

The Year in Review: Significant Developments in Antidumping and Countervailing Duty Litigation

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Over the past year, the United States Department of Commerce (“Commerce”) has seen some significant developments in antidumping and countervailing duty litigation before the U.S. Court of International Trade (“CIT”), and the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”). Some of these developments affected the assessment and liquidation of antidumping and countervailing duties. Others affected the manner by which Commerce calculates the margins of dumping, and the rate of subsidization. This past year has also seen developments affecting the way international developments interact with U.S. law.

Assessment and Liquidation of Antidumping and Countervailing Duties

As the agency that administers the antidumping and countervailing duty law, one of the most basic things Commerce must do is instruct the Bureau of Customs and Border Protection (“Customs”) how to assess antidumping and countervailing duties. The United States administers a retrospective system. Once Commerce issues an antidumping or countervailing duty order, entries of merchandise subject to that order are required to pay a cash deposit as a security for the actual antidumping or countervailing duties. Every year, on the anniversary month of the order, Commerce publishes an opportunity to conduct an administrative review of the entries from that previous year. It is during this administrative review that Commerce looks back at those entries and determines the

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actual amount by which those entries were dumped or subsidized.¹ If that actual amount differs from the cash deposit, either the difference is refunded to the importer with interest, or the importer must pay the difference with interest.

Deemed Liquidated

The mechanics by which this assessment and liquidation of antidumping and countervailing duties is accomplished was a significant topic of litigation before both the CIT and Federal Circuit over the past year. This was emphasized by the fact that the first slip opinion the CIT issued in 2004 was International Trading Co. v. United States, 306 F. Supp.2d 1265 (Ct. Int'l Trade 2004), known as International Trading II. To understand the significance of International Trading II, it is first necessary to understand a prior case decided by the Federal Circuit involving the same litigants, but a prior antidumping administrative review. That is the case of International Trading Co. v. United States, 281 F.3d 1268 (Fed. Cir. 2002), or International Trading I.

The issue in International Trading I was the correct interpretation of 19 U.S.C. §1504(d) (1993). This statute states that when Customs fails to liquidate an entry within six months of notice from Commerce of the lifting of the suspension of liquidation, the entry is liquidated by operation of law at the rate in effect at the time of entry.² This is

¹ Commerce's antidumping administrative reviews serve two functions. First, Commerce looks back at entries occurring during the twelve month period preceding the anniversary month of the antidumping order, and calculates the amount of antidumping duties that should be assessed for each the importers of the subject merchandise. Second, Commerce calculates a weighted average of the margins of dumping for all of the importers of a single exporter or producer and uses that weighted average dumping margin as the cash deposit for antidumping duties for all entries of that exporter's or producer's merchandise going forward.

² The full text of the statute reads:

When a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry, unless liquidation is extended under subsection (b), within 6

known as being "deemed liquidated" as entered. In International Trading I, Commerce argued that Customs is given notice of the lifting of the suspension of liquidation when Commerce issues its liquidation instructions. Specifically, when Commerce issues its notice of the final results of an administrative review in the Federal Register, it only publishes the weighted average margin of dumping for each exporter or producer. An exporter or producer often has more than one importer. Each importer receives its own specific importer-specific assessment rate, which reflects business proprietary information, and cannot be made public. Therefore, Commerce informs Customs of the importer-specific assessment rates through its liquidation instructions, which are kept confidential. Because this is the first time Commerce communicates to Customs all of the information necessary to liquidate an entry subject to an antidumping order, Commerce contended that the time during which Customs must liquidate those entries, or else have the entries deemed liquidated as entered, should begin to run from the date of the issuance of Commerce's liquidation instructions.

The Federal Circuit rejected this argument, and held that when Commerce completes an administrative review that is not challenged through litigation, notice to Customs of the lifting of the suspension of liquidation occurs when Commerce publishes the final results of the administrative review in the Federal Register. 281 F.3d at 1277.

months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry (other than an entry with respect to which liquidation has been extended under subsection (b)) not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record or (in the case of a drawback entry or claim) at the drawback amount asserted at the time of entry by the drawback claimant.

19 U.S.C. § 1504(d) (1993).

Key to the Federal Circuit's decision was the need to provide "an unambiguous and public starting point for the six-month liquidation period." 281 F.3d at 1275.

