19 U.S.C. 1581(c)—JUDICIAL REVIEW OF ANTIDUMPING & COUNTERVAILING DUTY DETERMINATIONS ISSUED BY THE DEPARTMENT OF COMMERCE

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I. Introduction

While the U.S. Court of International Trade ("CIT") decided many notable cases on novel legal issues in 2006, it also clarified the law on several traditional trade remedy issues regarding the administration of antidumping and countervailing duty laws by the U.S. Department of Commerce ("Commerce" or the "Department"). The Court addressed such important areas of the law as the use of adverse facts available ("AFA"), the legality of the Commerce Department's "zeroing" practice, and many other aspects of antidumping ("AD") and countervailing duty ("CVD") calculations. Additionally, the Court of Appeals for the Federal Circuit ("CAFC") overruled the CIT on several notable trade remedy subjects, often deferring to the methodology or determination of the Department.

II. Antidumping Duty Cases

A. *Notice*

Generally, actions commenced at the agency or court level require the party bringing the action to notify other affected or potentially affected parties of the impending case. This due process requirement serves to inform parties of the potential need and opportunity to protect their legal rights.

In *PAM, S.p.A. & JCM, Ltd. v United States*, the U.S. Court of Appeals for the Federal Circuit ("CAFC") reviewed a judgment by the U.S. Court of International Trade ("CIT") regarding the notification and service requirements for a party requesting an administrative review

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pursuant to 19 C.F.R. § 351.303(f)(3)(ii).[1] Under this regulation, the party requesting the review "must serve a copy of the request by personal service or first class mail on each exporter or producer specified in the request and on the petitioner."[2] The CAFC held that a party's failure to strictly adhere to this regulation did not automatically mandate the rescission of an agency decision; rather, a party must prove that it was "substantially prejudiced" by the other party's failure to follow the regulation before it may be afforded such relief.[3]

The CIT determined that parties were required to "strictly comply" with the regulation, and that Commerce could not "relax or modify" it.[4] Because the parties had requested the administrative review, in this case domestic pasta producers failed to serve a foreign pasta exporter, PAM, S.p.A. ("PAM"), the CIT held that Commerce's final results for the administrative review as to PAM were void from the beginning.[5]

On appeal, the CAFC reversed the CIT's judgment and remanded the case for adjudication on the merits.[6] Citing the general principle that a court or administrative agency may relax or modify "procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it,"[7] the CAFC held that a party must show that it was "substantially prejudiced" by the lack of service before an agency's actions or results may be rescinded.[8] As explained by the CAFC, it is illogical to rescind the final results of an administrative review solely because a party does not strictly adhere to a regulation if the other party was not prejudiced by the failure to act.[9] To do so would unnecessarily penalize the Government, the other parties, and the public.[10]

The CAFC further explained that judicial precedent does not require that regulations providing an "important procedural benefit" be

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1. PAM, S.p.A. v. United States (*PAM II*), 463 F.3d 1345 (Fed. Cir. 2006), *rev'g* 395 F. Supp. 2d 1337 (Ct. Int'l Trade 2005); *see also* 19 C.F.R. § 351.303(f)(3)(ii) (2006).
2. 19 C.F.R. § 351.303(f)(3)(ii).
3. *See PAM II*, 463 F.3d at 1346.
4. *See* PAM, S.p.A. v. United States (*PAM I*), 395 F. Supp. 2d 1337, 1343 (Ct. Int'l Trade 2005). The CIT found that Commerce had no discretion in this matter due to the plain language of the regulation, and that strict compliance is required due to the important procedural benefits conferred by the regulation. *Id.* at 1342-44.
5. *Id.* at 1344.
6. *PAM II*, 436 F.3d at 1346.
7. *Id.* at 1348 quoting Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538-39 (1970).
8. *Id.* at 1348-49.
9. *Id.* at 1348.
10. *Id.*

exempt from a "substantial prejudice" analysis as claimed by PAM.[11] According to the Court, the cases that PAM relied on solely addressed situations where the courts had determined that the rule did not provide important procedural benefits or did not address the question at all.[12] Accordingly, the CAFC declined to determine whether 19 C.F.R. § 351.303(f)(3)(ii) provided an "important procedural benefit," and instead focused on the issue of whether PAM was substantially prejudiced by the domestic pasta producers' failure to serve notice of the request for an administrative review.[13]

Upon reviewing the record, the CAFC determined that PAM was not substantially prejudiced by the failure to receive notice in accordance with 19 C.F.R. § 351.303(f)(3)(ii).[14] Specifically, the CAFC found that PAM had received both constructive and actual notice of the review via publication in the Federal Register.[15] The Court further found that notice was only delayed by seventeen days, that PAM did not claim or show that its ability to respond and defend its interests was impeded by this delay, and that PAM requested and received sufficient extensions of time to respond compared to the alleged time lost due to the improper service.[16] Accordingly, the CAFC held that the CIT had erred in voiding the final results of the administrative review as to PAM, and remanded the case for further consideration on the merits.[17]

B. *Subject Matter Jurisdiction*

The CIT has exclusive jurisdiction over all cases brought under Section 516A of the Tariff Act of 1930, including civil actions contesting the final results of an administrative review of an AD order.[18] This grant of jurisdiction, however, is divested upon the liquidation of the subject merchandise at issue, as it "eliminates the only remedy available . . . for an incorrect review determination by depriving the trial court of

11. *Id.* (disagreeing with *PAM I*'s interpretation of *Am. Farm Lines*, 397 U.S. at 532). The CAFC also explained that its own precedent failed to address or require the prerequisite finding that the regulation did not provide an important procedural benefit before determining whether the failure to strictly comply with the rule caused "substantial prejudice." *Id.*

12. *Id.*

13. *Id.* at 1349.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000); 28 U.S.C. § 1581 (2000).

the ability to assess dumping duties."[19] While appellants typically seek and obtain a preliminary injunction against liquidation from the reviewing court, the injunction and liquidation process can pose challenges for the parties involved.

In *Agro Dutch Industries Ltd. v. United States*, the CAFC affirmed the CIT's jurisdiction over actions challenging final results of administrative reviews of AD orders in which the subject entries are unliquidated.[20] Agro Dutch Industries ("Agro Dutch") commenced an action before the CIT challenging Commerce's final results in an administrative review of an AD order on preserved mushrooms from India.[21] Although Agro Dutch obtained a preliminary injunction to enjoin the liquidation of the subject entries, many of the entries had been liquidated by the time the preliminary injunction went into effect.[22]

Subsequent to filing its motion for judgment on the agency record, Agro Dutch submitted a notice of supplemental authority to inform the CIT of two recent cases addressing whether liquidation instructions could be issued prior to the deadline to commence an action challenging the results of an administrative review.[23] In response, the CIT requested that Agro Dutch advise the Court of any unliquidated entries of subject merchandise.[24] Approximately a month later, and before Agro Dutch had responded to the Court's request, the CIT denied Agro Dutch's motion for judgment on the agency record and dismissed the case.[25] The CIT stated that it was constrained to conclude that all subject entries had been liquidated, as Agro Dutch had not responded to the Court's request for information.[26]

Agro Dutch then filed a motion for reconsideration, explaining that there were several unliquidated entries and that it was still in the process of compiling an accurate list of the entries when the CIT

19. Gerdau Ameristeel Corp. v. United States, 442 F. Supp. 2d 1367, 1369 (Ct. Int'l Trade 2006) quoting Zenith Radio Corp. v. United States, 710 F.2d 806, 810 (Fed. Cir. 1983); *see also* Timken Co. v. United States, 569 F. Supp. 65 (Ct. Int'l Trade 1983).

