 2004 liquidations never really happened.

The second major problem with AHAC’s argument that it should not be held liable for the antidumping duties arose from its decision not to pay them, and instead wait to collaterally attack the legality of CBP’s actions in a collection action. As the court explained, “[g]enerally, ‘all liquidations, whether legal or not, are subject to [19 U.S.C. § 1514’s] timely protest requirement’ and become final and conclusive unless an authorized party files a protest or commences a civil action contesting the denial of a protest.” 59 Thus, if AHAC was obligated to file an action in the CIT after CBP denied its protests in order to preserve its right to contest the liquidations, its failure to pay the duties and file the action would render the June 2005 reliquidations final and conclusive against it. That is exactly what the CIT concluded:

[T]he court finds that the timely protest requirement applied because the entries at issue were not deemed liquidated by operation of law and because the reliquidations occurred before the June 2004 liquidations became final. Thus, the June 2005 reliquidations—“whether legal or not”—became final and conclusive against AHAC when AHAC did not institute litigation challenging them. See Juice Farms, 68 F.3d at 1346; accord Philip Morris U.S.A. v. United States, 907 F.2d 158, 1990 WL 79000, at *2 (Fed. Cir. 1990) (“[A]n unlawful reliquidation is not void, but is merely voidable.”). 60

57. Id.
58. Id. at 1347-48 (quotation and citation omitted).
59. Id. at 1347 (citing Juice Farms, Inc. v. United States, 68 F.3d 1344, 1346 (Fed. Cir. 1995)).
60. Id. at 1347-48.
AHAC had attempted to avoid this difficult result by relying on the holding of the U.S. Court of Appeals for the Federal Circuit in *United States v. Cherry Hill Textiles, Inc.* In *Cherry Hill*, the Federal Circuit allowed the surety to launch a deemed liquidation collateral attack in a collection action. There, however, CBP waited more than thirteen months to liquidate the entries with an increase in duty, and the duties actually liquidated by operation of law under 19 U.S.C. § 1504(d) before CBP moved to liquidate. In *AHAC*, the CIT easily distinguished *Cherry Hill*, holding that “there were no final and conclusive liquidations in this case when the June 2005 reliquidations occurred.” At the time of the June 2005 reliquidations the timely June 2004 liquidations had not become final due to AHAC’s still-pending protest. Thus, no deemed liquidation had ever occurred, and AHAC could not escape liability.

B. *Prejudgment Interest*

After finding AHAC liable under its bond, the CIT proceeded to determine that AHAC was additionally liable to the government for prejudgment interest above and beyond the face amount of its bond. Interestingly, the court found liability not under 19 U.S.C. § 580 (the statutory provision providing for interest in suits where bonds are implicated to recover duties), but under equitable principles.

Under 19 U.S.C. § 580, interest is allowed “[u]pon all bonds, on which suits are brought for the recovery of duties.” Before launching into its analysis of the statute, the court carefully noted that its interpretation of the statute was not fettered by the Executive agency’s opinion on the matter:

> [T]his court must decide whether “duties” in § 580 (and the meaning assigned to it in 1799) “fairly and clearly includes” modern remedial duties like antidumping duties . . . . Because neither Customs nor any other agency has been charged with administering § 580, the court construes the statute without deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) (requiring deference to an agency’s reasonable “construction

61. 112 F.3d 1550, 1560 (Fed. Cir. 1997).
of a statutory scheme "it is entrusted to administer" (emphasis added)).

The court then undertook a historical exegesis of the statute and its use of the term “duties” and found that as originally enacted the term did not encompass “special” or remedial duties such as antidumping duties.

This court finds the reasoning in Dynacraft [Indus. v. United States, 118 F.Supp. 2d 1286, 1291 (2000)] and Wheatland [Tube Co. v. United States, 495 F.3d 1355 (Fed. Cir. 2007)] instructive in this case. Here, like in those cases, the court is asked to construe the open-ended word “duties” to include all types of duties. However, the Dynacraft and Wheatland cases counsel that the meaning of “duties” is not necessarily so expansive and that it may be appropriate to distinguish between duties. Such a distinction is necessary here. Antidumping duties were created over 120 years after § 580’s enactment, are meaningfully different from the customs duties existing in 1799, and have long been treated as meaningfully different by Congress, courts, and the Government. For these reasons, the court cannot conclude that Congress in 1799 clearly would have intended § 580 to extend to all duties, no matter how distinct. See Newman [v. Arthur, 109 U.S. 132, 138 (1883)]. Accordingly, § 580 interest is not available to the Government in this action.

The CIT thus ruled that prejudgment statutory interest was not available for antidumping duties owed by a surety under its bond.

However, the CIT did not stop its interest inquiry there. It noted that AHAC refused to pay CBP’s legitimate demands but arguably engaged in no dilatory or bad faith conduct. Nevertheless, reasoning that a surety does not need to exhibit bad faith to become liable for equitable interest in excess of its bond limits, the court concluded that equitable principles favored awarding prejudgment interest. The CIT found that “the dispositive fact here is that AHAC did not pay following the Government’s proper demand on the continuous bond, thereby depriving the Government of the ability to use the withheld funds. That failure exposes AHAC to potential interest liability in excess of its bond

64. AHAC, 964 F. Supp. 2d at 1351-52 (citation omitted).
65. Id. at 1354 (citations omitted).
Thus, under the CIT’s reasoning sureties can be liable beyond the face amount of their bond for simply failing to pay CBP as soon as the agency demands payment, even in cases where there is a bona fide dispute as to the validity of the claim. “The fact that AHAC raised good-faith defenses to liability . . . does not constitute ‘an extraordinary circumstance that can justify denying prejudgment interest.’”

On appeal, the Federal Circuit upheld the CIT’s decision finding AHAC liable under its bond for the antidumping duties. While it vacated the CIT’s award of equitable prejudgment interest, it ruled that statutory prejudgment interest was available, and in so doing rejected the bifurcation the CIT made between “normal” duties and antidumping duties for purposes of awarding interest under 19 U.S.C. § 580. Accordingly, it is fair to assume the already troubled relationship between an importer and its surety will be further strained by the interest-related aspects of AHAC may impact its surety since 19 U.S.C. § 580 provides for a relatively high annual interest rate of six percent.

V. CONCLUSION

The CIT is a specialized federal court which adjudicates disputes involving international commerce. While the court is a full-fledged Article III tribunal with plenary powers in law and equity, the ability of a CIT judge to exercise independent legal judgment depends on the procedural posture of the case, the nature of any federal proceedings below, and statutory or jurisprudential constraints that may obligate the court to utilize deferential standards of review and associated levels of deference. Accordingly, the ultimate resolution of a CIT case often depends on the strategies the parties utilized to render the dispute ripe for adjudication as well as effective advocacy regarding the applicable standard of review.

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66. Id. at 1355 (citing Ins. Co. of N. Am. v. United States, 951 F.2d 1244, 1246 (Fed. Cir. 1991)).

67. Id. at 1356 (quoting City of Milwaukee v. Nat’t Gypsum Co., 515 U.S. 189, 198 (1995)).