Congress amended 19 U.S.C. § 1504(d) in 1994, adding the phrase "Except as provided in section 751(a)(3) [19 U.S.C. § 1675(a)(3)]," to the language of the statute.

Section 751(a)(3) of the Trade and Tariff Act of 1930 states:

[I]f the administering authority orders any liquidation of entries pursuant to a review under paragraph (1), such liquidation shall be made promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued. In any case in which liquidation has not occurred within that 90-day period, the Secretary of the Treasury shall, upon the request of the affected party, provide an explanation thereof.

In International Trading II, Commerce argued that the 1994 amendment to 1504(d) altered the rules concerning deemed liquidation. Commerce argued that the addition of the new language created a separate remedy for those entries that are subject to an administrative review pursuant to section 751. That is, if an entry were subject to an administrative review, that entry had to be liquidated within ninety days of the issuance of Commerce's liquidation instructions to Customs. If liquidation does not occur within that time frame, then pursuant to the language of section 751(a)(3), the remedy available is to seek an explanation from the Secretary of the Treasury. Alternatively, Commerce argued that the amendment to 19 U.S.C. § 1504(d) clarified that the date on which Customs receives notice of the lifting of the suspension of liquidation was the date on which Commerce issued its liquidation instructions.

The CIT rejected both of these arguments, holding that entries subject to an administrative review under section 751 of the Act are subject to both the six month time period of 19 U.S.C. § 1504(d), and the ninety day time period of 19 U.S.C. § 1675(a)(3). 306 F. Supp.2d at 1269. Because the entries at issue were not liquidated within six

months of the publication of the Federal Register notice of the final results of the administrative review, they were deemed liquidated as entered. 306 F. Supp.2d at 1279. Commerce has appealed this decision. The appeal is currently pending before the Federal Circuit.

The Federal Circuit also weighed in on the application of the deemed liquidated statute, specifically with respect to how it affects the rights of domestic producers. In Cemex, S.A. v. United States, 384 F.3d 1314 (Fed. Cir. 2004), the Federal Circuit faced the issue of whether the Continued Dumping and Subsidy Offset Act of 2000 (the so-called “Byrd Amendment”) gave a domestic interested party to an antidumping order a remedy when an entry is deemed liquidated as entered pursuant to 19 U.S.C. § 1504(d) at a lower antidumping rate than is calculated in an administrative review.

The court first faced the issue of whether the entries had been deemed liquidated by operation of law. In the underlying litigation over the administrative review of gray portland cement and clinker from Mexico, the domestic interested parties were successful in arguing that the weighted average margin of dumping was higher than the 56.94% cash deposit rate. After two remands, Commerce calculated an assessment rate of 106.846% on the merchandise in question. On January 8, 1998, the Federal Circuit issued an opinion affirming an opinion of the CIT that in turn affirmed Commerce's second remand redetermination. The mandate of the court issued on March 2, 1998. The deadline for filing for a writ of certiorari with the Supreme Court ended on April 8, 1998. Commerce, however, issued liquidation instructions on March 23, 1998.

By 2001, entries at the Port of Nogales of cement from Mexico subject to the administrative review had still not been liquidated. Customs believed that the entries had

been deemed liquidated pursuant to 19 U.S.C. § 1504(d) in September of 1998, six months after the issuance of the March 23, 1998 liquidation instructions, and posted a bulletin notice at the Port of Nogales to that effect. The domestic interested parties did not learn about the notice until it filed a Freedom of Information Act request in 2002. The domestic interested parties in turned filed a lawsuit seeking the reliquidation of the Nogales entries at the assessment rate affirmed by the Federal Circuit in 1998.

The Federal Circuit first held that the Nogales entries were not properly deemed liquidated by operation of law. 384 F.3d at 1321. The court noted that the requirements for deemed liquidation to occur are: (1) that the suspension of liquidation is lifted, (2) that Customs receives notice of the removal of the suspension, and (3) that the liquidation not occur within six months of that notice. *Id.* Here, the suspension of liquidation only lifted after the deadline for filing for a writ of certiorari expired on April 8, 1998. Commerce's liquidation instructions of March 23, 1998 were too early, and therefore ineffective for triggering the six month period. *Id.*

In this regard, the court noted that its case law required that the notice to Customs be unambiguous and public. *Id.* In this instance, the liquidation instructions were not disclosed to the public, and therefore could not serve as the basis for triggering the six month period. *Id.* Accordingly, Customs wrongly concluded that the Nogales entries had been deemed liquidated as entered by operation of law. *Id.*

The court noted that the statute provided the domestic producers two remedies. Namely, 19 U.S.C. § 1516a affords domestic producers the ability to challenge the calculation of the antidumping or countervailing duty in court. 384 F.3d at 1322. Additionally, 19 U.S.C. § 1516 allows domestic producers to challenge Customs'

decisions with respect to the duty rate, the appraised value, and the classification of imported merchandise. Id. However, the remedy that 19 U.S.C. § 1516 provides is prospective only, and cannot cure an alleged wrongful liquidation. Id.