20. Agro Dutch Industries Ltd. v. United States, 167 Fed. Appx. 202, 202 (Fed. Cir. 2006), *rev'g*, No. 02-00499, 2005 Ct. Int'l Trade LEXIS 30 (Feb. 28, 2005). Because this opinion was issued as unpublished or nonprecedential, reference to U.S. Court of Appeals for the Federal Circuit's rules governing the citation of such judgments is required to determine its precedential value.

21. *Agro Dutch Indus. Ltd.*, 167 Fed. Appx. at 202.

22. *Id.* at 202-03.

23. *Id.* at 203.

24. *Id.*

25. *Id.*

26. *Id.*

entered its judgment.[27] The Government agreed with Agro Dutch's findings, and further agreed that the case was not moot due to the existence of unliquidated subject entries.[28] The CIT, however, rejected Agro Dutch's motion on the grounds that Agro Dutch had failed to respond at its "earliest convenience" to the Court's request for information, and that Agro Dutch had not satisfied the standard for granting a motion for reconsideration.[29] Agro Dutch then appealed the CIT's judgment to the CAFC.

The CAFC reversed the CIT's dismissal of the action, and remanded the case for further consideration.[30] As explained by the CAFC, the CIT's original order dismissing the case rested on a jurisdictional ground.[31] Because all parties agreed that unliquidated entries of the subject merchandise still existed, the jurisdictional basis for the dismissal order was no longer valid.[32] The CAFC also noted that the CIT had never set a deadline by which Agro Dutch was required to submit a response to the CIT's request for information.[33] Finally, the CAFC disagreed with the Government's position that the CIT had correctly dismissed the case based on the merits, and that Agro Dutch had forfeited its right to address the issues on appeal to the CAFC.[34] The CAFC found that the CIT had not formally ruled on the merits of the case, and remanded the case for final disposition.[35]

C. *Value Added Tax*

Commerce is authorized to calculate the foreign market value of imported goods in one of three ways: (1) by determining the price at which the merchandise is sold in its country of origin; (2) by determining the price of the merchandise in a third country; or (3) by calculating a "constructed value."[36] When calculating a constructed value, Commerce must include "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise,

27. *Id.*

28. *Id.*

29. *Id.* As explained by the CIT and summarized by the Federal Circuit, motions for reconsideration will be granted when there has been a "miscarriage of justice."

30. *Id.* at 204-05.

31. *Id.* at 204.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 204-05.

36. *See* 19 U.S.C. § 1677b(a)(1)(B)(i), (a)(1)(C), (a)(4) (2000).

during a period which would ordinarily permit the production of the merchandise in the ordinary course of business."[37] The governing statute further provides that the cost of the materials included in the calculations must be determined without regard to any internal tax imposed on the materials or their sale by the exporting country that is refunded or remitted upon the export of products made from those materials.[38]

In *Elkem Metals Co. v. United States*, the CAFC addressed the issue of whether Commerce is statutorily obligated to include internal taxes in its calculations of constructed value if the tax is not refunded or remitted.[39] Upon reviewing the plain language of the governing statutes, and determining that *Chevron* deference was appropriate in this case, the CAFC held that Commerce, although not prohibited from doing so, is not required to include in its calculations of constructed value of subject merchandise any VATs paid by a producer that are not refunded or remitted.[40]

The internal taxes at issue in *Elkem Metals Co.* were two value-added taxes imposed by the Brazilian Government on certain goods and services (collectively, "VAT").[41] Under the Brazilian VAT system, Rima Industrial S/A ("Rima"), a foreign producer of silicon metal, incurred VAT on its input purchases but was not required to pay the VAT immediately.[42] Instead, Rima was permitted to use the VAT paid by its domestic customers on sales of finished merchandise to offset the VAT it incurred from its input purchases at the end of each month.[43] If the VAT paid by Rima's domestic customers exceeded the VAT incurred by Rima, Rima was required to remit any excess VAT payments it received to the Brazilian Government.[44] If the VAT incurred by Rima exceeded that paid by its domestic customers, although Rima was still required to pay the difference to the Brazilian Government, Rima would also receive a VAT credit offset for the difference.[45] Under Brazilian law, companies may use their VAT credits to purchase goods or materials

37. 19 U.S.C. § 1677b(e)(1).

38. 19 U.S.C. § 1677b(e).

39. *See* Elkem Metals Co. v. United States, 468 F.3d 795 (Fed. Cir. 2006), *rev'g*, No. 02-00232, 2005 Ct. Int'l Trade LEXIS 117 (Aug. 26, 2005).

40. *Id.* at 797.

41. *Id.* at 798.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

from other companies.[46]

In the underlying administrative review of the AD order on silicon metal from Brazil, Commerce excluded the VAT on Rima's inputs from its constructed value calculations, finding that Rima had recovered in full the amount that it had paid on the VAT incurred from input purchases.[47] Using this constructed value, Commerce calculated a *de minimis* dumping margin for Rima.[48]

On appeal, the U.S. Government moved for a remand so that the constructed value could be recalculated to include the VAT incurred from Rima's input purchases, which the CIT granted.[49] On remand, however, Commerce again determined that Rima had fully recovered all of the VAT incurred on input purchases related to U.S. sales, based on the VAT paid by Rima's domestic customers and the VAT credits Rima used to make purchases.[50] Accordingly, Commerce's remand results continued to exclude the VAT from its calculations of Rima's constructed value.[51]

Upon reviewing Commerce's remand results, the CIT held that Commerce is required to include VAT paid for input purchases in its constructed value calculations as a matter of law, as the VAT was neither remitted nor refunded.[52] The CIT then remanded the case again, directing Commerce to include the VAT paid by Rima in its calculations of constructed value, and to adjust the dumping margin accordingly.[53]

As instructed by the CIT, Commerce recalculated the constructed value by including the VAT paid by Rima.[54] The CIT sustained Commerce's second decision on remand.[55] Elkem, a domestic producer of the subject merchandise, then appealed to the CAFC challenging Commerce's determination that Rima's questionnaire responses provided a proper accounting of the VAT on input purchases.[56] Both the Government and Rima cross-appealed, challenging the CIT's holding

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46. *Id.*

47. *Id.* at 799.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* Even after recalculating the constructed value, the resulting margin was still *de minimis*, at 0.48 percent.

