

# JUDICIAL REVIEW OF THE INTERNATIONAL TRADE COMMISSION'S DETERMINATIONS IN ANTIDUMPING AND COUNTERVAILING DUTY PROCEEDINGS: AN OVERVIEW OF DECISIONS IN 2006

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## I. INTRODUCTION

In 2006, the U.S. Court of International Trade (“CIT”) and the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit” or “CAFC”) issued approximately 15 published decisions reviewing the U.S. International Trade Commission’s (“Commission” or “ITC”) determinations related to antidumping (“AD”) or countervailing duty (“CVD”) proceedings. These cases included several longstanding disputes, reflecting the recent trend for challenges to ITC decisions to entail multiple remands and several rounds of judicial review before final resolution.<sup>1</sup> The decisions included controversial CAFC rulings on the ITC’s required analysis of the role of non-subject imports in its material injury determinations; resolution of a case which was expected to, but did not, decide whether the CIT may “reverse” a decision by the ITC; and numerous decisions addressing various aspects of the Commission’s statutorily-mandated factors for assessing injury and causation in antidumping and CVD cases. In these cases, in general, the courts continued to reinforce the strong rule of deference to the agency’s determinations. In addition, in 2006 the CIT issued two opinions addressing the constitutionality of certain Byrd Amendment provisions involving the ITC.

This article provides a survey of the most noteworthy 2006 judicial

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1. This article assumes familiarity with the primary standard of review that applies to the Court of International Trade’s and Federal Circuit’s review of ITC determinations, which is that the court must determine whether the ITC’s determination is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” See 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). For a detailed discussion of the substantial evidence standard, see Andrea C. Casson & Neal J. Reynolds, *Judicial Review of the International Trade Commission’s Injury Determinations in Antidumping and Countervailing Duty Proceedings: An Overview and Analysis of Federal Court Decisions in 2005*, 38 GEO. J. INT’L L. 89, 90-92 (2006).

decisions related to ITC determinations in or related to antidumping and countervailing duty proceedings.

## II. BRATSK ALUMINUM AND THE ROLE OF NON-SUBJECT IMPORTS IN THE COMMISSION'S INJURY ANALYSIS

The most notable, and certainly the most controversial decision, in an appeal of an ITC AD/CVD determination during 2006 was the Federal Circuit's decision in *Bratsk Aluminum Smelter v. United States*.<sup>2</sup> The Court's articulation in that case of the requirement that the ITC make a specific determination regarding the impact of non-subject imports is already resonating in subsequent judicial opinions and Commission decisions and has even become the subject of proposed legislation.

In *Bratsk*, the CIT had previously sustained the ITC's affirmative material injury determination with respect to subject imports of silicon metal from Russia that the Commerce Department had found to be sold in the United States at less than fair value.<sup>3</sup> The sole issue before the CAFC was whether the administrative record established that material injury to the domestic industry was "by reason of" the subject imports.<sup>4</sup> Appellants, respondents in the underlying investigation, argued that the ITC was required by *Gerald Metals, Inc. v. United States*<sup>5</sup> to make a "specific determination as to whether the non-subject imports would simply replace the subject imports, with the same impact on domestic products, if the subject imports were excluded from the market."<sup>6</sup> The ITC had "made no such determination" and had found the CAFC's decision in *Gerald Metals* to be "factually distinguishable."<sup>7</sup>

The CAFC began its review by noting that the subject merchandise—silicon metal—was a commodity product for which price was the "primary consideration" and that during the period of investigation ("POI"), ten exporting countries, including Russia, had supplied silicon metal to the U.S. market.<sup>8</sup> The Court then reviewed its previous holdings in *Gerald Metals* and *Taiwan Semiconductors Indus. Ass'n v. Int'l*

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2. *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006).

3. *Bratsk Aluminum Smelter v. United States*, No. 03-00200, slip op. 04-152 (Ct. Int'l Trade Dec. 3, 2004), *vacated and remanded*, 444 F.3d 1369.

4. *Bratsk*, 444 F.3d at 1372.

5. *Gerald Metals, Inc. v. United States*, 132 F.3d 716 (Fed. Cir. 1997).

6. *Bratsk*, 444 F.3d at 1372.

7. *Id.*

8. *Id.* at 1371.

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*Trade Comm.*<sup>9</sup> In *Gerald Metals*, a 1997 decision, the CAFC had held that where “fairly traded non-subject imports were substitutable for the . . . subject imports and undersold the domestic product just as the subject imports had,” the Commission must explain in its causation analysis “why domestic consumers would not have purchased the fairly-traded non-subject imports” in place of the subject imports.<sup>10</sup> *Taiwan Semiconductors* applied the *Gerald Metals* requirement with respect to the role of non-subject imports in the causation analysis, and upheld the Commission’s negative injury determination, finding that “substantial evidence supports the fact that the United States market share was impacted largely by non-subject imports” and that the record did not show that the subject imports had caused material injury “in light of the dominant presence of non-subject imports in the market place.”<sup>11</sup>

The Court in *Bratsk* then clarified its holdings in *Gerald Metals* as follows:

*Gerald Metals* did not, of course, establish a per se rule barring a finding of causation where the product is a commodity product and there are fairly traded imports priced below the domestic product. However, under *Gerald Metals*, the Commission is required to make a specific causation determination and in that connection to directly address whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic producers.<sup>12</sup>

The Court found that the antidumping investigation at issue in *Bratsk* “revealed the same conditions that triggered the additional causation inquiry” in *Gerald Metals* and *Taiwan Semiconductors* because silicon metal from all sources was “generally interchangeable,” and non-subject imports were significant and had also undersold the domestic

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9. *Taiwan Semiconductor Indus. Ass’n v. Int’l Trade Comm’n*, 266 F.3d 1339 (Fed. Cir. 2001).

10. *Bratsk*, 444 F.3d at 1374 (citing *Gerald Metals*, 132 F.3d at 718, 720-23).

11. *Id.* (quoting *Taiwan Semiconductor*, 266 F.3d at 1345-47). In *Taiwan Semiconductor*, the CAFC applied the holding of *Gerald Metals* and upheld the ITC’s determination, after two remand proceedings, that the domestic industry was not injured by Taiwanese imports of static access random access memory chips (“SRAMs”). The ITC had found that non-subject Korean imports of SRAMs were also priced below domestic products and thus, in light of the presence of non-subject imports, the increase in volume of subject imports was not sufficient to demonstrate that the subject imports were the cause of material injury to the domestic industry. 266 F.3d at 1345-47.

12. *Bratsk*, 444 F.3d at 1374-75.

product.<sup>13</sup> The CAFC rejected the ITC's attempts to distinguish *Gerald Metals*, holding that the "specific determination" requirement applies "whenever the antidumping investigation is centered on a commodity product, and price competitive non-subject imports are a significant factor in the market."<sup>14</sup> Thus, the CAFC vacated the CIT's decision so that the case could be remanded to the ITC with instructions to address the "specific determination" requirements of *Gerald Metals*.<sup>15</sup>

Following almost immediately on the heels of *Bratsk*, less than one month later, the CAFC issued another decision involving the necessary analysis of non-subject imports in the Commission's injury determinations, *Caribbean Ispat Ltd. v. United States*, 450 F.3d 1336 (Fed. Cir. 2006). This time, however, because the investigation at issue involved subject imports from Trinidad and Tobago, the first issue was the ITC's interpretation of a requirement under the Caribbean Basin Economic Recovery Act ("CBERA"),<sup>16</sup> exempting Caribbean nations from the cumulation rule and mandating that the ITC analyze the volume, price effects, and impact of imports from those nations separately from those of other subject countries.<sup>17</sup>

The plaintiff Caribbean Ispat, a Trinidadian producer, appealed the CIT's decision, which upheld the ITC's affirmative determination that steel wire rod imports collectively, and from Trinidad and Tobago alone, caused material injury to the domestic industry.<sup>18</sup> Plaintiff argued that the CBERA required the ITC to weigh the impact of imports from Trinidad and Tobago against the impact of fairly traded and less than fair value ("LTFV") imports from all other countries and then to decide whether the imports from non-CBERA countries are "so significant" as to render the impact of CBERA imports immaterial.<sup>19</sup> The ITC disagreed, arguing that the CIT was correct in finding that the Commission was precluded from considering the effect of other LTFV

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13. *Id.* at 1374-75.

14. *Id.* at 1375.

15. *Id.* at 1376. Senior Circuit Judge Archer dissented from the CAFC's opinion in *Bratsk*, finding that the ITC had "adequately considered the effect of both the subject imports and the interchangeable non-subject imports on the domestic industry in its determination and found substantial evidence in the record to support its material injury determination." *Id.* Accordingly, Judge Archer noted that he would have affirmed the CIT's decision sustaining the ITC's determination. *Id.*

16. See 19 U.S.C. § 1677(7)(G)(ii)(III)(2000).

17. *Caribbean Ispat Ltd. v. United States*, 450 F.3d 1336, 1337-38 (Fed. Cir. 2006).

18. *Id.* at 1337.

19. *Id.* at 1338.

imports.<sup>20</sup> The CAFC, however, disagreed with the lower court, finding that the Commission could treat LTFV imports from non-CBERA countries in the same manner as it typically treated fairly traded imports, i.e., as an “other economic factor,” in investigations not involving CBERA countries.<sup>21</sup>

Caribbean Ispat also argued that the ITC committed legal error when it failed to evaluate whether Trinidadian imports “were material in light of the vastly larger volumes of other subject imports” and had failed to consider “the effect of fairly traded imports.”<sup>22</sup> The CAFC agreed and found that contrary to *Bratsk*, the Commission had failed to address whether imports from Trinidad and Tobago would likely be replaced by other imports.<sup>23</sup> Given the “high level of fungibility” that the Commission had found, the CAFC held that “[b]ecause CBERA required the Commission to treat Trinidad and Tobago’s imports separately from all other imports . . . *Bratsk* indicates that, in the present case, the ‘Commission is required to make a specific causation determination and . . . to directly address whether [other LTFV imports and/or fairly traded imports] would have replaced [Trinidad and Tobago’s] imports without any beneficial effect on domestic products.’”<sup>24</sup> The Court thus remanded the case for the ITC to make such a “specific determination.”