Because 19 U.S.C. § 1514(a) provides that a decision from Customs regarding the liquidation of an entry is “final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section,” the domestic producers had no remedy to address the wrongful liquidation.³ 384 F.3d at 1322-23. The two remedies the statute did provide the domestic producers simply did not apply here. 384 F.3d at 1322.

The court noted that the domestic producers could have urged Commerce to comply with the 1998 judgment prior to 2001, looked for public liquidation instructions from Commerce, and watched for the notice of liquidation at the Port of Nogales. 384 F.3d at 1325. The court stated that the domestic producers “should have moved the Court of International Trade to enforce the judgment in 1998, rather than in 2003.” Id. The court noted that the proper avenue for addressing these seemingly harsh result was to lobby Congress, not seek redress from the courts. Id.

Third Party Resellers

The problem of third party resellers occasionally arises in the context of an antidumping duty administrative review. In calculating the weighted average margin, Commerce obtains its information from the respondent, usually an exporter or a producer

³ Relying on Mitsubishi Electronics America v. United States, 44 F.3d 973 (Fed. Cir. 1994), the domestic producers argued that Customs’ role in assessing antidumping duties is ministerial, and therefore Customs cannot have made a decision as envisioned by 19 U.S.C. § 1514(a). The Federal Circuit distinguished Mitsubishi, noting that while Customs’ role in calculating the actual amount of the antidumping duty is ministerial, here Customs made a decision regarding liquidation. 384 F.3d at 1324. It is that decision that became final pursuant to 19 U.S.C. § 1514(a). 384 F.3d at 1324.

of the subject merchandise. When the respondent is a producer, that producer may sell its merchandise to several customers who are not in the United States, and not know what those customers intend to do with the merchandise. On occasion, those customers will resell the merchandise for export to the United States. Because the producer may not know that the merchandise it sold to a customer not in the United States is being resold for export to the United States, when the producer reports its U.S. sales to Commerce, it may not include those sales.

In an administrative review, Commerce calculates an assessment rate for each importer of the subject merchandise. However, cash deposits are applied based on the producer or exporter of the subject merchandise. Each separate importer will be assessed antidumping duties based on the price of their own purchases of the subject merchandise from the producer or exporter. When a producer is not aware of a third party outside of the United States who resells its merchandise to the United States, Commerce will not have the information necessary to calculate an importer-specific assessment rate for that sale. Nonetheless, that importer will still be subject to posting a cash deposit based on the weighted average margin calculated for that producer. Thus, when Commerce issues its liquidation instructions, it may believe that it has covered all of the importers, based on the information supplied by the producer. When an unknown reseller has entered subject merchandise, Commerce may not know that it needs to order liquidation of those entries.⁴

⁴ In 2003, Commerce adopted a policy to address the liquidation of entries by third party resellers:

Automatic liquidation at the cash-deposit rate required at the time of entry can only apply to an intermediary (e.g., reseller, trading company, exporter) which does not have its own rate if no administrative review has been requested, either of the intermediary or of any producer of merchandise the intermediary exported to the United States. If the Department conducts a review of a producer of the intermediary's merchandise where

This is what occurred in the Federal Circuit case of Shinyei Corp. v. United States, 355 F.3d 1297 (Fed. Cir. 2004). Shinyei purchased bearings made in Japan from manufacturers subject to an antidumping order. Shinyei then resold those bearings in the United States. The manufacturers had no knowledge that Shinyei was reselling their bearings to the United States, and therefore did not report sales to Shinyei during the administrative reviews of the bearings antidumping order.