55. *Id.*

56. *Id.*

that Commerce is statutorily required to include VAT in the calculations of Rima's constructed value.[57]

After reviewing the statutory language, the CAFC reversed the CIT and held that Commerce was not required to include the VAT paid on input purchases in the calculations of Rima's constructed value.[58] Specifically, the CAFC found that the AD statute was silent on the issue of whether Commerce must include VAT in its constructed value calculations if the VAT is neither remitted nor refunded.[59] As such, the CAFC held that Commerce's policy regarding VAT was entitled to *Chevron* deference, and found Commerce's policy to be a reasonable interpretation of the statutory provision.[60] The CAFC also found prior decisions regarding this issue, and relied upon by the CIT, to be inapposite due to the changes in Brazilian law on VAT, and the factual differences between those cases and the one at issue.[61] The case was then remanded for further proceedings, and with the instruction that Commerce be permitted to recalculate Rima's constructed value using the methodology employed in its first remand results.[62]

D. *Substantial Evidence*

In *Timken U.S. Corp. v. United States*, the CAFC clarified what types of errors Commerce may correct prior to the issuance of its final results in administrative reviews of AD orders.[63] As explained in its decision, the CAFC determined that Commerce must review allegations of errors raised by parties, without regard to whether the errors are "clerical" in nature, so long as they are raised prior to the issuance of the final results, and affirmed Commerce's authority to determine the reliability of the evidence submitted in support of the alleged errors.[64] This decision could have important implications for participants in AD proceedings, as it apparently broadens the ability of parties to allege errors at later stages of proceedings, indeed at any point before Commerce's final determination.

When determining whether it may or should grant a party's request

57. *Id.*

58. *Id.* at 801. Because this holding rendered Elkem's appeal moot, the CAFC declined to address the other issues in the case.

59. *Id.* at 801.

60. *Id.* at 801-02.

61. *Id.* at 802-03.

62. *Id.* at 803.

63. Timken U.S. Corp. v. United States, 434 F.3d 1345 (Fed. Cir. 2006).

64. *Id.* at 1353-54, 1356-57.

to correct errors made during an administrative review, Commerce generally applies the "Colombia Flowers Test." Under this two-part inquiry, derived from Commerce's final results in an administrative review of an AD order on fresh cut flowers from Colombia, Commerce must first determine whether the error is "clerical" in nature, rather than methodological or substantive, or an error in judgment.[65] Second, if the error is determined to be "clerical," then Commerce must determine whether the new evidence demonstrating the error is reliable.[66]

In the underlying administrative review, Timken, an importer of cylindrical roller bearings, reported that it had five channels of distribution and classified each of its home market sales under one of the five channels.[67] Commerce redesignated the channels of distribution and/or grouped certain channels together, which resulted in three channels of distribution identified as home markets 1, 2, and 3.[68] Commerce then calculated a preliminary dumping margin of 61.60 percent.[69]

After reviewing the preliminary results and prior to the issuance of the final results, Timken requested that Commerce correct alleged "clerical errors" that Timken made when it "erroneously" reported some transactions in certain channels of distributions rather than in others.[70] In support of this request, Timken submitted several invoices and purchaser orders for the sales that were allegedly miscategorized.[71] Upon applying the Colombia Flowers Test, Commerce determined that the errors were "errors in judgment," and also found the new evidence submitted to be questionable, as Commerce was prevented from verifying the documents' reliability.[72]

On appeal, the CIT rejected the rigid application of the Colombia Flowers Test, although it agreed that Timken's error was not "clerical" in nature.[73] Based on its concern that the application of the Colombia Flowers Test would result in an inaccurate dumping margin, and the uncertainty regarding whether the new evidence would conflict with

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65. *See id.* at 1348; *see also* Certain Fresh Cut Flowers from Colombia, 61 Fed. Reg. 42,833 (Dep't of Commerce Aug. 19, 1996) (final results of admin. rev.).

66. *See Timken U.S. Corp.*, 434 F.3d at 1348; *see also* Certain Fresh Cut Flowers from Colombia, 61 Fed. Reg. 42,833 (Dep't of Commerce Aug. 19, 1996) (final results of admin. rev.).

67. *Timken U.S. Corp.*, 434 F.3d at 1347.

68. *Id.*

69. *Id.*

70. *Id.* at 1347-48.

71. *Id.* at 1348.

72. *Id.*

73. *Id.*

information already on the administrative record, the CIT remanded the case for further investigation.[74]

Although it noted its disagreement with the CIT's application of the Colombia Flowers Test's first inquiry, Commerce reviewed the new evidence on remand pursuant to the CIT's direction.[75] Commerce determined that no corrections were warranted because new evidence failed to substantiate Timken's claim of the alleged error, and the reclassification of the sales in question would not result in a more accurate dumping margin.[76] The CIT sustained these remand results, finding that Commerce had satisfied its obligation to review the evidence and provided a reasonable explanation for its decision.[77]

On appeal, the CAFC affirmed the CIT's rejection of Commerce's rigid application of the Colombia Flowers Test, and held that the CIT correctly remanded the case for further review.[78] According to the CAFC, the Government's reliance on a prior decision by the CAFC and Commerce's final results in *Certain Fresh Cut Flowers from Colombia* was misplaced.[79] Clarifying its reasoning in an earlier case, *Alloy Piping Products, Inc. v. Kanzen Tetsu Sdn. Bhd.*, the CAFC explained that the decision turned on when (that is, at what point during the administrative review) the party sought to correct errors, not the type or nature of error that the party was attempting to correct.[80] The CAFC, noting that it is not bound by an agency's decision, also emphasized its disagreement with the rigidity of the Colombia Flowers Test and Commerce's reliance upon *NTN Bearing Corp. v. United States* to derive the "clerical" error requirement.[81]

The CAFC next addressed the issue of whether the new evidence submitted by Timken was sufficient to require correction of the alleged error.[82] After reviewing the record, the CAFC concluded that Timken had failed to provide sufficient evidence or explanation supporting its claim, and that Commerce's original decision was supported by substantial evidence.[83]

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74. *Id.*

75. *Id.* at 1348-49.

76. *Id.*

77. *Id.* at 1349-50.

78. *Id.* at 1354.

79. *Id.*

80. *Id.* at 1352; *see also* Alloy Piping Prods., Inc. v. Kanzen Tetsu Sdn. Bhd., 334 F.3d 1284 (Fed. Cir. 2003).

81. *Timken U.S. Corp.*, 434 F.3d at 1352-53; *see also* NTN Bearing Corp. v. United States, 74 F.3d 1204 (Fed. Cir. 1995).

82. *Timken U.S. Corp.*, 434 F.3d at 1354.

83. *Id.* at 1354-56.

E. *AFA Rate*

In one of the most interesting cases of 2006, *Decca Hospitality Furnishings v. United States*,[84] the CIT issued mandamus relief requiring Commerce to reissue its cash deposit instructions where the original instructions were unlawful and the respondent would otherwise be unable to obtain credit to post the cash deposit. Originating from Commerce's determination in *Wooden Bedroom Furniture from the People's Republic of China*,[85] Chinese respondent Decca Hospitality Furnishings brought the action in an attempt to receive a separate cash deposit rate, rather than the "PRC-wide" rate assigned by Commerce.