*Bratsk* and *Caribbean Ispat* made unequivocally clear the CAFC’s view of the ITC’s affirmative obligation to explain, when the product at issue is fungible and price-sensitive, whether non-subject imports would replace subject imports, obviating the effectiveness of antidumping duty relief. Indeed, in the immediate wake of these strong statements

20. In support of its contention, the Commission relied almost exclusively on one seemingly vague passage from the Uruguay Round Agreements Act Statement of Administrative Action (“SAA”), indicating that WTO signatories must “examine all relevant evidence” including “any known factors, other than the dumped . . . imports which at the same time are injuring the domestic industry.” *Id.* at 1338-39 (quoting from the SAA, H.R. Doc. No. 103-316, vol. 1, at 851-52 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040). The Commission asserted that the reference to “other than the dumped imports” restricted its ability to consider dumped imports from non-CBERA countries in determining whether imports from a CBERA country caused material injury. *Id.* at 1339. The CAFC found that the ITC read too much into the passage’s reference to causation, especially because it did not even address the “unique circumstances” of CBERA and other non-cumulation provisions. *Id.*

21. *Id.* at 1339 (citing *Gerald Metals Inc. v. United States*, 132 F.3d 716, 732 (Fed. Cir. 1997)) (remanding because the CIT did not properly consider the presence of fairly-traded Russian imports in its decision to sustain the ITC’s affirmative injury determination).

22. *Caribbean Ispat*, 450 F.3d at 1341.

23. *Id.*

24. *Id.* (citing *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006)).

by the CAFC, the CIT, exercising an apparent abundance of caution, in *Sichuan Changhong Electric Co., Ltd. v. United States*,<sup>25</sup> remanded the ITC's causation analysis, even though the CIT expressly indicated that it had little doubt that the ITC's findings with respect to non-subject imports were, in fact, reasonable and supported. Specifically, Changhong, a Chinese respondent in the ITC's antidumping investigation of color television receivers ("CTVs") from China and Malaysia, challenged the ITC's affirmative material injury determination. One of its principal contentions on appeal was that the ITC had failed to consider other factors that might have negatively affected the domestic industry's performance during the period of investigation, "especially the impact of non-subject imports."<sup>26</sup> As a result, Changhong asserted, the ITC "failed in its duty to ensure that injury from other factors was not attributed to subject imports."<sup>27</sup>

The Court reviewed the Commission's volume, price and impact analyses, noting the Commission's findings with respect to non-subject imports. The Court concluded that Changhong's argument was "without merit,"<sup>28</sup> and that it was "apparent that the ITC took the necessary steps to ensure that it did not attribute injury caused by nonsubject imports to the subject imports."<sup>29</sup> Nevertheless, and even though it explicitly recognized that CTVs had not been found to be commodity products or highly fungible,<sup>30</sup> the Court remanded the case to the Commission. The Court cited the CAFC requirement in *Bratsk* and *Caribbean Ispat* for a "specific causation determination" concerning whether non-subject imports would replace subject imports. Given that the Commission's determination in CTVs predated these CAFC decisions, the CIT directed the Commission to determine whether the requirement applied in this case, and, if so, to adjust its analysis accordingly.<sup>31</sup>

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25. *Sichuan Changhong Elec. Co. v. United States*, 466 F. Supp. 2d 1323 (Ct. Int'l Trade 2006).

26. *Id.* at 1329.

27. *Id.*

28. *Id.* at 1332.

29. *Id.* at 1333.

30. *Id.*

31. *Sichuan Changhong*, 466 F. Supp. 2d at 1333. In its remand determination, the ITC determined that the "specific causation determination" requirements of *Bratsk* and *Caribbean Ispat* were inapplicable. The Commission first reiterated its concerns that the *Bratsk* test is "unclear," and that the decision's reference to what constitutes a commodity product provides "few meaningful criteria for the Commission to apply." It then concluded that the record did not support a conclusion that the domestic like product and subject imports – much less CTVs from all

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While *Changhong*, decided in late 2006, was one of the first cases to apply *Bratsk* and *Caribbean Ispat*, the CIT will likely proceed cautiously where the “impact of non-subject imports” analysis is at issue. For example, in *Tropicana Products, Inc. v. United States*, 484 F. Supp. 2d 1330 (Ct. Int’l Trade 2007), the court reviewed the Commission’s final affirmative injury determination in *Certain Orange Juice from Brazil*.<sup>32</sup> Tropicana argued that the Commission had failed to consider the effect of non-subject imports, citing the *Gerald Metals* requirements.<sup>33</sup> Reviewing the holdings in *Gerald Metals* and *Bratsk*, the CIT remanded the case for the ITC to examine whether the product was, in fact, a commodity product, whether non-subject imports were competitively priced and a significant factor in the domestic market, and, if subject imports were sold at fair value, whether non-subject imports would replace them without beneficial effect on the domestic industry.<sup>34</sup>

While the CIT has been very cautious in light of *Bratsk* when non-subject imports are an issue, as evidenced by *Tropicana* and *Sinchuan Changhong*, the Commission’s reaction has also been noteworthy. In response to the Federal Circuit’s ruling in *Caribbean Ispat*, 450 F.3d 1336 (Fed. Cir. 2006), the CIT remanded the case to the Commission, instructing it to make the necessary “nonsubject import replacement” determination.<sup>35</sup> The Commission, by a vote of 3-2, reversed its previous views, and made a negative determination.<sup>36</sup> The two dissenting Commissioners rendered an affirmative determination, finding *Bratsk* to be inapplicable.<sup>37</sup> One Commissioner voting in the negative had done so previously and relied on her earlier opinion.<sup>38</sup> However, two

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sources – were highly interchangeable. Consequently, reasoned the Commission, CTVs did not “possess even the basic characteristics of a commodity product, as that term is used by the Federal Circuit in *Bratsk*.” The Commission also determined, as required by the CIT’s remand instructions, that its causation analysis in the Original Determination otherwise complied with the applicable Federal Circuit requirements. *Certain Color Television Receivers from China*, USITC Pub. 3905, Inv. No. 731-TA-1034 (Feb. 2007) (Final) (Remand).

32. *Certain Orange Juice from Brazil*, USITC Pub. 3838, Inv. No. 731-TA-1089 (Mar. 2006) (Final).

33. *See Tropicana Products, Inc. v. United States*, 484 F. Supp. 2d 1330, 1349 (Ct. Int’l Trade 2007).

34. *Id.* at 1351.

35. *See Caribbean Ispat, Ltd. v. United States*, No. 02-00756, slip op. 06-151 (Ct. Int’l Trade 2006).

36. *See Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, USITC Pub. 3903, Inv. No. 731-TA-961 (Jan. 2007) (Final) (Remand) [hereinafter *Remand Results*] (issued pursuant to the Federal Circuit’s opinion in *Caribbean Ispat*, 450 F.3d 1336 (Fed. Cir. 2006)).

37. *See id.* at 25-27.

38. *See id.* at 1 n.3.

Commissioners who had previously voted in the affirmative reversed their votes based on the *Bratsk* analysis, making clear that “the Federal Circuit’s decision *Bratsk* and its remand order in this case compel [them] to reach a negative determination . . . even though [they] believe an affirmative determination is consistent with the statute and supported by the factual record.”<sup>39</sup>

In their remand opinion, those two Commissioners stated their view of the *Bratsk* holding, as follows:

The . . . ambiguities arise in large part because the requirement imposed by the *Bratsk* panel . . . is not among the statutory factors Congress has required the Commission to consider. Indeed, such a test misconstrues the purpose of the statute, which is not to bar subject imports from the U.S. market or award subject import market share to U.S. producers, but is meant instead to ‘level competitive conditions’ by imposing a duty on subject imports and thus enabling the industry to compete against fairly traded imports. The statutory scheme in fact contemplates that subject imports may remain in the U.S. market after an order is imposed and even that the industry afterwards may continue to suffer material injury. Indeed, the dumping of subject imports may have no impact on respective market shares, but may affect the domestic industry’s selling price and profitability alone. Therefore, the Commission is required under *Bratsk* to determine whether non-subject imports would fill the void created by the ‘elimination’ of subject imports despite the fact that there may be no such void created by an order.<sup>40</sup>

In fact, these two Commissioners interpreted *Bratsk* to create a presumption in favor of finding that non-subject imports would replace subject imports without beneficial effect on the domestic industry.<sup>41</sup> To rebut the presumption, they argued, would require proving the negative—that non-subject imports would not replace subject imports or

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39. *Id.* at 22 (internal citations omitted). Those two Commissioners were Vice Chairman Aranoff and Commissioner Hillman.

40. *Id.* at 15.

41. See *Mittal Steel Point Lisas Ltd. v. United States*, 495 F. Supp. 2d 1374, 1377-78 (Ct. Intl’ Trade 2007) (discussing *Remand Results*, *supra* note 38, at 30).

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that such replacement would still benefit the domestic industry.<sup>42</sup> The information needed to rebut such a presumption, they wrote, would necessarily be derived from countries not under investigation, and which would have no incentive to provide it.<sup>43</sup>

Despite certain Commissioners' clear discomfort with *Bratsk*, they applied the analysis and made a negative remand determination in *Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, which the CIT upheld. The CIT, in *Mittal Steel Point Lisas* recognized the domestic industry's "plea for relief" from the Commission's "extreme interpretation" of *Bratsk*,<sup>44</sup> which it suggested arose from the Commission's disagreement with the CAFC. The CIT, however, held that it was unable to conclude that the Commission had not carried out the Federal Circuit's mandate and thus affirmed the remand determination.<sup>45</sup>

As the ITC's remand determination in *Caribbean Ispat* suggests, the *Bratsk* decision and its progeny have given rise to considerable controversy. In June 2007, for example, former ITC Commissioner Jennifer Hillman testified before the Senate Finance Committee that the ITC had been so alarmed by the *Bratsk* decision that, for the first time in its history, it had recommended that the Solicitor General seek a Supreme Court review.<sup>46</sup> In August 2007, Senate Finance Committee Chairman Max Baucus (D-Mont.) and Senator Orrin Hatch (R-Utah), introduced legislation which would, *inter alia*, reverse the *Bratsk* decision. The proposed legislation provides that the ITC must make material injury determinations in antidumping and countervailing duty cases without regard to whether non-subject imports will likely replace the imports from investigated countries.<sup>47</sup>

Absent legislation, the application of *Bratsk* will likely continue to be raised in antidumping and countervailing duty appeals. Even if the

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42. *Id.* at 1378.

43. *Id.*

44. *Id.* at 1375.

45. *Id.* at 1380.