Upon entry, Shinyei's bearings were subject to a 45.83% cash deposit rate. Commerce conducted an administrative review of the manufacturer of those bearings, and after litigation, calculated a weighted average margin of 1.43% and 16.71% for the same time period as Shinyei's entries. In 1998, Commerce issued liquidation instructions for those administrative reviews. However, because the manufacturers had not supplied information regarding their sales to Shinyei, Shinyei's sales were not reviewed by Commerce, and therefore the liquidation instructions did not contain an assessment rate for Shinyei's entries.

entries of the merchandise were suspended at the producer's rate, automatic liquidation will not apply to the intermediary's sales. If, in the course of an administrative review, the Department determines that the producer knew, or should have known, that the merchandise it sold to the intermediary was destined for the United States, the intermediary's merchandise will be liquidated at the producer's assessment rate which the Department calculates for the producer in the review. If, on the other hand, the Department determines in the administrative review that the producer did not know that the merchandise it sold to the intermediary was destined for the United States, the intermediary's merchandise will not be liquidated at the assessment rate the Department determines for the producer or automatically at the rate required as a deposit at the time of entry. In that situation, the entries of merchandise from the intermediary during the period of review will be liquidated at the all-others rate if there was no company-specific review of the intermediary for that review period.

U.S. Department of Commerce, Import Administration, Notice of Clarification of Automatic-Liquidation Regulation (May 1, 2003), available at <http://ia.ita.doc.gov/assessment/new/reseller-announcement-05-02-2003.html> (site visited February 3, 2005).

On March 23, 2000, Shinyei filed a lawsuit with the CIT seeking a writ of mandamus to order Customs to liquidate at the 1.43% and 16.71% rates. On August 1, 2000, Commerce issued liquidation instructions to Customs, ordering that all entries not covered by the 1998 liquidation instructions be liquidated at the rate entered; for Shinyei that was the cash deposit rate of 45.83%. The CIT permitted Shinyei to amend its Complaint to allege that Commerce's liquidation instructions violated 19 U.S.C. § 1675(a)(2). The CIT then dismissed the case for lack of jurisdiction.

Before the Federal Circuit, the Government argued that the CIT lacked jurisdiction because the entries had been liquidated, and there was no provision in the law to allow for a reliquidation of those entries. The Federal Circuit disagreed. The court first held that Shinyei's cause of action was based on the Administrative Procedure Act ("APA"), which states that "[a] person suffering legal wrong because of agency action, or adversely affect or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Because this lawsuit involved the administrative enforcement of the imposition of "tariffs, duties, fees, or other taxes on the importation of merchandise other than the raising of revenue," the CIT had subject matter jurisdiction under 28 U.S.C. § 1581(i). 355 F.3d at 1304-05.

Having decided that the CIT had subject matter jurisdiction, the court then addressed the effect of the liquidation of Shinyei's entries. Section 516A of the Trade and Tariff Act of 1930 provides for the judicial review of antidumping proceedings. Under section 516A(e), if entries subject to an administrative review are enjoined, then those entries must be liquidated in accordance with a final court decision on the merits of the case. 19 U.S.C. § 1516a(e). Zenith Radio Corp. v. United States, 710 F.2d 806, 810

(Fed. Cir. 1983) held that once liquidation of an entry subject to an antidumping duty occurs, a decision of the CIT regarding Commerce's calculation of the antidumping duty in an administrative review can have no effect. "The statutory scheme has no provision permitting reliquidation" in such an instance. Id. Thus, because the CIT can provide no remedy, the court has no jurisdiction over such a case. Id.

In Shinyei, however, the Federal Circuit limited the holding of Zenith to those situations where the lawsuit is filed pursuant to section 516A of the Act. Because Shinyei sought relief pursuant to the APA, Zenith did not apply, and the CIT had jurisdiction. 355 F.3d at 1309-10.

The Government argued that 19 U.S.C. § 1514 prevented reliquidation.

Specifically, 19 U.S.C. § 1514(a) states that:

decisions of the Customs Service . . . as to . . . the liquidation or reliquidation of any entry, or reconciliation as to the issues contained therein, or any modification thereof . . . shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed by section 2636 of that title.

The court noted that the alleged error at issue in Shinyei was on the part of Commerce, not Customs. 355 F.3d at 1311-12. Therefore, the prohibition on reliquidation absent a protest under 19 U.S.C. § 1514(a) did not apply. Id. Indeed, 28 U.S.C. § 2643 provides the CIT with the power to order not only a money judgment against the United States, but also "any other form of relief that is appropriate" Therefore, the CIT had jurisdiction to hear Shinyei's cause of action. The Federal Circuit remanded the case to the CIT for further proceedings. Id. at 1312.