In December 2003, Commerce initiated its investigation into Wooden Bedroom Furniture from the PRC.[86] Over the course of the investigation, Commerce rejected as untimely evidence submitted by Decca that purported to establish that Decca is not state-controlled and is thus entitled to a separate rate.[87] By virtue of Commerce having rejected the evidence, Decca was assigned the PRC-wide rate of 198.08 percent.[88]

Decca appealed the final determination, asserting that Commerce had failed to properly notify Decca of its request for information and of the deadline for submitting such information.[89] Consequently, Decca argued the CIT should consider and conclude from the rejected evidence that Decca was entitled to the separate rate assigned to all non-mandatory respondents: 6.65 percent.[90] The Court sided with Decca, remanding the case to Commerce for a determination as to whether, notwithstanding Commerce's failure to follow its regulations, "Decca had nevertheless received actual and timely notice of the relevant submissions and deadlines."[91] If the agency were unable to establish whether Decca had received proper notice, the CIT held, Commerce was to determine whether Decca was indeed entitled to a

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84. Decca Hospitality Furnishings v. United States, 427 F. Supp. 2d 1249 (Ct. Int'l Trade 2006).

85. Wooden Bedroom Furniture from the People's Republic of China, 69 Fed. Reg. 67,313 (Dep't of Commerce Nov. 17, 2004) (notice of final determination of sales at less than fair value).

86. Wooden Bedroom Furniture from the People's Republic of China, 68 Fed. Reg. 70,228 (Dep't of Commerce Dec. 18, 2003) (notice of initiation).

87. Wooden Bedroom Furniture from The People's Republic of China, 69 Fed. Reg. at 67,313.

88. *See id.* at 67,317.

89. *See* Decca Hospitality Furnishings, LLC v. United States, 391 F. Supp. 2d 1298, 1303 (Ct. Int'l Trade 2005).

90. *See id.* at 1302-04.

91. *Decca*, 427 F. Supp. 2d at 1253-54.

separate rate.[92]

On remand, Commerce found it was not feasible to determine whether Decca had received actual and timely notice.[93] Reviewing Decca's separate rate submissions, then, Commerce determined that Decca was indeed entitled to the 6.65 percent rate.[94] During the remand proceedings, Decca requested that Commerce amend its cash deposit instructions, which had previously ordered Decca to pay a cash deposit equal to the 198.08 percent rate.[95]

The CIT affirmed Commerce's remand determination.[96] However, Commerce refused to amend its cash deposit instructions on the grounds that, while Commerce had not appealed the CIT's decision, a Defendant-Intervenor had filed an appeal of the remand to the Federal Circuit; for this reason, Commerce refused to act until the court proceedings were concluded.[97] As a result, Decca found itself subject to the 198.08 percent rate despite the Court's ruling that it was entitled to the 6.65 percent rate. In response, Decca filed a motion for the CIT to enforce its judgment, and, in the alternative, to issue a writ of mandamus ordering Commerce to adjust the cash deposit rate.[98]

No party contested that, were Decca ultimately afforded the 6.65 percent rate, Decca would be entitled to a refund of its cash deposit plus interest.[99] However, Decca nonetheless moved for the court order, grounding its motion on the central premise that Decca had attempted but was unable to obtain enough credit to cover the 198.08 percent deposit.[100] Consequently, Decca was essentially excluded from trading in the U.S. market. The Court summarized Decca's argument: "[U]nless the court directs Commerce to amend Decca's cash deposit rate . . . Decca is blocked from the U.S. market until a final and conclusive court decision issues."[101]

The Court began its discussion of the issues by noting that Commerce's duty to issue orders to Customs is primarily a ministerial act.

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92. *Id.* at 1316-17.

93. Wooden Bedroom Furniture from The People's Republic of China, 71 Fed. Reg. 1,511 (Dep't of Commerce Jan. 10, 2006) (notice of court decision not in harmony).

94. *Id.*

95. *Decca*, 427 F.'Supp. 2d at 1253-54.

96. Decca Hospitality Furnishings, LLC v. United States, slip op. 05-161 (Ct. Int'l Trade Dec. 20, 2005).

97. *Decca*, 427 F. Supp. 2d at 1254.

98. *Id.* at 1250.

99. *Id.* at 1255.

100. *Id.*

101. *Id.*

Commerce, the Court noted, may be required to revise its cash deposit order simply by virtue of having made a remand determination.[102] And Commerce may not enforce a rate that the Court has already deemed unlawful.[103]

Given this, the Court's analysis focused on Decca's prayer for relief, which the Court interpreted as a motion for writ of mandamus.[104] The Court set forth a three part test for determining whether mandamus relief was appropriate: (1) the party seeking the writ must have "no other adequate means" to achieve the relief requested; (2) the party seeking relief must demonstrate that his right to relief is "clear and indisputable," meaning that the defendant owes the petitioner a nondiscretionary duty; and (3) the Court must be satisfied that a writ is appropriate under the circumstances.[105]

As to the first criterion, the Court notes that, in a typical AD case, a respondent would generally have an adequate remedy given that an erroneous cash deposit rate would be corrected at the time of liquidation.[106] As the Court writes:

> [U]nder this regime, theoretically, an importer should be no more disinclined to import goods into the United States under the threat that an appeal (or administrative review) will reinstate a prior cash deposit rate than it would if it were required to pay the original, albeit erroneous, cash deposit.[107]

However, the Court concluded that Decca's argument was valid. The 198.08 percent rate was prohibitive, and served as an effective bar against Decca's U.S. operations. "[G]iven the complexity of U.S. trade laws," noted the Court, "an importer's creditors may not understand the risks involved in providing credit and, consequently, may decline to provide credit where it is otherwise efficient to so provide;" in the alternative, a creditor may simply charge an interest rate far in excess of the interest the importer would receive upon correction of the cash

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102. *Id.* at 1257.

103. *Id.*

104. *Id.* at 1255-56. As noted, Decca's motion sought the Court to enforce its judgment and, in the alternative, to impose mandamus relief. Given that the former request would still require the Court to take the "specific step of ordering Commerce to instruct Customs to lower Decca's cash deposit rate," the Court construed Decca's motion as one solely for mandamus.

105. *Id.* at 1256 citing Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 380 (2004).

106. *Id.* at 1257.

107. *Id.*

deposit rate.[108] Accordingly, without relief, Decca would be harmed by the unlawful rate during the pendency of the appeal.

With respect to whether Commerce was under a duty to correct its instruction, the Court observed that, according to *NTN Bearing*,[109] Commerce could not order an adjustment to the deposit rate until the issuance of a "final court decision."[110] While Commerce argued that the language from *NTN Bearing* implicated the pending CAFC appeal, Decca contended that "final court decision" referred to a judgment issued by the CIT.[111] Distinguishing *NTN Bearing* on the grounds that it involved a motion for partial summary judgment, the Court held that Decca's construction was more correct.[112]

Thus, the CAFC noted that while "the law does not limit Commerce's clear duty to comply with a judgment of the [CIT]," at issue is whether the law imposes a duty on Commerce.[113] Turning to a separate CAFC case,[114] the Court determined that the CIT decision triggered Commerce's duty under the statute to amend the cash deposit rate and its accompanying instructions to Customs.[115] Finding that the Court's equitable jurisdiction was not precluded by statute and was thus available, the Court granted Decca's motion for mandamus.[116]

F. *Zeroing*

On appeal from Commerce's determination in the thirteenth administrative review of *Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom*, the CIT affirmed Commerce's practice of zeroing in *Paul Müller Industrie GMBH & Co. v. United States*.[117] Paul Müller Industrie and several other respondents (collectively, "Respondents") challenged Commerce's use of zeroing in the calculation of the Respondents' dumping margins. In particular, Respondents each argued that "Commerce's practice of assigning a zero margin to export price . . . or constructed export price

108. *Id.* at 1257-58.