46. Jennifer A. Hillman, Distinguished Visiting Fellow, Inst. of Int'l Econ. Law, Georgetown University Law Center, Testimony before the United States Senate Finance Committee: Trade Enforcement for a 21st Century Economy (June 12, 2007) available at <http://finance.senate.gov/hearings/testimony/2007test/061207testjh.pdf> (also noting that the Solicitor General ultimately did not seek such a review). See also *Carbon and Certain Alloy Steel Wire Rod From Trinidad and Tobago*, USITC Pub. 3903, Inv. No. 731-TA-961 at I-1-2 (Jan. 2007) (Final) (Remand) (indicating that the Commission had asked for a stay of those remand proceedings while a Supreme Court appeal was under consideration).

47. Trade Enforcement Act of 2007, S. 1919, 110th Cong. § 402 (2007).

narrower test in *Bratsk* is ultimately addressed by Congress, the Commission's consideration of the role of non-subject imports will almost certainly continue to be an issue the Courts are asked to review under *Gerald Metals*.

### III. THE FEDERAL CIRCUIT'S DECISION IN NIPPON TIN MILL

During 2006, the long-running dispute concerning the Commission's 2000 final material injury determination in the investigation of *Tin-and Chromium-Coated Steel Sheet from Japan* ("*TCCSS from Japan*") again found itself before the Federal Circuit.<sup>48</sup> The *Nippon Steel Corp. v. United States* ("*Nippon Tin Mill*") decision was much anticipated, as it was believed that the Federal Circuit might address in its decision the question of whether the CIT has the authority to direct the ITC to reverse a determination, rather than merely to remand its analyses to address certain flaws. While the *Nippon Tin Mill* opinion provided direct guidance to the CIT regarding the scope of its authority and its standard of review, the Federal Circuit ultimately avoided issuing a definitive holding on whether and when the CIT may ever instruct the ITC to reverse its findings on remand.

The complicated procedural background and strong language of the CAFC decision provide some indication of how intensely the issue of the CIT's authority was litigated. The *Nippon Tin Mill* litigation arose from a Japanese producer's challenge to an August 2000 final affirmative material injury determination issued by the ITC in its antidumping investigation of *TCCSS from Japan*.<sup>49</sup> In 2001, the CIT sustained the Commission's volume findings but remanded on price effects and causation.<sup>50</sup> The Commission's first remand decision, in March 2002, was again affirmative.<sup>51</sup> The CIT remanded a second time on the pricing issues, vacated the ITC's affirmative determination, and di-

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48. As the Federal Circuit noted, "[t]his antidumping case has a procedural history spanning six years, which now includes four determinations by the Commission, four opinions from the Court of International Trade, and one prior opinion from this court." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1348 (Fed. Cir. 2006).

49. *Tin- and Chromium-Coated Steel Sheet from Japan*, USITC Pub. 3300, Inv. No. 731-TA-860 (Aug. 2000) (Final).

50. *Nippon Steel Corp. v. United States*, 182 F. Supp. 2d 1330, 1340, 1356 (Ct. Int'l Trade 2001) [hereinafter *Nippon I*].

51. *Tin- and Chromium-Coated Steel Sheet from Japan*, USITC Pub. 3493, Inv. No. 731-TA-860 (Mar. 2002) (Final) (First Remand).

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rected the Commission to enter a negative injury determination.<sup>52</sup> The CIT explained that it was directing the Commission to enter a negative finding because the Commission had “demonstrated an unwillingness or inability to address the substantial claims made by the respondents or the concerns expressed by the court . . . .”<sup>53</sup> The Commission appealed to the Federal Circuit, which in 2003 vacated the decision of the CIT, finding that the CIT had exceeded its authority to the extent it had engaged in refinding of facts and interposing its own views on causation and injury, and that the CIT had abused its discretion by declining to remand.<sup>54</sup> On remand, the ITC again issued an affirmative material injury determination.<sup>55</sup> Nippon challenged the ITC’s remand, and the CIT remanded a third time, mandating again that the ITC issue a negative determination.<sup>56</sup> In response to this third remand, the ITC in late 2004 issued a negative determination, expressly stating that the negative outcome was “dictated by the Court’s findings in *Nippon IV*; it [was] not, however, the determination we would have made in the absence of those findings.”<sup>57</sup> When International Steel Group (now Mittal Steel USA),<sup>58</sup> a member of the domestic industry, sought the CIT’s review of this directed negative determination, the CIT in 2005 sustained the negative outcome.<sup>59</sup> The ITC and Mittal appealed to the Federal Circuit, which in 2006 agreed that the CIT had erred in remanding the case to the Commission for a third time.

The Federal Circuit began by dedicating almost three pages of its opinion to the role of Article III judges versus that of the Commission with respect to the resolution of antidumping cases and the scope of the “substantial evidence” standard of judicial review.<sup>60</sup> Specifically, the

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52. *Nippon Steel Corp. v. United States*, 26 CIT 911, 936 (Ct. Int’l Trade 2002) [hereinafter *Nippon II*].

53. *Id.*

54. *See Nippon Steel Corp. v. Int’l Trade Comm’n*, 345 F.3d 1379, 1380-81 (Fed. Cir. 2003) [hereinafter *Nippon III*].

55. *Tin- and Chromium-Coated Steel Sheet from Japan*, USITC Pub. 3674, Inv. No. 731-TA-860 (Feb. 2004) (Final) (Second Remand).

56. *Nippon Steel Corp. v. United States*, 350 F. Supp. 2d 1186, 1188-89 (Ct. Int’l Trade 2004) [hereinafter *Nippon IV*].

57. *Tin- and Chromium-Coated Steel Sheet from Japan (Views on Remand)*, USITC Pub. 3751, Inv. No. 731-TA-860 (Dec. 2004) (Final) (Third Remand).

58. International Steel Group was later merged with Mittal Steel USA. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1349 (Fed. Cir. 2006).

59. *Nippon Steel Corp. v. United States*, No. 00-09-00479, 2005 WL 675842 (Ct. Int’l Trade Mar. 23, 2005) [hereinafter *Nippon V*].

60. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350-52 (Fed. Cir. 2006).

CAFC noted that while the ITC Commissioners are appointed by the President and confirmed by the Senate due to their “expertise in recognizing, and distinguishing between, fair and unfair trade practices,” Article III judges have expertise “primarily in law.”<sup>61</sup> The Court found that the question for the CIT under the substantial evidence standard was not whether it agreed with the Commission’s decision, but whether it was “reasonable and supported by the record as a whole, even if some evidence detracts from the Commission’s conclusion.”<sup>62</sup> In short, the Court succinctly stated that the CAFC and the CIT “do not make the determination . . . [but] merely vet the determination.”<sup>63</sup>

In reviewing the Commission’s second remand determination, the CIT had rejected the Commission’s affirmative price effects findings, concluding that Japanese underselling and domestic price depression or suppression was “insignificant” and that specific conditions of competition minimized the subject imports’ impact on domestic prices.<sup>64</sup> The Federal Circuit found that substantial evidence supported both the affirmative conclusion of the ITC with respect to price effects and the negative conclusion of the CIT,<sup>65</sup> but that the substantial evidence standard “compels deference to the Commission.”<sup>66</sup> With respect to the ITC’s causation findings, the Federal Circuit also concluded that the CIT, in reviewing the second remand determination, had “improperly substituted its credibility determinations for those of the Commission.”<sup>67</sup> Again highlighting the need for deference with respect to factual findings under the “substantial evidence” standard, the Court held that even though the CIT’s analysis of the evidence might have been correct, adequate evidence existed on both sides, and “assigning evidentiary weight falls exclusively within the authority of the Commission.”<sup>68</sup>

The CAFC explained that “when the totality of the evidence does not illuminate a black-and-white answer to a disputed issue, it is the role of the expert fact finder—here the majority of the Presidentially-appointed, Senate-approved Commissioners—to decide which side’s evidence to believe. So long as there is adequate basis in support of the

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61. *Id.* at 1350.

62. *Id.* at 1352 (citing *Altx Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004)).

63. *Id.*

64. *Id.* at 1353 (citing *Nippon IV*, 350 F. Supp. 2d 1186, 1221 (Ct. Int’l Trade 2004)).

65. *Nippon Steel*, 458 F.3d at 1353.

66. *Id.* at 1354.

67. *Id.* at 1357.

68. *Id.* at 1358.

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Commission's choice of evidentiary weight," the CIT and the CAFC, reviewing under the substantial evidence standard, must defer to the Commission.<sup>69</sup> The CAFC thus reversed the CIT's last two decisions (the third remand to the ITC and the affirmation of the ITC's negative third remand determination), set aside the ITC's mandated negative determination, and directed the CIT to reinstate the Commission's second affirmative remand determination.<sup>70</sup> However, the CAFC specifically did not rule on whether the CIT acted *ultra vires* in directing the ITC to enter a negative determination. The Court declined to decide the scope of the CIT's "authority under § 1516a," leaving open the possibility that, in the future, the CIT would be faced with an ITC "determination that is unsupported by substantial evidence, and for which remand would be 'futile,'"<sup>71</sup> making it appropriate for the ITC to reverse its findings on remand.

### IV. APPEALS OF PROCEDURAL ISSUES, INCLUDING DUE PROCESS CLAIMS

The year 2006 was also notable for procedural challenges to the Commission's administration of the AD/CVD laws. The CIT continued to be highly deferential to the ITC regarding its administration of the statute and regulations in the context of challenges that it had denied due process rights or otherwise offended procedural mandates.

In *Sichuan Changhong Electric Co., Ltd. v. United States*, 466 F. Supp. 2d 1323 (Ct. Int'l Trade 2006), in addition to contesting the ITC's failure to consider the impact of non-subject imports,<sup>72</sup> Plaintiff Changhong challenged on due process grounds the limited time it was afforded to comment on new factual information. During the course of the investigation, the ITC had conducted a hearing in accordance with its standard practice and regulations.<sup>73</sup> The arguments made during the hearing induced the Commission to re-evaluate certain financial information on the record for the domestic industry, and ultimately to request that the domestic producers submit updated financial data not previously on the record.<sup>74</sup> By the time the new financial data was released to interested parties under the administrative protective order, Changhong and the other respondents had only four days to

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69. *Id.* at 1359.

70. *Id.*

71. *Id.* (citing *Nippon IV*, 350 F. Supp. 2d 1186, 1222 (Ct. Int'l Trade 2004)).

72. See discussion of *Sichuan Changhong*, *supra* page 8.

73. *Sichuan Changhong Elec. Co. v. United States*, 466 F. Supp. 2d 1323, 1325 (Ct. Int'l Trade 2006).