Retroactivity

In Jilin Henghe Pharmaceutical Co. v. United States, 342 F. Supp.2d 1301 (Ct. Int'l Trade 2004), the CIT faced the issue of whether a court's decision concerning an antidumping investigation should be applied retroactively to entries occurring before Commerce publishes the Timken notice. The case involved Commerce's antidumping order on bulk aspirin from China. Jilin had previously sued Commerce over the antidumping investigation. On remand in that litigation, Commerce determined that Jilin had a *de minimis* margin, and should be excluded from the antidumping order. This remand redetermination was affirmed by the CIT.

Commerce published its Timken notice on September 30, 2002. While this litigation over the investigation was pending, however, Commerce conducted two administrative reviews in which Jilin took part. Both reviews resulted in a zero or *de minimis* margin. After winning the litigation over the investigation, Jilin decided to withdraw from participating in the third administrative review. This review involved entries made prior to the September 30, 2002 Timken notice, and subject to the cash deposit rate originally determined in the challenged investigation. When Jilin withdrew from the administrative review, Commerce issued instructions to Customs to liquidate Jilin's entries made between July 1, 2002 and September 29, 2002 at the cash deposit rate. Jilin filed a lawsuit at the CIT based on those liquidation instructions.

Commerce argued that 19 U.S.C. § 1516a(c)(1) required application of the court's decision affirming its remand excluding Jilin from the antidumping order to be prospective only. That is, by statute, the court's decision could only affect entries made

on or after the date on which Commerce published the Timken notice. The full text of this statute reads:

Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) shall be liquidated in accordance with the determination of the Secretary, the administering authority, or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision.

19 U.S.C. § 1516a(c)(1) (emphasis added). Because Jilin never sought an injunction to cover its entries, the statute clearly mandated that the entries be liquidated in accordance with Commerce's original determination that Jilin had been dumping, despite its victory in the litigation over the investigation.

The CIT rejected this plain language argument, first noting that Commerce did not actually liquidate the entries during the pendency over the litigation. 342 F. Supp.2d at 1308. The court cited Laclede Steel Co. v. United States, 928 F. Supp. 1182 (Ct. Int'l Trade 1996), where a respondent sought an injunction from the court to prevent liquidation of entries subject to three antidumping administrative reviews. The respondent's entries were subject to a 6.21% cash deposit rate. The respondent instituted a lawsuit over Commerce's investigation, and as a result, received a reduced cash deposit rate of 4.08%. Upon winning the court decision over the investigation, the respondent withdrew its participation in the administrative reviews. While the court decision regarding the investigation was appealed, the appeal did not involve this respondent's claims. In that situation, the CIT issued a permanent injunction to prevent Commerce

from ordering liquidation at the higher cash deposit rate. In Laclede, the CIT cited the “yo-yo” effect that occurred when Commerce’s original determination is altered after a remand, and then subject to a decision on appeal from the Federal Circuit. 928 F. Supp. at 1187.

The Jilin court then determined that Commerce’s liquidation instructions were not in accordance with law because Commerce’s inclusion of Jilin in the order was discredited. 342 F. Supp.2d at 1309. Once Commerce’s Final antidumping determination has been invalidated, it cannot serve as a legal basis for the imposition of antidumping duties on Plaintiff’s entries.” Id. at 1309-10. The court, therefore, issued a declaratory judgment that Commerce is required to issue liquidation instructions in accordance with the court decision on the aspirin antidumping investigation. Id. at 1311. Commerce’s appeal of this decision is currently pending before the Federal Circuit.

Calculation of the Countervailing Duties

In Norsk Hydro Canada, Inc. v. United States, Ct. No. 03-00828, Slip Op. 04-129 (October 12, 2004), the CIT addressed the issue of how payments of countervailing duties in previous review periods could affect the calculation of the countervailing duty in a subsequent administrative review. Norsk Hydro was subject to countervailing duty investigations of pure and alloy magnesium from Canada. It had received a non-recurring subsidy, the benefit of which Commerce allocated over a period of years. After the imposition of a countervailing duty, Norsk Hydro imported pure and alloy magnesium into the United States in 1997, posting countervailing duty cash deposits between 3.18% and 7.61%. Pursuant to an administrative review of that period, the countervailing duty assessment rate was calculated to be 2.02%. However, Customs

officials at Port Huron erroneously liquidated the entries at the higher cash deposit rates. During the administrative review of Norsk Hydro's 2001 entries, Norsk Hydro presented evidence demonstrating that it had paid countervailing duties on the 1997 entries in excess of the amount that should have been assessed. Norsk Hydro requested that Commerce adjust the assessment on the 2001 entries to account for its overpayment of countervailing duties on the 1997 entries. When Commerce refused, Norsk Hydro instituted a lawsuit based on Commerce's administrative review of the 2001 entries.