109. NTN Bearing Corp. of Am. v. United States, 892 F.2d 1004 (Fed. Cir. 1989).

110. *Decca*, 427 F. Supp. 2d at 1259 (citing *NTN Bearing Corp. of Am.*, 892 F.2d at 1006).

111. *Id.* at 1261.

112. *Id.*

113. *Id.*

114. Timken Co. v. United States, 893 F.2d 337 (Fed. Cir. 1990).

115. *Decca*, 427 F. Supp. 2d at 1261-62.

116. *Id.* at 1263-64.

117. Paul Muller Indus. GMBH & Co. v. United States, 435 F. Supp. 2d. 1241 (Ct. Int'l Trade 2006).

. . . sales made above normal value . . . is a violation of U.S. antidumping law and WTO dispute settlement decisions."[118] In a brief opinion, the Court conducted a relatively straightforward *Chevron* analysis, ultimately deciding that Commerce's practice of zeroing is supported by substantial evidence and is in accordance with the law.[119]

Of greater relevance to trade practice, however, is the extent to which *Paul Müller* symbolizes the CIT's position with respect to zeroing practice and its confluence with the U.S. Government's obligations under recent WTO dispute settlement cases.[120] That is, *Paul Müller* fits within an increasingly long line of cases that essentially defer responsibility for WTO compliance to the Executive Branch.[121] Through *Paul Müller*, it becomes clear that the CIT has no plans to overturn the zeroing apple cart unless and until the Executive Branch changes its policy position that zeroing is consistent with recent WTO dispute settlement decisions.[122] As the Court writes in dismissing the Respondents' challenge:

> In this case, none of the Plaintiffs offer a valid reason to disregard *stare decisis* and re-examine Commerce's interpretation concerning its zeroing methodology in administrative reviews. Commerce's practice continues to be a reasonable interpretation of the statute, is supported by substantial evidence and is in accordance with law.[123]

Accordingly, until Commerce alters its practice in order to company with the WTO rulings on the subject, the CIT appears unlikely to uphold any challenges to the practice of zeroing.

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118. *Id.* at 1244.

119. *See id.* at 1245.

120. *See, e.g.*, Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/R (Oct. 31, 2005); s*ee also* Appellate Body Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins, ¶ 263, WT/DS294/AB/R (Apr. 18, 2006). The U.S. Government began this process in 2007, at least with respect to zeroing in the course of antidumping investigations. Implementation of the Findings of the WTO Panel in US Zeroing (EC); Notice of Initiation of Proceedings Under Section 129 of the URAA; Opportunity to Request Administrative Protective Orders; and Proposed Timetable and Procedures, 72 Fed. Reg. 9306 (Mar. 1, 2007).

121. *See, e.g.,* Corus Staal BV v. United States, 395 F. 3d 1343, 1349 (Fed. Cir. 2005); Timken Co. v. United States, 354 F.3d 1334, 1338 (Fed. Cir. 2004).

122. *See Paul Muller Indus. GMBH & Co.*, 435 F. Supp. 2d. at 1245.

123. *Id.*

G. *Surrogate Value of Raw Materials*

In June, the CIT decided an appeal of Commerce's process for using and applying surrogate value of raw materials when dealing with non-market economy ("NME") countries in *Allied Pacific Food (Dalian) Co. v. United States*.[124] In a challenge to Commerce's determination in *Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China*,[125] respondent Allied Pacific Food argued that the Department erred in its determination of surrogate values for raw shrimp, the most significant import value in an antidumping calculation.[126] In particular, Allied Pacific sought a remand directing Commerce to use data collected by the Seafood Exporter's Association of India, rather than information that Commerce obtained from the financial statement of Nekkanti Sea Foods Ltd., an Indian seafood producer, which had been submitted by the petitioner.[127]

Allied Pacific argued that, while the principal raw material for the subject merchandise consisted of raw, head-on, shell-on shrimp, the data in Nekkanti's financial statement were "based in part on materials other than unprocessed shrimp, including seafood other than shrimp and shrimp that has been partially processed."[128] Commerce did not dispute that the Nekkanti data did not fit inputs for the subject merchandise perfectly, but instead relied on its statutory discretion in determining whether particular data represent the best available surrogate data.[129]

The Court found in favor of Allied Pacific.[130] While Commerce has discretion under the statute, the agency is "required to support with substantial evidence on the record its determination that the Nekkanti financial statement data were the best available information for valuing unprocessed shrimp."[131] In this respect, Commerce's determination was fatally flawed: Commerce failed to make findings as to the amount of material in the Nekkanti data that consisted of seafood other than shrimp and of partially processed shrimp;[132] and Commerce also

124. *Allied Pacific Food*, 435 F. Supp. 2d 1295 (Ct. Int'l Trade 2006).

125. Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China, 69 Fed. Reg. 70,997 (Dep't of Commerce Dec. 8, 2004) (final admin. review).

126. *See Allied Pacific Food*, 435 F. Supp. 2d at 1296-98.

127. *Id.* at 1297.

128. *Id.*

129. *See id.*

130. *Id.*

131. *Id.*

132. *Id.*

neglected to explain exactly why other proposed surrogate data sets were disregarded in favor of the Nekkanti financial statement.[133] Ultimately, the Court remanded the issue, deciding that Commerce's exercise of its discretion to use the Nekkanti data set was not founded on substantial evidence that the Nekkanti data was the best available data.[134]

H. *Section 201 Duties*

In *Wheatland Tube Co. v. United States*,[135] a January decision that was later overturned by the CAFC,[136] the CIT held that Commerce was unreasonable in failing to deduct section 201 duties from a respondent's export price ("EP"). The domestic producers, Wheatland Tube Company and Allied Tube & Conduit Corporation ("Plaintiffs"), contested Commerce's determination in the 2003 administrative review of *Certain Welded Carbon Steel Pipes and Tubes from Thailand*,[137] arguing that the Department should not have allowed respondent Saha Thai Pipe Company ("Saha") to include the duties in its EP.

Under Section 772(a) of the Tariff Act of 1930, the Commerce Department is required to calculate the EP based on "the price at which the subject merchandise is first sold . . . to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States."[138] The Act further requires Commerce to adjust the EP downward to reflect "any additional costs, charges, or expenses, *and United States import duties*, which are incident to bringing the subject merchandise . . . to the place of delivery in the United States."[139] Thus, in a typical administrative review, Commerce will generally deduct from a respondent's EP any duties paid by a respondent upon import into the United States, though not AD or CVD "special" duties.

Given that Commerce had never before addressed the propriety of a deduction for Section 201 duties, the agency declined to make any such adjustment during its preliminary review.[140] While Commerce allowed

133. *Id.*

134. *Id.* at 1297, 1322.