74. *Id.* at 1325-26.

submit their final comments, which by regulation could not contain new factual information.<sup>75</sup> While Changhong dedicated part of its final comment submission to an evaluation of the new financial data, it complained to the CIT, after the ITC's final affirmative determination of material injury with respect to Chinese CTV imports, that four days was an insufficient amount of time to review, analyze, and comment on the new data, much less conduct further research and develop its own information and arguments in response, which would potentially include new information.<sup>76</sup>

On appeal, the Court noted that Changhong did not identify specific information in the new financial data that was deficient or otherwise questionable which would have required additional time to review and analyze.<sup>77</sup> Rather, Changhong simply complained that it could have "attempted" to develop additional information addressing the new data had it been given more time.<sup>78</sup> The Court noted that such an argument could be made with respect to almost every administrative proceeding: more time will inevitably enable a party to improve the quality of its comments.<sup>79</sup> Especially in the absence of any specific evidence that, given more time, Changhong would have provided more probative comments, and in light of the Commission's full compliance with the statute and regulations, the Court refused to remand the case to grant Changhong additional time to comment.<sup>80</sup> The Court was equally unconvinced that Changhong's inability to submit new factual information deprived it of its due process rights, finding that the regulatory deadline for submitting new factual information in the context of an antidumping investigation imposed a "reasonable means to bring an administrative procedure to closure."<sup>81</sup>

*Connecticut Steel Corp. v. United States* also addressed procedural due process issues within the context of a USCIT Rule 56.2 motion for judgment on the agency record challenging an ITC negative preliminary injury determination.<sup>82</sup> Plaintiffs, domestic steel producers and

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75. *Id.* at 1326-27.

76. *Id.* at 1326.

77. *Id.* at 1328.

78. *Id.*

79. *Id.*

80. *Id.* at 1328-29.

81. *Id.* at 1329.

82. *Conn. Steel Corp. v. United States*, 462 F. Supp. 2d 1322 (Ct. Int'l Trade 2006) (denying motion for judgment on agency record against ITC's negative preliminary injury determination in Carbon and Certain Alloy Wire Rod from China, Germany, and Turkey, USITC Pub. 3838, Inv. Nos. 731-TA-1099-1101 (Jan. 2006) (Prelim.)).

## JUDICIAL REVIEW OF INJURY DETERMINATIONS

petitioners, contested the ITC's reliance on a revised questionnaire response, which, they alleged, was unreliable and aberrational.<sup>83</sup> Notably, the questionnaire response at issue was from another domestic producer, whose original response had been incomplete and lacked a certification of accuracy from a company official, as required by the Commission's regulations.<sup>84</sup> The revised questionnaire, which was complete and included a certification, reported different data than had been reported in the original response, and had been submitted after the Commission's deadline filing for post-conference briefs. Accordingly, the parties had no opportunity to comment on the revised data before the ITC issued a negative preliminary determination terminating the investigation.

The Court ultimately rejected each of Plaintiff's arguments as to why the Commission's reliance on the revised questionnaire was unreasonable.<sup>85</sup> It also quickly dismissed Plaintiff's procedural due process claim. The Court found that neither the statute nor applicable regulations provides parties a right to comment on all information submitted to the ITC in a preliminary investigation.<sup>86</sup> The Court contrasted the statutory provisions pertaining to a final injury investigation, which require the ITC to provide parties with "a final opportunity to comment" on information obtained by the Commission, with those applicable to preliminary investigations.<sup>87</sup> The Court noted that this procedural difference between the preliminary and final phases was understandable "[g]iven the tight timetable" of the preliminary phase. The Court denied Plaintiff's due process claim and upheld the ITC's negative preliminary determination in its entirety.<sup>88</sup>

Another interesting procedural issue was addressed in 2006 in *Nippon Steel Corp. v. United States* ("*Nippon (GOES)*"),<sup>89</sup> in an appeal of the ITC's sunset review of the antidumping and CVD orders on *Grain-Oriented Silicon Electrical Steel from Italy and Japan*.<sup>90</sup> In its third remand determination, the ITC issued a negative finding, by a 3-2 vote,<sup>91</sup>

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83. *Id.* at 1325-26.

84. *Id.* at 1324-25.

85. *Id.* at 1330-31.

86. *Id.* at 1331-32.

87. *Id.* at 1332.

88. *Id.* at 1332-33.

89. *Nippon Steel Corp. v. United States*, 433 F. Supp. 2d 1336 (Ct. Int'l Trade 2006), *rev'd*, 494 F.3d 1371 (Fed. Cir. 2007) [hereinafter *Nippon (GOES)*].

90. *See* Grain-Oriented Silicon Electrical Steel from Italy and Japan, USITC Pub. 3798, Inv. Nos. 701-TA-355, 731-TA-659-660 (Sept. 2005) (Review) (Third Remand).

91. *See id.* at 1.

reversing three prior affirmative determinations.<sup>92</sup> Notably, however, one of the sitting Commissioners, who had previously voted in the affirmative, did not vote in the third remand.<sup>93</sup> Thus, the first issue before the CIT in the appeal of the ITC's negative determination in *Nippon (GOES)* was whether a vote by less than the full sitting Commission was valid.

The CIT upheld the legitimacy of the vote of only five Commissioners, relying in large part on the Court of Customs and Patent Appeal's decision in *Voss Int'l Corp. v. United States*,<sup>94</sup> which interpreted the statutory provision currently found at 19 U.S.C. § 1330(c)(6).<sup>95</sup> In *Voss*, the court had validated a determination made by four of the six sitting ITC Commissioners.<sup>96</sup> Based on the clear statutory language and the holding in *Voss*, the CIT concluded that because the Third Remand Determination was reached by a majority of a quorum of the sitting Commissioners, it was valid.<sup>97</sup>

Another notable aspect of the *Nippon (GOES)* decision is the CIT's view on the applicability of the "doctrine of 'law-of-the-case.'"<sup>98</sup> Defendant-intervenors complained, based on that doctrine, that because the CIT had previously found that substantial evidence supported the conclusion that subject exporters would not be prohibited from shifting GOES sales to the U.S. market if the orders were revoked, the ITC was, in effect, estopped from reaching the opposite conclusion in its Third Remand Determination.<sup>99</sup> The CIT concluded that reliance on

92. See Grain-Oriented Silicon Electrical Steel from Italy and Japan, USITC Pub. 3680, Inv. Nos. 701-TA-355, 731-TA-659-660 (Mar. 2004) (Review) (Second Remand); Grain-Oriented Silicon Electrical Steel from Italy and Japan, USITC Pub. 3585, Inv. Nos. 701-TA-355, 731-TA-659-660 (Dec. 2002) (Review) (First Remand); Grain-Oriented Silicon Electrical Steel from Italy and Japan, USITC Pub. 3396, Inv. Nos. 701-TA-355 and 731-TA-659-660 (Feb. 2001) (Review).

93. Although Commissioner Marcia Miller had left the ITC and had been replaced by Commissioner Shara Aranoff, Commissioner Miller was still a sitting Commissioner when the vote on the Third Remand Determination was taken. Commissioner Miller, however, refrained from participation in the vote and, based on her past affirmative votes, Defendant-intervenors argued that her abstention may have affected the outcome. *Id.* at 1339-40.

94. *Voss Int'l Corp. v. United States*, 628 F.2d 1328 (C.C.P.A. 1980).

95. That provision provides that a "majority of the commissioners in office shall constitute a quorum, but the Commission may function notwithstanding vacancies." 19 U.S.C. § 1330(c)(6) (2007).

96. 628 F.2d at 1333.

97. *Nippon (GOES)*, 433 F. Supp. 2d at 1341.

98. "The law-of-the-case doctrine 'generally bars retrial of issues that were previously resolved.'" *Id.* at 1344 n.10 (quoting *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 697 (Fed. Cir. 2001)).

99. *Id.* at 1344-45.

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the “law-of-the-case argument . . . was misplaced.”<sup>100</sup> The Court relied upon CAFC decisions, which had explained that in upholding certain conclusions in the original determination, the court did not find them to be “correct” as a matter of law, but only supported by substantial record evidence. Such a holding was not, therefore, inconsistent with a finding that the opposite conclusion—the negative volume finding—could also be supported by substantial evidence.<sup>101</sup> Thus, the Court held that the law of the case doctrine did not prevent the Commission from reversing its previously upheld volume findings.<sup>102</sup>

### V. THE CONSOLIDATED FIBERS DECISION AND JURISDICTION UNDER THE RESIDUAL PROVISION

In another unusual challenge to the ITC’s findings in AD/CVD cases, *Consolidated Fibers, Inc. v. United States*<sup>103</sup> addressed the ITC’s refusal to institute a proceeding to reconsider its original injury determination in light of new evidence that domestic producers had conspired to fix prices of subject merchandise and to allocate customers during the original POI. Specifically, during the five-year review of the antidumping duty orders on polyester staple fiber (“PSF”) from Korea and Taiwan, “[P]laintiffs argued that this conspiracy compromised the integrity of the Commission’s original PSF investigation and injury determinations,” warranting a reconsideration of the original affirmative injury determination.<sup>104</sup>

Plaintiffs analogized the impact of the conspiracy to the Commission’s decision to reconsider its original injury determination in *Ferrosilicon from Brazil, China, Kazakhstan, Russian, Ukraine, and Venezuela*.<sup>105</sup> In *Ferrosilicon*, the Commission found that reconsideration of certain antidumping and countervailing duty determinations was appropriate

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100. *Id.* at 1346.

101. *Id.* at 1346 (citing *Taiwan Semiconductor Indus. Ass’n v. United States*, 24 CIT 914, 919 (2000), *aff’d*, 266 F.3d 1339 (Fed. Cir. 2001)).

102. *Id.* at 1346-47. The CIT’s approval of the ITC’s third and negative remand decision in the *Nippon (GOES)* sunset review was the subject of a subsequent 2007 Federal Circuit determination, which vacated the CIT’s decision approving the third remand and the third remand itself. *Nippon Steel Corp. v. U.S. Int’l Trade Comm’n*, 494 F.3d 1371 (Fed. Cir. 2007). The Federal Circuit directed that the second, affirmative remand determination be reinstated, finding it supported by substantial evidence. *Id.* at 1381.

103. *Consol. Fibers, Inc. v. United States*, 465 F. Supp. 2d 1338 (Ct. Int’l Trade 2006).

104. *Id.* at 1339-40.