135. *Wheatland Tube Co.*, 414 F. Supp. 2d 1271 (Ct. Int'l Trade 2006).

136. *See* Wheatland Tube Co. v. United States, 495 F.3d 1355-56, 1366 (Fed. Cir. 2007).

137. Certain Welded Carbon Steel Pipes & Tubes from Thail., 69 Fed. Reg. 61,649 (Dep't of Commerce Oct. 20, 2004) (final results of antidumping duty admin. review).

138. 19 U.S.C. § 1677a(a) (2000).

139. 19 U.S.C. § 1677a(c)(2)(A) (emphasis added).

140. Certain Welded Carbon Steel Pipes & Tubes from Thailand, 69 Fed. Reg. 18,539, 18,541 (Dep't of Commerce Apr. 8, 2004) (prelim. results of antidumping duty admin. review).

Saha to make certain billing adjustments for Section 201 duties for the final results, the agency again declined to deduct the full amount of the duties from Saha's EP. Consequently, Saha received a *de minimis* weighted-average margin of 0.17 percent.[141]

The Plaintiffs appealed, arguing that Section 201 duties are import duties and should be deducted from the EP as provided in the statute. If the duties are not deducted, Plaintiffs argued, the Section 201 duties could essentially be considered a credit against antidumping margin that would otherwise exist.[142]

Commerce responded by contending that Section 201 duties are "special duties" not contemplated within the meaning of "United States import duties." Citing the legislative history of Section 201, Commerce argued that Congress intended to treat Section 201 duties, CVDs, and ADs similarly, noting that each duty is imposed following a determination of material injury.[143] Deducting these "special" duties from the EP, argued Commerce, would amount to "double-counting."[144]

The CIT sided with the Plaintiffs. The Court noted that Section 202 of the Trade Act provides that the ITC may recommend any such action as would be necessary to address the injury or threat of injury present in a Section 201 case.[145] The Court also identified language providing that the ITC may recommend "an increase in, or the imposition of, any duty on the imported article."[146] The Court interpreted this language as evidence of Congress' intent that Section 201 duties would be considered import duties for purposes of the statute, and not special remedial or punitive duties as in the antidumping and countervailing duty statutes.[147]

In this respect, the Court noted, "AD duties are intended to offset price discrimination from overseas competitive industries . . . . In contrast, § 201 duties are set forth by Presidential fiat to counter a surge in imports."[148] In essence, Section 201 duties are temporary changes to the normal import tariff designed to provide relief to an injured or threatened industry; antidumping duties are supplements added to normal import tariffs aimed at counterbalancing sales into the U.S.

141. Certain Welded Carbon Steel Pipes & Tubes from Thail., 69 Fed. Reg. at 61,650.

142. *Wheatland Tube Co.*, 414 F. Supp. 2d at 1274.

143. *Id.* at 1275-76.

144. *Id.* at 1276.

145. *Id.* at 1281. (citing 19 U.S.C. § 2252(e)(1) (2000)).

146. 19 U.S.C. § 2252(e)(2)(A).

147. *Wheatland Tube Co.*, 414 F. Supp. 2d at 1281-83.

148. *Id.* at 1282.

market at less than fair value by foreign producers.

Accordingly, the Court concluded that Section 201 duties constitute "United States import duties" and should be deducted from a respondent's EP. The Court wrote, "[B]y its failure to deduct § 201 duties, Commerce has effected the very result that it intended to avoid. By failing to deduct § 201 duties from EP, Commerce improperly negates the § 201 duty imposed by the President, artificially decreases Respondent's AD margin, and upsets the balance between § 201 and AD duties."[149]

III. Countervailing Duty Cases

A CVD order may be imposed if the production of subject merchandise has been unfairly subsidized by a foreign government, and that the subsidization has materially injured or threatens to injure a U.S. industry. Commerce and the U.S. International Trade Commission ("ITC") share the responsibility in deciding whether to impose a CVD order. Commerce determines whether a subsidy was received, while the ITC investigates whether the domestic industry has been materially injured or is threatened with material injury. CVD cases have been less common than AD cases in recent years,[150] and often raise complex issues peculiar to the process in determining whether to impose countervailing duties and the calculation of the duty rates.

A. *Calculations*

Norsk Hydro Canada, Inc. v. United States[151] was one of the few CVD cases that the CAFC decided in 2006. This case focused on the relationship between the "imposition of" and the "assessment of" countervailing duties, and Commerce's statutory obligations when conducting administrative reviews of CVD orders in light of that relationship.[152] Specifically, the CAFC clarified whether Commerce is statutorily obligated to offset a CVD rate in an administrative review if subject entries from a prior year were liquidated at an incorrect rate.[153]

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149. *Id.* at 1283.

150. This may change with the Commerce Department's recent decision to permit application of the CVD law to China, reversing a 20-year practice of not doing so due to China's status as a non-market economy (NME) for purposes of the antidumping law..

151. Norsk Hydro Canada, Inc. v. United States, 472 F.3d 1347 (Fed. Cir. 2006), *rev'g*, 391 F. Supp. 2d 1326 (Ct. Int'l Trade 2005).

152. *Id.* at 1348.

153. *Id.*

The CAFC held that the "imposition of countervailing duties," and the "assessment or liquidation of duties" were distinct events, and that Commerce and Customs are responsible for those tasks, respectively.[154] The CAFC further found that Commerce's determination that it may only consider the entries received during the actual period of review when calculating the proper CVD rate to be a permissible interpretation of the governing statute.[155]

In 1999, Commerce conducted an administrative review of products entered in 1997 by NHC, an importer of magnesium and alloy magnesium, which were subject to a countervailing duty order on magnesium and alloy *magnesium* from Canada.[156] After determining a subsidy rate of 2.02 percent, Commerce instructed Customs to liquidate the subject entries at that set rate.[157] Approximately a year later, NHC was notified by both the port of entry and Customs that the 1997 subject entries had been deemed liquidated at the cash deposit rate, which ranged from 3.18 percent to 7.61 percent.[158] At the time, NHC took no action regarding this matter.[159]

During the administrative review for entries made in 2001, NHC challenged the duties that had been collected on the 1997 subject entries and requested that the 2001 subsidy rate be offset by the amount that had been overpaid for the 1997 entries.[160] Commerce rejected NHC's request on the ground that it properly instructed Customs as to the subsidy rate, and thus did not have the authority to make the offset as Customs had made the error.[161] NHC then appealed this determination to the CIT, who held that Commerce was statutorily obligated to make the offset and remanded the case to Commerce to make the adjustment.[162]

Disagreeing with the CIT's reasoning, the CAFC reversed and remanded the case with instructions to vacate the offset that Commerce had issued per the CIT's instructions.[163] First, the CAFC distinguished the act of "imposing" countervailing duties from the act of "assessing"

154. *Id.* at 1359-60.
155. *Id.* at 1360-63.
156. *Id.* at 1353.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 1353-54.
162. *Id.* at 1354.
163. *Id.* at 1363.