105. *Id.* at 1339-40 (discussing *Ferrosilicon from Brazil, China, Kazakhstan, Russian, Ukraine, and Venezuela*, USITC Pub. 3218, Inv. Nos. 303-TA-23, 731-TA-566-570, 731-TA-641 (Aug. 1999) (Reconsideration) [hereinafter *Ferrosilicon*]).

based on new evidence of a price-fixing conspiracy among domestic producers during the original investigation period. In that case, the ITC reopened its investigation and ultimately reversed its original affirmative material injury finding *ab initio*, issuing a negative determination instead. As a result, the Department of Commerce rescinded the antidumping and countervailing duty orders.<sup>106</sup>

In the PSF five-year review, however, the ITC had denied Plaintiffs' request for reconsideration, giving rise to an appeal in which the threshold issue presented was whether the Court had jurisdiction to review the Commission's refusal to reconsider its determination. The Court first considered whether it could assert jurisdiction under 28 U.S.C. § 1581(c), which authorizes judicial review of certain specified Commission antidumping determinations set forth in 19 U.S.C. § 1516a(a).<sup>107</sup> While Plaintiffs argued that the Commission's denial of reconsideration was "subsumed within and inseparable from" the final five-year review determination itself, which made review under § 1581(c) appropriate, the Court disagreed. The Court held that the Commission's five-year review decision is reviewed under the "substantial evidence" standard set forth in § 1516a(b)(1)(B)(i), while the denial of the reconsideration request, "if reviewable at all," is subject to "the more deferential abuse of discretion standard," so that the jurisdictional basis for review of a sunset decision "does not extend to review of the denial of reconsideration."<sup>108</sup>

The Court then considered whether it could assert jurisdiction pursuant to 28 U.S.C. § 1581(i),<sup>109</sup> the CIT's residual jurisdictional provision, which, the Court noted, "supplies jurisdiction for Administrative Procedure Act ("APA") claims challenging the administration and enforcement of the antidumping laws . . ."<sup>110</sup> Using an APA analysis,

106. *Id.* at 1339-40.

107. *Id.* at 1341-42.

108. *Consol. Fibers*, 465 F. Supp. 2d at 1341. As support for the application of this standard of review, the court cited 28 U.S.C. § 2640(e), 5 U.S.C. § 706(2)(A), and *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270 (1987). *Id.* Notably, the court acknowledged that if the Commission had commenced a formal reconsideration proceeding, jurisdiction under 28 U.S.C. § 1581(c) would have been appropriately exercised to review the results of that proceeding. *Id.*

109. 28 U.S.C. § 1581(i) confers jurisdiction on the CIT for, *inter alia*, civil actions commenced against the United States with respect to the "administration and enforcement" of the antidumping laws. *Id.* at 1342. It is often applicable when no other provision of § 1581 provides judicial review in an antidumping/countervailing duty context. *Id.*

110. *Id.* While Plaintiffs had not expressly invoked the APA in their complaint, the Court proceeded with an APA analysis, noting that Defendants had construed Plaintiffs' challenge as such, and Plaintiffs had not objected. *Id.*

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the ITC maintained that the agency's refusal to open a reconsideration proceeding was not reviewable because there are no laws or regulations governing a reconsideration proceeding and it is "therefore an 'agency action . . . committed to agency discretion by law.'"<sup>111</sup> The Court, however, found that while the "general rule is that an agency's denial of a petition for reconsideration is committed to agency discretion and not subject to judicial review," there is an exception for reconsideration requests based on new evidence or changed circumstances.<sup>112</sup> In such instances, the Court may review the denial based on the "arbitrary, capricious, or abuse of discretion standard."<sup>113</sup> Because the reconsideration request was based on new evidence of the alleged price-fixing conspiracy, the Court found that it had jurisdiction under 28 U.S.C. § 1581(i).<sup>114</sup>

While the ITC's reconsideration in *Ferrosilicon* was discussed in *Consolidated Fibers, Inc.*, during 2006 the CIT also heard an appeal stemming from the challenge to the *Ferrosilicon* redetermination. After several rounds of remands, the ITC's negative injury determination in its third remand proceeding in *Ferrosilicon* was again before the CIT in *Elkem Metals Co. v. United States*.<sup>115</sup> At issue was whether U.S. prices for ferrosilicon had been affected by the price-fixing conspiracy between domestic producers and whether the conspiracy was a significant condition of competition that affected U.S. producers' prices during three distinct periods—the "Prior Period," "Conspiracy Period," and "Subsequent Period."<sup>116</sup>

The CIT had remanded to the Commission with instructions to further explain and provide substantial evidence that prices in the Subsequent Period were affected by the conspiracy. The ITC, however, concluded that the record did not support any conclusion on how prices were established during the Subsequent Period, much less a conclusion that the prices were solely the result of marketplace forces and not the conspiracy.<sup>117</sup> The Commission found that the record only supported the conclusion that prices were not established differently in

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111. *Consol. Fibers*, 465 F. Supp. 2d at 1342. Defendant's argument rested on 5 U.S.C. § 701(a)(2), a jurisdictional limitation for APA claims that applies to the general grant of jurisdiction in 28 U.S.C. § 1581(i). *Id.*

112. *Id.* at 1343.

113. *Id.*

114. *Id.*

115. *Elkem Metals Co. v. United States*, 441 F. Supp. 2d 1292 (Ct. Int'l Trade 2006).

116. *Id.* at 1293-94.

117. *Id.* at 1296.

the Subsequent Period than in the Conspiracy Period. Plaintiffs took issue with the ITC's adverse inference that the price-fixing conspiracy prevented domestic prices during the Subsequent Period from being set by the market because there was not evidence that anything had changed from the Conspiracy Period.<sup>118</sup>

Although the ITC asserted in the Third Remand Determination that it "abandoned its previous conclusion that the Conspiracy affected prices in the Subsequent Period," the CIT found that the ITC was, in fact, attempting to reach the same conclusion by drawing an adverse inference. In other words, if the ITC concluded that prices in the Subsequent Period were not set solely by the market, they necessarily must have been set by some other force or affected by the conspiracy.<sup>119</sup> This approach, the Court determined, was inconsistent with its previous holdings that the ITC could not use an adverse inference to conclude that the conspiracy affected prices outside the Conspiracy Period.<sup>120</sup> The case was again remanded—for the fourth time—for the ITC to either reopen the record to obtain data regarding marketplace conditions to support its conclusion that prices during the Subsequent Period were not set by market forces, or to find that the conspiracy was not a significant factor in the Subsequent Period such that prices during that period were set by market forces and to complete its analysis based on that conclusion.<sup>121</sup>

## VI. JUDICIAL REVIEW OF THE ITC'S CUMULATION ANALYSIS

In 2006, the CIT heard two cases involving cumulation of imports from multiple countries covered by an investigation or a five-year review. In *Allegheny Ludlum Corp. v. United States*,<sup>122</sup> members of the domestic industry challenged the ITC's determination in its five-year review of the antidumping duty and countervailing duty orders on stainless steel sheet and strip ("SSSS") from France, Germany, Italy,

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118. *Id.* at 1298.

119. *Id.* at 1299.

120. *Id.* (citing *Elkem Metals Co. v. United States*, 342 F. Supp.2d 1207, 1210-11 (Ct. Int'l Trade 2004) (*Elkem VI*) and *Elkem Metals Co. v. United States*, 2004 WL 2786274 at \*3 (Ct. Int'l Trade Dec. 3, 2004) (*Elkem VII*)).

121. *Id.* at 1301.

122. *Allegheny Ludlum Corp. v. United States*, 475 F. Supp. 2d 1370, 1372-73 (Ct. Int'l Trade 2006).

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Japan, Korea, Mexico, Taiwan, and the United Kingdom.<sup>123</sup> The ITC had decided not to cumulate imports from France and the UK. It issued negative determinations as to those two countries and affirmative determinations for the remaining six.<sup>124</sup> Plaintiffs challenged the ITC's negative sunset determinations, as well as its decision not to cumulate French and UK imports with imports from the other subject countries.<sup>125</sup>

The ITC's decision not to cumulate subject imports from France and the UK had rested on its statutorily-required findings with respect to (1) whether such imports were likely to compete with each other and the domestic like product, and (2) the likelihood of no discernable adverse impact on the domestic industry if the orders were to be revoked.<sup>126</sup> Plaintiffs challenged the cumulation decision on several grounds.<sup>127</sup> Plaintiffs first asserted that the ITC's reliance only on pre- and post-order volume and price information did not adequately examine conditions of competition.<sup>128</sup> The CIT flatly rejected this argument, finding that the discretionary cumulation provision did not preclude the ITC from considering "any factors it considers relevant, including pre- and post-order pricing behavior and volume trends."<sup>129</sup>

The CIT similarly rejected Plaintiffs' next challenge that the cumulation decision was "circular," i.e., it "rel[ied] on the same factors for refusal to cumulate as for an ultimate negative injury determination."<sup>130</sup> Reviewing its holding in *Neenah Foundry Co. v. United States*,<sup>131</sup> the Court noted that *Neenah* held that "if import trends are considered

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123. Stainless Steel Sheet and Strip from France, Germany, Italy, Japan, Korea, Mexico, Taiwan, and the UK, USITC Pub. 3788, Inv. Nos. 701-TA-381-382, 731-TA-797-804 (July 2005) (Review).

124. In a sunset (five-year) review, the ITC determines whether revocation of an order would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. The statute further directs the Commission to consider the likely volume, price effect, and impact of imports of the subject merchandise on the domestic industry if the order is revoked. 19 U.S.C. § 1675a(a)(1) (2005).

125. *Allegheny Ludlum*, 475 F. Supp. 2d at 1373.

126. *Id.* at 1376. Pursuant to 19 U.S.C. § 1675a(a)(7), the ITC may cumulate imports in a sunset review "if such imports would be likely to compete with each other and with the domestic like product" in the U.S. market. The same provision mandates that the ITC "shall not" cumulate imports from any particular country if such imports are likely to have no discernable adverse impact on the domestic industry.

127. *Allegheny Ludlum*, 475 F. Supp. 2d at 1377.

128. *Id.* at 1377-78.

129. *Id.* at 1378.

130. *Id.* at 1378.

131. *Neenah Foundry Co. v. United States*, 155 F. Supp. 2d 766 (Ct. Int'l Trade 2001).

for different purposes, namely in the cumulation and injury determination, this does not result in an impermissible circular analysis.”<sup>132</sup> Moreover, the Court found that, in any event, the Commission had not considered identical factors in its cumulation and injury determinations.<sup>133</sup>

Plaintiffs next argued that the Commission’s basis for refusing to cumulate subject imports was inconsistent with earlier cases in which it had considered pre-order pricing and volume issues and that it should have relied in larger part on more current information, rather than pre-order trends, so as not to undermine the prospective nature of a sunset review.<sup>134</sup> The Court rejected Plaintiffs’ arguments, noting the considerable deference due the ITC’s selection of factors that are relevant to its cumulation analysis, including different conditions of competition. The Court also emphasized the limited utility of precedent in sunset reviews, writing that “[e]ach individual sunset determination does not bind the Commission to use those same factors in other determinations . . . case law suggests that five-year reviews are considered of limited precedential value.”<sup>135</sup>

Plaintiffs also argued that the ITC’s cumulation decision for the UK was based on faulty factual considerations that, if interpreted differently, would have led to a finding that the UK did not compete under different conditions of competition.<sup>136</sup> In particular, Plaintiffs complained about the Commission’s reliance, in part, on the fact that the principal UK producer had exported largely a specialty product. Plaintiffs argued that the ITC should have examined the UK producer’s continued production of commodity grade SSSS that competed with other imports.<sup>137</sup> In this regard, Plaintiffs asserted, the Commission would have found an overlap of competition had it analyzed “likely” competition instead of historical sales made under the confines of the antidumping order.<sup>138</sup> Again unwilling to disturb the ITC’s findings, the Court held that Plaintiffs failed to recognize that the low volume of overall UK imports supported a finding of no discernable impact and

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132. *Allegheny Ludlum*, 475 F. Supp. 2d at 1378-79 (citing *Neenah*, 155 F. Supp. 2d at 774).

133. *Id.* at 1379.

134. *Id.* at 1379-80.

135. *Id.* at 1380 (citing *Neenah*, 155 F. Supp. 2d at 774; *Cogne Acciai Speciali S.p.A. v. United States*, No. 04-00411, slip op. 05-122, 2005 Ct. Int’l Trade LEXIS 130, at \*4 (Ct. Int’l Trade Sept. 12, 2005); *Ugine-Savoie Imphy v. United States*, 248 F. Supp. 2d 1208 (Ct. Int’l Trade 2002)).

136. *Id.* at 1381.

137. *Id.*

138. *Id.*

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no reasonable overlap of competition.<sup>139</sup>

Another case in which the CIT evaluated the ITC's cumulation decision was *Noviant OY v. United States*.<sup>140</sup> Plaintiffs, Finnish producers of subject merchandise, challenged the Commission's decision to cumulate Finnish imports of purified carboxymethylcellulose ("CMC") with those from other subject countries.<sup>141</sup> While the cumulation issue was central,<sup>142</sup> Plaintiffs' cumulation challenge was in the context of a general challenge to the sufficiency and reliability of the questionnaire responses on which the ITC relied in deciding to cumulate Finnish imports.

Plaintiffs argued that in cumulating Finnish imports, the ITC had improperly relied on the questionnaire responses of parties that had no or insufficient knowledge of Finnish purified CMC.<sup>143</sup> Plaintiffs complained that rather than relying on the responses of end-users, who reported that Finnish purified CMC was "Sometimes" or "Never" interchangeable with other purified CMC, the ITC instead relied on the questionnaire responses of parties that did not purchase Finnish CMC or were using purified CMC in applications for which Finnish CMC could not lawfully be used.<sup>144</sup>

In response, the CIT noted that the sole domestic producer, as well as a majority of responding importers and purchasers, reported that the domestic like product and subject imports, including imports from Finland, were "Always" or "Frequently" interchangeable.<sup>145</sup> Similar overwhelming responses were reported with respect to the interchangeability of subject imports with each other.<sup>146</sup> Moreover, the CIT noted that the ITC had, in fact, addressed Plaintiffs' very concern by acknowledging that the record data concerning end use shipments indicated that the majority of Finnish imports were sold into sectors where the other subject countries had a more limited presence.<sup>147</sup> Nonetheless, the ITC concluded that this factor, considered with other record evidence, demonstrated "more than minimal fungibility" between Finn-

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139. *Id.* at 1381-82.

140. *Noviant OY v. United States*, 451 F. Supp. 2d 1367 (Ct. Int'l Trade 2006).

141. *Id.* at 1369.

142. Unlike five-year reviews, cumulation is mandatory in the context of an investigation provided that the petitions were filed on the same day and that the imports compete in with each other and the domestic like products in the U.S. market. *See* 19 U.S.C. § 1677(7)(G)(I) (2007).

143. *Noviant OY*, 451 F. Supp. 2d at 1370-71.

144. *Id.*

145. *Id.* at 1380.

146. *Id.*

147. *Id.*

ish and other subject imports during the period of investigation.<sup>148</sup>

Thus, the Court upheld the ITC, finding no basis to disturb the Commission's cumulation decision, notwithstanding the fact that Plaintiffs drew a different conclusion from the record evidence or that the ITC placed more emphasis on certain evidence rather than evidence preferred by Plaintiffs.<sup>149</sup>

#### VII. JUDICIAL REVIEWS OF GENERAL CHALLENGES TO THE ITC'S INJURY ANALYSIS

In 2006, a number of CIT decisions involved more "typical" challenges to the reasonableness and sufficiency of the ITC's overall injury analysis.

*Int'l Imaging Materials, Inc. v. United States*, 2006 Ct. Int'l Trade LEXIS 18, Slip Op. 2006-11 (Jan. 23, 2006), involved a challenge to the ITC's negative injury determination in *Certain Wax and Wax/Resin Thermal Transfer Ribbons from France and Japan*.<sup>150</sup> Plaintiff, a domestic producer, contested the Commission's definition of the domestic like product, as well as its volume, price, and impact conclusions. As the Court explained, thermal transfer ribbons ("TTR") are "ink-covered strips of film used in barcode printers and fax machines."<sup>151</sup> The first two steps in the production process produce "jumbo rolls," which are then further processed by slitting and packaging into "finished" TTR, which falls into two categories—"finished fax TTR" and "barcode TTR."<sup>152</sup> The ITC had used its standard "six-factor" analysis to decide whether finished fax TTR was part of the domestic like product.<sup>153</sup>

Plaintiff argued that the ITC should have instead used its semifin-

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148. *Noviant OY*, 451 F. Supp. 2d at 1381 (citing Purified Carboxymethylcellulose from Finland, Mexico, Netherlands, and Sweden, USITC Pub. 3787, Inv. No. 731-TA-1084-1087 (June 2005) (Final)). In upholding the ITC's cumulation decision, the CIT also noted that fungibility was but one of four cumulation factors, the other three of which supported the ITC's cumulation decision and were unchallenged by Plaintiff. *Id.* at 1382 n. 10.

149. *Id.* at 1381-82.

150. *Certain Wax and Wax/Resin Thermal Transfer Ribbons from France and Japan*, 69 Fed. Reg. 20,949 (Apr. 19, 2004).

151. *Int'l Imaging Materials, Inc. v. U.S. Int'l Trade Comm'n*, No. 04-00215, slip op. 06-11 at 1 (Ct. Int'l Trade Jan. 23, 2006).

152. *Id.*

153. *Id.* at 2. The six-factor analysis compares (1) physical characteristics and uses, (2) interchangeability, (3) channels of distribution, (4) customer and producer perceptions, (5) manufacturing facilities, production processes, and production employees, and (6) the price of domestic products to subject imports.

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ished products analysis,<sup>154</sup> which it claimed would have led the ITC to conclude that finished fax TTR was not part of the same like product as other TTR.<sup>155</sup> Plaintiff argued that because the ITC had used its semifinished products analysis in previous analogous cases, it was “bound” to do so for TTR.<sup>156</sup> The CIT, however, held that the ITC’s “prior factual determinations . . . do not constitute precedent that the Commission is bound to follow.”<sup>157</sup> While the semifinished product analysis may have been appropriate in consideration of the totality of the factual circumstances of some cases, the Court found that the unique facts of another case could properly lead the ITC to conclude that the six-factor test is more appropriate.<sup>158</sup> After acknowledging the ITC’s discretion in determining which test is most appropriate, however, the CIT concluded that the Commission had not sufficiently explained its reasons for using the six-factor test and thus remanded the issue to the ITC for further explanation.<sup>159</sup>

Plaintiff also objected to the ITC’s methodology for measuring volume and price effects because the ITC had focused only on the volume and pricing of jumbo rolls, and not on the further processed products produced from the jumbo rolls, where, Plaintiff argued, competition for TTR sales principally occurs.<sup>160</sup> However, by applying the “production-related activities” test,<sup>161</sup> the ITC had concluded that the activities of U.S. “slitters” of TTR, who produced finished TTR, constituted domestic production and thus their shipments of finished TTR produced by slitting jumbo rolls were domestic shipments.<sup>162</sup> Accordingly, reasoned the ITC, such domestic shipments were properly excluded from its volume and price effect analysis. The CIT agreed, finding that the ITC’s production-related activities analysis and the methodology and facts it relied upon were fully explained and

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154. The semifinished product analysis evaluates “whether articles at different stages of processing should be included in the same like product.” *Id.* at 3.

155. Finished fax TTR was expressly excluded from the scope of the antidumping duty order, as defined by the Department of Commerce. *Id.* at 3, n.4.

156. *Int’l Imaging*, slip op. 06-11 at 3.

157. *Id.* at 4.

158. *Id.* at 4.

159. *Id.*

160. *Id.* at 5.