or liquidating them.[164] Because 19 U.S.C. § 1671 provides the criteria for determining whether to impose duties, and Commerce is the agency responsible for that determination, the Court reasoned that "it follows that CVDs are 'imposed' before liquidation, since Commerce is not involved in liquidation."[165] Based on this understanding, the CAFC concluded that because Commerce is the agency that actually imposes the duties, and Customs is responsible for assessing and liquidating the duties, "Commerce's failure to make the setoffs does not result in the imposition . . . of a duty greater than the benefit received."[166] The Court further found that Commerce is not statutorily obligated to "correct" assessment errors from prior administrative reviews, which were made by Customs, by providing an offset in a subsequent administrative review of the order.[167]

The CAFC also held that Commerce's practice of limiting its review of entries solely to those entered during the period of review at issue in the administrative review to be a reasonable interpretation of the governing statute.[168] Because the statute does not specify the length of a "period of review," the CAFC determined that Commerce's interpretation was entitled to *Chevron* deference.[169] The Court then reviewed the "reasonableness" of Commerce's interpretation, and found it to be supported by the statute's provision for "annual reviews," and that it promoted efficiency and finality.[170] Based on these findings, the CAFC reversed the underlying CIT judgment, and remanded the case[171]

B. *Methodology*

In *Royal Thai Government v. United States*, the CAFC considered what methodologies Commerce may use to determine the "specificity" of a subsidy for CVD purposes, and to determine whether drawbacks should

164. *Id.* at 1359-60.

165. *Id.* at 1359.

166. *Id.* at 1360.

167. *Id.*

168. *Id.* at 1360-61. Under the governing statute, 19 U.S.C. § 1675 (1999), "[a]t least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order . . . the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall . . . review and determine the amount of any net countervailable subsidy."

169. *Id.* at 1360-61.

170. *Id.* at 1361.

171. *Id.* at 1363.

be fully or only partially countervailed.[172] With respect to the question of what means Commerce may employ to determine the specificity of a subsidy, the CAFC held that Commerce may use its discretion to determine what methodology is most appropriate so long as the method is reasonable.[173] The CAFC also determined that Commerce is not required to use the generally accepted accounting principles of the home country to measure the reasonableness of a program instituted to track the inputs used in the production of exported goods.[174]

During the underlying CVD investigation, Commerce investigated several Thai programs to determine whether certain Thai manufacturers of hot-rolled carbon steel flat products ("Thai steel producers") had received any countervailable subsidies for the production of their exported goods. One of these programs was a debt-restructuring program in which the Thai steel producers were participants.[175] In another program, the Thai steel producers received duty exemptions for any raw and essential material imports that they incorporated into goods for export.[176] In its final determination, Commerce found that the debt-restructuring program was not countervailable.[177] However, the import duty exemptions the Thai steel producers received were deemed countervailable in their entirety.[178]

On appeal, the CIT held that Commerce correctly determined that the debt restructuring program did not constitute a countervailable subsidy.[179] The CIT, however, found that Commerce incorrectly deter-

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172. Royal Thai Gov't v. United States, 436 F.3d 1330 (Fed. Cir. 2006), *aff'g in part and rev'g in part*, 341 F. Supp. 2d 1315 (Ct. Int'l Trade 2004). The CAFC also considered whether Commerce's denial of a request to investigate the respondent company for alleged equity infusions was not supported by substantial evidence. *Id.* After reviewing the administrative record, the CAFC determined that there was sufficient evidence to support Commerce's determination that the requesting party had failed to provide information that established a reasonable basis to believe or suspect that the company had received an equity infusion. *Id.*

173. *Id.* at 1336.

174. *Id.* at 1339-40.

175. *Id.* at 1332; *see also* Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand, app. I: Issues and Decision Memorandum at Section III, pt. A, 66 Fed. Reg. 50,410 (Dep't. of Commerce Oct. 3, 2001).

176. *Royal Thai Gov't*, 436 F.3d at 1332; *see also* Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand, app. I: Issues and Decision Memorandum at Section II, pt. A, cmt. 3, 66 Fed. Reg. 50,410 (Dep't of Commerce Oct. 3, 2001).

177. *Royal Thai Gov't*, 436 F.3d at 1333.

178. *Id.*

179. *Id.* Under 19 U.S.C. § 1677(5A)(D)(iii), Commerce must consider four factors when determining whether a subsidy is "specific" for the purposes of imposing countervailing duties.

mined that the entire amount of duty exemptions received were countervailable and remanded the case, directing Commerce to find a *de minimis* total estimated net countervailing subsidy rate.[180]

The CAFC agreed with the CIT that Commerce correctly determined that the debt restructuring program was not "specific," and was therefore not countervailable.[181] In doing so, the CAFC rejected the claim of U.S. Steel (a domestic producer of hot-rolled steel) that Commerce, instead of reviewing the magnitude of the benefits provided by restructuring, erroneously reviewed only the distribution and magnitude of the loans that were restructured to determine whether the program was specific.[182] As explained by the CAFC,

> [I]t is not unreasonable for Commerce to presume that the amount of benefits conferred by debt restructuring would roughly be proportional to the magnitude of the debts that were restructured, and as a result to compare the magnitudes of the debts that were restructured rather than to engage in the intensive investigations and calculations contemplated by U.S. Steel.[183]

Accordingly, the CAFC held that Commerce's finding that the debt restructuring program was not specific was supported by substantial evidence and otherwise in accordance with the law.[184]

The CAFC, however, disagreed with the CIT's judgment that Commerce erroneously countervailed the full amount of the import duty

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Under the statutory provision, a subsidy is specific if one of the following circumstances exist: (1) the actual recipients of the subsidy are limited in number; (2) the predominant user of the subsidy is an enterprise or an industry; (3) a disproportionately large amount of the subsidy is received by an enterprise or industry; or (4) the authority granting the subsidy has discretion in whom to award the subsidy, and has exercised that discretion in a manner that suggests that an enterprise or industry is being favored over others. 19 U.S.C. § 1677(5A)(D)(iii) (2007); *see also Royal Thai Gov't*, 436 F.3d at 1335.

180. *Royal Thai Gov't*, 436 F.3d at 1334.

181. *Id.* at 1336.

182. *Id.* at 1335. According to U.S. Steel, Commerce should have employed a method that compared the pre- and post-restructuring interest rates and loan repayment schedules, and that compared the benefits received by different companies and industries.