161. In applying this test, the ITC evaluated the capital investment necessary to compete effectively as a slitter in the U.S. market (e.g., the cost of slitting machines), the level of expertise required for slitting operations, the percentage of value-added by the slitting and packaging operations, and whether the slitting and packaging operations were labor intensive. *Id.*

162. *Id.* at 6.

supported by substantial record evidence.<sup>163</sup>

The Court also rejected Plaintiff's complaint that the ITC failed to consider the indirect effects of subject imports on the domestic industry by ignoring evidence that slitters using imported jumbo rolls gained an advantage due to their lower cost.<sup>164</sup> The Court noted that the ITC had expressly found that "the pricing and average unit value data indicate that subject jumbo rolls were priced higher than domestic jumbo rolls, and as such [slitters] did not have a raw material cost advantage over domestic coaters."<sup>165</sup> An examination of the data that the ITC had relied on its conclusion also sufficiently demonstrated that there were no indirect effects of jumbo roll sales because there was no underselling of imported jumbo rolls or evidence that the consumers of imported rolls financially benefited from their use.<sup>166</sup> Thus, the CIT held that the ITC had examined potential indirect effects in its analysis and that its conclusion was supported by substantial evidence.<sup>167</sup>

The Court also upheld the ITC's finding that subject import volume was not significant.<sup>168</sup> The Court acknowledged that the statute permits the ITC to consider subject import volume on either an absolute or relative (to production or consumption in the United States) basis, and the courts have held that the ITC may employ "one of several methods of analyzing volume" to meet its statutory obligation.<sup>169</sup> By relying more heavily on relative comparisons rather than the absolute size of market share, the CIT found that the ITC did not exceed its discretion.<sup>170</sup>

With respect to impact, Plaintiff faulted the ITC for not addressing the purported "anomaly" of the domestic industry's declining operating income and profitability in the face of increasing consumption.<sup>171</sup> The Court rejected Plaintiff's arguments, finding that the ITC had sufficiently addressed this "anomaly," especially because the declines in operating income and profitability were very slight. Plaintiff also argued that the agency's impact finding was undermined because the operating income of one company with large and increasing profitabil-

163. *Id.* at 7.

164. *Id.*

165. *Int'l Imaging*, slip op. 06-11 at 7 (quoting *Certain Wax and Wax/Resin Thermal Transfer Ribbons From France and Japan*, Confidential Views of the Commission, Inv. Nos. 731-TA-1039-1040 at 35 (Apr. 2004) (Final)).

166. *Id.*

167. *Id.*

168. *Id.* at 10.

169. *Id.* at 9.

170. *Id.*

171. *Id.* at 10.

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ity over the POI skewed the record data, contrary to the experience of the rest of the domestic industry.<sup>172</sup> The Court also rejected this argument, concluding that “the facts do not support plaintiff’s contention that only one company was profitable during the period of investigation.”<sup>173</sup>

The CIT did, however, remand to the ITC its finding that prices in the U.S. market were not related to subject import prices.<sup>174</sup> The Court found that remand was warranted due to the Commission’s failure to address Plaintiff’s argument concerning the correlations that were contrary to the Commission’s trend analysis. The CIT also remanded for an explanation, in its impact analysis, of the Commission’s conclusion that price declines were caused by declines in unit costs and increased productivity, given that the cost evidence relied upon apparently did not include data for a portion of the domestic industry.<sup>175</sup>

Also beginning with a challenge to the ITC’s definition of the domestic like product, *Cleo Inc. v United States*,<sup>176</sup> reviewed the decision of an evenly-divided ITC in its final affirmative LTFV determination regarding *Certain Tissue Paper Products from China*.<sup>177</sup>

Plaintiffs, domestic producers and a purchaser, argued that the ITC should have found that bulk and consumer tissue paper were not the same like product. Plaintiffs argued, *inter alia*, that the Commission had not correctly applied its six-factor test.<sup>178</sup> The CIT carefully reviewed the ITC’s analysis of each of the six factors employed in its like product analysis<sup>179</sup> and determined that the ITC had sufficiently differentiated its product analyses in certain other cases cited by Plaintiffs, and upheld the Commission’s like product determination.<sup>180</sup> The Court found that it must “afford deference to the Commission’s decision to give a greater weight to the physical characteristics, end use, and product similarities between bulk and consumer tissue paper,” rather

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172. *Id.*

173. *Id.*

174. *Id.* at 8.

175. *Id.* at 11-12. The *Int’l Imaging* opinion, while a relatively straightforward review of an ITC decision, provides a good overview of the types of issues that are likely to be remanded, even under a broad construction of the need for *Chevron* deference.

176. *Cleo Inc. v. United States*, No. 05-00336, Slip Op. 06-131 (Ct. Int’l Trade Aug. 31, 2006).

177. *See Certain Tissue Paper Products from China*, USITC Pub. 3758, Inv. No. 731-TA-1070B (March 2005) (Final).

178. *Cleo Inc.*, slip op. 06-131, at 8-12.

179. *Id.* at 11-23.

180. *Id.* at 22-24.

than rely on the differences found when it considered other factors.<sup>181</sup>

Plaintiff Target also challenged the import volume finding, arguing that its imports of consumer tissue paper had not injured the domestic industry because they did not displace domestic production.<sup>182</sup> Rather, Target claimed, it had opened and expanded a new market for specialty consumer tissue paper, which it necessarily filled with imports because domestic companies did not have the capacity to, or even attempt to, meet its color, design, and quality needs.<sup>183</sup> While much of the data from the Commission's analysis is redacted as confidential, the Court found that the ITC's conclusion that domestic companies could and would supply Target's tissue paper needs during the POI was supported by record evidenced and thus rejected Target's claims.<sup>184</sup>

The CIT was similarly deferential to the ITC's conclusions regarding plaintiff Cleo's ability to source from domestic suppliers during the POI, finding that it was not permitted to re-evaluate the ITC's decision to assign more weight to the testimony and assertions of other domestic producers over those of Target and Cleo.<sup>185</sup> In addition, while the data for certain pricing products, when viewed in isolation, weakened its affirmative finding, the CIT found that the combined data supported the Commission's price effects determination.<sup>186</sup> The Court found that utilizing the combined data was also more consistent with the Commission's practice of totaling the number of over- and underselling comparisons in its pricing analysis to assess whether, as a whole, the price data reflects prevalent underselling.<sup>187</sup> Finally, the CIT refused to find fault with the ITC's impact conclusion, finding it had properly considered two sets of financial data covering different years, despite Plaintiffs' argument that it should have relied solely on the more current set.<sup>188</sup>

In another appeal of an ITC affirmative material injury determination in its countervailing duty investigation of *DRAMs and DRAM Modules from Korea*,<sup>189</sup> the CIT in *Hynix Semiconductor, Inc. v United*

181. *Id.* at 24-25.

182. *Id.* at 29-33.

183. *Id.* at 29-32.

184. *Id.* at 33-34.

185. *Id.* at 37-38.

186. *Id.* at 47-48.

187. *Id.* at 48 (citing *Altx Inc. v. United States*, 167 F. Supp. 2d 1353, 1365 (Ct. Int'l Trade 2001)).

188. *Id.* at 51-57.

189. *DRAMs and DRAM Modules from Korea*, USITC Pub. 3616, Inv. No. 701-TA-431 (Aug. 2003) (Final).

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*States*<sup>190</sup> undertook a record-intensive review of the ITC's findings and ultimately sustained its determinations on all but one issue. Plaintiff Hynix, a manufacturer of subject merchandise, first argued that the ITC's finding that subject import volume was significant was flawed. Specifically, Hynix asserted that because total market volumes have always been increasing dramatically, the "only proper measure of volume increase is an increase in market share."<sup>191</sup> Hynix then argued that the market share of the imports was small and had declined at the end of the period, and could not "be deemed significant."<sup>192</sup> The CIT rejected these arguments, finding that the statute expressly permitted absolute volumes or relative import volumes to be significant.<sup>193</sup> In addition, the CIT found that even if a market share analysis were the only appropriate analysis in this case, the ITC's reasoning behind its conclusion that the market share increase was significant was nonetheless supported by substantial record evidence, particularly given that domestic market share had declined.<sup>194</sup>

With respect to price effects, Hynix asserted that, instead of comparing weighted-average import prices to weighted-average domestic prices, the ITC should have given more weight to a "disaggregated brand name analysis."<sup>195</sup> Again deferring to the ITC, the Court found that the ITC's choice of a weighted-average pricing methodology was reasonable and supported, based on its routine application of that methodology, which had been sustained by the CIT in previous cases, and its conclusion that a disaggregated brand name analysis would not fulfill its statutory obligation to consider the industry as a whole.<sup>196</sup> Because both methodologies "had advantages and disadvantages," the Court concluded that the ITC did not err in choosing one over the other.<sup>197</sup>

Regarding impact, however, the CIT sustained all but one of the ITC's findings. The CIT instructed the ITC on remand to explain the effect of the "unprecedented drop" in demand for downstream electronic products during the POI because the ITC had not sufficiently evaluated the potential impact of this decline in demand on the domestic industry by "simply noting a potential factor and issuing a

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190. *Hynix Semiconductor, Inc. v. United States*, 431 F. Supp. 2d 1302 (Ct. Int'l Trade 2006).

191. *Id.* at 1307.

192. *Id.* at 1308.

193. *Id.*

194. *Id.* at 1309.

195. *Id.* at 1310.

196. *Id.* at 1311.

197. *Id.* at 1312.

conclusionary assertion that such a factor did or did not play a major role in causing a material injury.”<sup>198</sup>

Notably, however, only three days after the Federal Circuit’s opinion in *Bratsk*, discussed *supra*, the ITC’s consideration of the impact of non-subject imports, although challenged by Plaintiff, was not one of the issues with which the Court found fault. Rather, the Court sustained the ITC’s finding that because a large portion of non-subject imports were specialty products that did not significantly compete with domestic production and did not undersell domestic production as frequently as subject imports, it was reasonable to conclude that non-subject imports did not have “such a predominate effect in producing harm as to prevent the subject imports from being a material factor.”<sup>199</sup>

#### VIII. CONSTITUTIONALITY OF THE BYRD AMENDMENT

During 2006, the CIT decided two cases involving the ITC that concerned the denial of duty distributions under the Continued Dumping and Subsidy Offset Act (“CDSOA”), commonly referred to as the Byrd Amendment.<sup>200</sup> Under the CDSOA, U.S. Customs and Border Protection (“CBP”) collects antidumping and countervailing duties pursuant to AD/CVD orders and assigns them to special accounts designated for specific orders.<sup>201</sup> If a member of the domestic industry qualifies as an “affected domestic producer,” as defined in the CDSOA, it is eligible to receive distributions of collected duties if it certifies to CBP that it has incurred the requisite qualifying expenditures.<sup>202</sup> CBP will only distribute funds to parties who are identified by the ITC as affected domestic producers.<sup>203</sup>

The two 2006 CDSOA cases involved the ITC due to its authority, pursuant to 19 U.S.C. § 1675c(d), to determine whether a domestic producer is an affected domestic producer, and thus entitled to receive distributions of antidumping and countervailing duties collected by CBP. Notably, both cases addressed constitutional challenges to the CDSOA by domestic producers that had been denied CDSOA distributions because they failed to qualify as affected domestic producers

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198. *Id.* at 1320 (citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

199. *Id.* at 1318.

200. *See* 19 U.S.C. § 1675c (2000) (repealed 2006). While these cases will certainly be the subject of lengthy analyses, for purposes of this survey, a brief summary is in order.