183. *Id.* at 1336. The CAFC also noted that Commerce had "determined that the magnitude of debt that is structured is roughly proportional to the benefit conferred by restructuring." *Id.* Further, the CAFC acknowledged that Commerce had considered the methodology proposed by U.S. Steel and determined it to be impracticable. *Id.*

184. *Id.*

exemptions received by the Thai steel manufacturers.[185] As the CAFC explained, if a program permits a drawback that "exceeds the amount of import charges on imported inputs that are consumed in the production of the exported product, making normal allowances for waste," a countervailable benefit is deemed to exist.[186] Further, the entire amount of the import duty exemption is countervailable unless the government providing the benefit has implemented a system or procedure that confirms which inputs were used to produce the exported goods and the amounts used, and the system is reasonable, effective, and based on generally accepted commercial practices in the country exporting the goods.[187]

Upon reviewing the administrative record, the CAFC stated that it found no reason to second-guess Commerce's determination that the system allegedly tracking the inputs and amounts used in producing the export goods was unreasonable due to its failure to account for recoverable and saleable scrap.[188] In addition, the CAFC agreed with Commerce's determination that it may analyze a system's reasonableness using generally accepted accounting principles other than those employed by the exporting country.[189] The CAFC explained that it was deferring to Commerce's interpretations of its own regulation because the interpretations were reasonable.[190] As a result, the CAFC affirmed the CIT's decision regarding the specificity issue in relation to the debt restructuring program, reversed the CIT's judgment regarding the amount of the import duty exemption that could be countervailed, and remanded the case for disposition in accordance with its opinion.[191]

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185. *Id.* at 1339. If the remission or drawback of import duties provides a countervailable benefit, the amount of the benefit will normally be considered "the difference between the amount of import charges remitted or drawn back and the amount paid on imported inputs consumed in production for which the remission or drawback was claimed." 19 C.F.R. § 351.519(a)(3)(1) (2007).

186. *Royal Thai Gov't*, 436 F.3d at 1339 (quoting 19 C.F.R. § 351.519(a)(1)(i)). If the remission or drawback of import duties provides a countervailable benefit, the amount of the benefit will normally be considered "the difference between the amount of import charges remitted or drawn back and the amount paid on imported inputs consumed in production for which the remission or drawback was claimed." 19 C.F.R. § 351.519(a)(3)(1).

187. 19 C.F.R. § 351.519(a)(4) (2007); *see also Royal Thai Gov't*, 436 F.3d at 1339.

188. *Royal Thai Gov't*, 436 F.3d at 1339.

189. *Id.* at 1340.

190. *Id.*

191. *Id.* at 1341. The CAFC also determined that the CIT erroneously disallowed Commerce to consider information submitted in the parallel antidumping investigation and financial audit, based on the ground that Commerce is statutorily required to verify the factual bases underlying its determinations. *Id.*

C. *Presumption of Subsidy Specificity*

In *Magnola Metallurgy, Inc. v. United States*,[192] a review of Commerce's final results in the 2003 countervailing duty administrative review of *Pure Magnesium and Alloy Magnesium from Canada*,[193] the Court rejected Respondent's challenge to Commerce's specificity finding, holding that Commerce was reasonable in applying a rebuttable presumption that a subsidy found to be specific in a prior review continues to be specific in a subsequent review absent new evidence to the contrary. In particular, the Court held, by virtue of Commerce having determined a program to be a specific subsidy for purposes of the original investigation, Commerce was within its authority to presume that the program was still a specific subsidy for purposes of the administrative review.[194]

At issue was the manpower training measure program, an employment assistance and training program administered by the Gouvernement du Quebec ("GDQ"). In the original new shipper review, Commerce had determined that the GDQ program constituted a *de facto* specific subsidy to Magnola "because the grants Magnola received were disproportionately large when compared to other companies."[195]

Following Commerce's affirmative determination in the new shipper review, Magnola sought an administrative review for the 2003 calendar year.[196] In the administrative review, Magnola challenged that the alleged subsidy was a non-recurring grant that occurred prior to 2003 and thus that Commerce should not allocate the grant to the 2003 period of review.[197] Commerce disagreed. Relying on its prior determination that the GDQ's manpower training measure program constituted a subsidy covered by the statute, the Department noted, "It is the Department's policy not to revisit specificity determinations absent the presentation of new facts or evidence."[198] Magnola appealed to the

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192. Magnola Metallurgy, Inc. v. United States, 464 F. Supp. 2d 1376 (Ct. Int'l Trade 2006).

193. Pure Magnesium and Alloy Magnesium From Canada, 70 Fed. Reg. 54,367 (Dep't of Commerce Sept 14, 2005) (final results of 2003 countervailing duty admin. reviews).

194. *See Magnola Metallurgy, Inc.*, 464 F. Supp. 2d at 1379.

195. Issues and Decision Memorandum for the Final Results of the Countervailing Duty New Shipper Review of Alloy Magnesium from Canada, 68 ITADOC 22359 (Dep't of Commerce Apr. 21, 2003).

196. Pure Magnesium and Alloy Magnesium From Canada, 70 Fed. Reg. 24,530 (Dep't of Commerce May 10, 2005) (preliminary results of countervailing duty admin. reviews).

197. *See* Issues and Decision Memorandum for the Final Results of the 2003 Administrative Reviews for the Countervailing Duty Orders of Pure Magnesium and Alloy Magnesium from Canada, 70 ITADOC 54367 (Dep't of Commerce Sept. 7, 2005).

198. *Id.*

CIT, arguing that Commerce had failed to conduct a proper administrative review as required under the statute.[199]

The Court sided with Commerce. While the Court noted that "the statute requires that Commerce, upon request, conduct an administrative review and determine the amount of Magnola's subsidy," it further found "[t]he statute does not . . . specify the precise process and scope of the proceedings necessary to determine the amount of Magnola's subsidy."[200] In this case, the Court held that Commerce has "filled the gap in the statute" by promulgating regulations.[201] Accordingly, the issue was whether Commerce acted consistent with its regulations in declining to reopen its specificity determination.

Deferring to Commerce's interpretation of its own regulations, the Court ultimately decided that Commerce's general policy of applying a rebuttable presumption with respect to past specificity determinations was not unreasonable.[202] In so ruling, the Court cited several factors supporting the conclusion that the policy is reasonable: "the absence of new facts or evidence," especially where the prior determination was itself subject to judicial review;[203] the "interest of efficiently using the agency's resources;"[204] and the presence of language in the regulation providing that Commerce will only reopen a specificity determination "in a specified other review," with the implication that an administrative review is not specified.[205] The Court further noted that Commerce's "longstanding administrative practice" had been upheld as reasonable by the CAFC.[206]

Thus, rejecting on its face Magnola's argument that Commerce must conduct a new specificity determination for each review, the Court validated Commerce's practice of presuming that a particular subsidy remains a specific subsidy under the statute for purposes of future administrative reviews.[207] In order to prompt Commerce to revisit such a determination, per *Magnola*, a respondent must submit new evidence.

199. *See Magnola Metallurgy, Inc.*, 464 F. Supp. 2d at 1379.

200. *Id.* at 1380.

201. *Id.*

202. *See id.* at 1381.

203. *Id.*

204. *Id.*

205. *Id.* (emphasis omitted).

206. *Id.* at 1382 quoting PPG Indus., Inc. v. United States, 978 F.2d 1232, 1242 (Fed. Cir. 1992)).

207. *See id.* at 1383.

IV. Conclusion

2006 was a remarkably active year for both the CIT and the CAFC. In their review of antidumping and countervailing duty determinations by the Commerce Department, the CIT and the CAFC continued to extend great deference in general to Commerce's reasoning and determinations, affirming in several instances that Commerce is entitled to a significant amount of discretion in interpreting both its own regulations and the antidumping and countervailing duty statutes. In several notable cases, the CAFC was particularly deferential to Commerce, even reversing CIT decisions that had previously found fault with the agency's approach. In so doing, both courts have identified several interesting and important issues to be further examined in coming years.