201. *Id.* at § 1675c(e).

202. *Id.* at § 1675c(d)(1)-(2).

203. *Id.* at § 1675c(d)(1)-(3).

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because they had not expressed support for the relevant antidumping duty petition at the time of the original investigation, which was a statutory prerequisite for affected domestic producer status.<sup>204</sup>

In *PS Chez Sidney, LLC v. United States International Trade Commission and United States Customs Service*,<sup>205</sup> the CIT considered the constitutionality of the CDSOA<sup>206</sup> after Plaintiff, a member of the domestic industry in the antidumping investigation of *Freshwater Crawfish Tails from the People's Republic of China*, had been denied CDSOA distributions because it had indicated in its response to the Commission's questionnaire that it "took no position" with respect to the petition.<sup>207</sup> Thus, the ITC did not include the Plaintiff on its list of affected domestic producers eligible for CDSOA disbursements, and CBP did not disburse any funds to Plaintiff because, contrary to the statutory requirements,<sup>208</sup> Plaintiff had not expressed support for the petition.<sup>209</sup> As a result, Plaintiff filed suit with the CIT, which found that the issue before it was whether CDSOA violated the First Amendment right to free speech.<sup>210</sup> Citing *New York Times v. Sullivan*,<sup>211</sup> a seminal First Amendment Supreme Court decision, the CIT first noted that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others,"<sup>212</sup> and found that where the Government has "impose[d] limits on the free expression of political ideas and positions," it is bound by stringent limitations, and in some cases, strict judicial review.<sup>213</sup>

The CIT then determined that the CDSOA "support" requirement at issue was not an exercise of Congress' "broad authority [under the Spending Clause] to condition receipt of federal funds in order to

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204. *Id.* at § 1675c(b)(1).

205. *PS Chez Sidney, L.L.C. v. U.S. Int'l Trade Comm'n*, 442 F. Supp. 2d 1329 (Ct. Int'l Trade 2006).

206. Although CDSOA was repealed in 2006, the ITC's denial of disbursements under that statute at issue in this case took place prior to its repeal.

207. During the course of the ITC's investigation, Plaintiff has submitted two questionnaires, one with the box checked "Support" and one with the box checked "Take No Position." 442 F. Supp. 2d at 1331. The CIT determined that Plaintiff could not challenge the ITC's reliance on the latter response because it did not raise that issue at the administrative level and thus failed to exhaust administrative remedies. *Id.*

208. *See* 19 U.S.C. § 1675c(a)(6).

209. *PS Chez Sidney*, 442 F. Supp. 2d at 1334.

210. *Id.* at 1348.

211. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

212. *PS Chez Sidney*, 442 F. Supp. 2d at 1350 (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 414 (1984) (Stevens, J., dissenting)).

213. *Id.* at 1352.

further policy objectives.”<sup>214</sup> Accordingly, the CIT proceeded to review whether, under the strict scrutiny standard, the government had demonstrated that the burden on free speech created by the CDSOA “support” requirement was “necessary to serve a compelling state interest” and was “narrowly drawn to achieve that end.”<sup>215</sup> Determining that the “support” requirement did not meet the compelling state interest standard, the CIT held that to the extent the Government conditioned the payment of benefits under CDSOA on the content of a party’s opinion, i.e., whether it supported the petition, “it may no more do so than it may base the condition upon the color of their skin.”<sup>216</sup> Indeed, the objective of CDSOA—assistance to members of a domestic industry injured by unfairly traded imports—could be achieved by a narrower inquiry, e.g., “was the questionnaire respondent injured by the imports at issue?,”<sup>217</sup> as opposed to an inquiry regarding support for the petition, which asked “not for a fact but for an opinion.”<sup>218</sup> Because opposition to a petition could stem from a variety of reasons other than not perceiving injury at the hand of imports, the response to the “support” question was “inherently a political question.”<sup>219</sup> Concluding that there was no necessary connection between support for a petition and harm to a domestic producer, the CIT held that the “support” requirement of CDSOA failed the strict scrutiny test required by the First Amendment and thus violated the Constitution.<sup>220</sup> In 2007, Defendant United States moved for reconsideration of the CIT’s 2006 decision in *PS Chez Sidney*.<sup>221</sup> The CIT ultimately found that the unconstitutional “support of” language of the CDSOA should be severed from the remainder of the statute, and remanded the matter to the Commission and to CBP to redetermine *Chez Sidney*’s eligibility for CDSOA disbursements for the year in dispute.<sup>222</sup>

In another 2006 decision involving the constitutionality of CDSOA, *SKF USA Inc. v. United States*,<sup>223</sup> the ITC had similarly found that domestic producer SKF did not qualify as an affected domestic pro-

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214. *Id.*

215. *Id.* at 1356 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 403 (1992)).

216. *Id.* at 1356.

217. *Id.*

218. *Id.* at 1357.

219. *Id.*

220. *Id.* at 1358-59.

221. *See PS Chez Sidney, LLC v. United States Int’l Trade Comm’n*, 502 F. Supp. 2d 1318 (Ct. Int’l Trade 2007).

222. *Id.* at 1324-25.

223. *SKF USA Inc. v. United States*, 451 F. Supp. 2d 1355 (Ct. Int’l Trade 2006).

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ducer under the CDSOA, which requires that the producer be a petitioner or interested party who supported the petition pursuant to which an antidumping or countervailing duty had been issued.<sup>224</sup> In response to the ITC's questionnaires issued during the 1988 antidumping investigation of antifriction bearings from various countries, however, SKF had indicated that it opposed the petition.<sup>225</sup> When CDSOA was enacted in 2000, the ITC had provided CBP with a list of affected producers eligible for CDSOA distributions under the antifriction bearings AD order.<sup>226</sup> Due to SKF's opposition to the petition, it was not included on the ITC's list, and, as in the *Chez Sidney* case, CBP denied its request for duty distributions.<sup>227</sup>

SKF appealed the constitutionality of the CDSOA to the CIT, arguing that, as applied, it violated the Equal Protection doctrine by "discriminating between similarly situated domestic producers on the irrational basis of whether they supported the petition."<sup>228</sup> SKF submitted that because the purpose of the antidumping law is to equalize trade and prevent injury to the entire domestic industry, it was contrary to the purpose of the law to deny CDSOA distributions to certain members of the domestic industry that are equally injured by unfairly traded imports.<sup>229</sup> The CIT agreed with SKF that CDSOA drew an impermissible distinction between affected domestic producers based on whether or not the producer supported the petition.<sup>230</sup> Concluding that the distributions under CDSOA were an issue of economic policy, the CIT determined that the question before it was whether there was a "rational basis" for the classification drawn under CDSOA with respect to affected domestic producers.<sup>231</sup>

Based on the statutory and legislative history of the antidumping law and CDSOA, the CIT concluded that there was no conceivable, much less rational, basis for distinguishing between those producers that supported the petition and those that did not in making CDSOA distributions.<sup>232</sup> Specifically, the CIT reasoned that the purpose of the antidumping law was to ensure that the domestic industry as a whole

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224. See 19 U.S.C. § 1675c(b)(1) (2000) (repealed 2006)

225. *SKF*, 451 F. Supp. 2d at 1357.

226. *Id.* at 1358.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 1360.

231. See *id.* at 1360-61 (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)).

232. *Id.* at 1361.

can fairly compete in the market place.<sup>233</sup> There was no indication in the statutory language or legislative history that Congress intended to “help entities that suffered more injury than others . . . and then to identify the gravely injured as only the ones who supported an antidumping petition.”<sup>234</sup> Rather, the classification was far too broad because there could be numerous reasons for a producer’s decision not to support a petition which have nothing to do with whether it is being injured by unfair trade.<sup>235</sup> Accordingly, the CIT concluded that, as applied, the CDSOA was unconstitutional because it impermissibly discriminated against similarly situated members of the domestic industry.

Instead of enjoining the Government from making CDSOA distributions with respect to the antifriction bearing order at issue, however, the CIT determined that the Government could easily strike the unconstitutional portion of the law.<sup>236</sup> Thus, the CIT determined that the definition of “affected domestic producers” under CDSOA should be modified to remove the requirement that the domestic producers supported the petition in order to receive CDSOA distributions.<sup>237</sup> As a result of this revised definition, it remanded the issue back to the ITC and CBP to reexamine their refusal to disburse collected duties to SKF under CDSOA.<sup>238</sup>

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233. *Id.*

234. *Id.* at 1362.

235. *Id.*

236. *Id.* at 1364-65. (citing, *inter alia*, *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion), which held that a court should invalidate no more of a statute than is necessary).

237. *Id.* at 1365.

238. *Id.* at 1366-67. On remand, the ITC determined that SKF participated in the original investigation and was thus eligible, in accordance with the CIT’s 2006 opinion in *SKF USA Inc. v. United States*, to be placed on the affected parties list under the CDSOA for the ball bearings from Japan antidumping duty order and revised the list accordingly. *See SKF USA Inc. v. United States*, No. 05-00542, slip op. 07-116 at 4 (Ct. Int’l Trade July 26, 2007). In its remand opinion, CBP determined that SKF was eligible to receive a distribution of CDSOA funds for the relevant year under the Japan order. *See id.* at 4-5. SKF challenged the ITC’s and CBP’s remand opinions, however, to the extent that they were limited only to distributions for the order on ball bearings from Japan. *See id.* at 5-6. SKF contested that because the antidumping investigation was not limited to Japan, but covered nine countries, it was eligible for disbursements under all outstanding ball bearings orders. *See id.* at 6. Rejecting SKF’s argument, the CIT held that the ITC and CBP remand opinions fully complied with its 2006 opinion by limiting the scope of the remands to the order on Japan and thus affirmed both remand opinions in their entirety. *See id.* at 19.

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### IX. CONCLUSION

The year 2006 brought about resolution to some longstanding disputes over ITC determinations, although the opinions resolving those cases, especially *Bratsk*, *Nippon Tin Mill*, and *Nippon (GOES)*, are likely to resonate loudly through opinions issued in the coming months and years. Other decisions, such as the two CDSOA constitutionality opinions in *PS Chez Sidney* and *SKF*, are undoubtedly the beginning of litigation over controversial issues that will not likely be finally decided for some time. In any event, the decisions of 2006 have left a significant imprint on CIT and CAFC jurisprudence with respect to the review of ITC determinations, a number of which are likely to continue to reappear as prominent precedent at both the administrative and judicial levels.