Commerce argued that the CIT lacked jurisdiction, because Norsk Hydro had a remedy to address the erroneous liquidation either by pursuing a Customs protest, or by seeking reliquidation within one year pursuant to 19 U.S.C. § 1520(c). The CIT agreed that had the liquidation been the result of inadvertence, 19 U.S.C. § 1520(c) could have provided relief to Norsk Hydro. However, exhaustion of this remedy was not required to challenge Commerce's determination that it should not adjust the 2001 assessment rate based on the overpayment of the countervailing duties. Norsk Hydro, Slip Op. 04-129 at 16.

Concerning the substance of Norsk Hydro's argument, 19 U.S.C. § 1671(a) states that the countervailing duty imposed shall be "equal to the amount of the net countervailable subsidy." Commerce argued that it was constrained by 19 U.S.C. § 1675 to review a period of twelve months in its administrative review of the countervailing duty order. Thus, Commerce argued it had no authority to take into account the overpayments on the 1997 entries in the administrative review of the 2001 entries. The CIT rejected this argument, contending that "it would altogether nullify the meaning and purpose of § 1671(a) with regard to one-time, non-recurring subsidies." Slip Op. 04-129

at 24. That is, Commerce should have calculated the countervailing subsidy so that ultimately, the amount of the duties Customs assessed equals the net countervailable subsidy. Id. at 25.

Commerce's Application of Adverse Facts Available

In situations where information is not available, or when an interested party fails to provide information Commerce requested, Commerce may “use facts otherwise available in reaching the applicable determination” 19 U.S.C. § 1677e(a). When an interested party “has failed to cooperate by not acting to the best of its ability to comply” with Commerce’s request for information, Commerce may apply and adverse inference in selecting from the facts otherwise available. 19 U.S.C. § 1677e(b).

Commerce initiated an antidumping investigation of stainless steel bar from the United Kingdom, which became the subject of litigation in Valkia, Ltd v. United States, Crt. No. 02-00249, Slip Op. 04-71 (June 18, 2004). One respondent, Crownridge Stainless Steel Limited, instituted bankruptcy proceedings in response to the initiation of the investigation. Commerce sought information regarding the bankruptcy liquidation from United States Foreign Commercial Service personnel in London. The liquidator provided misinformation to USFCS personnel, that the company had ceased operations and was seeking a buyer for the site, plant and machinery. Meanwhile, a member of Crownridge's Board of Directors and another investor negotiated with the liquidator to purchase Crownridge's assets. The investors operated the company under the name "Valkia," and sold stainless steel bar that had been manufactured by Crownridge. All the while, Crownridge failed to respond to any requests for information by Commerce.

Commerce found Valkia to be Crownridge's successor in interest, and applied adverse facts available to it for Crownridge's misleading statements, and failure to respond to Commerce's questionnaires. Valkia challenged this determination, arguing that while Crownridge was undergoing liquidation, neither the liquidator nor the directors had the legal authority to answer Commerce's request for information. That CIT noted that the UK law to which Valkia cited was subject to interpretation. In fact, the law authorized "the carrying on of such 'business' 'as may be required' to wind up the company" Slip Op. 04-71 at 15. To the extent that Valkia argued that it was unable to respond to Commerce's questionnaires due to a lack of resources, the CIT noted that by statute, Commerce is required by 19 U.S.C. § 1677m(c) to provide any assistance that is practicable to avoid imposing an unreasonable burden on an interested party. The court stated, "Commerce presumably stands at the ready to do so, consistent with its statutory duties, but in the absence of notification of difficulty in responding, it cannot." *Id.* at 17.

The court found that Commerce considered all of the facts of record in reaching its determination that Valkia was the successor in interest to Crownridge, and upheld the determination as supported by substantial evidence. Slip Op. 04-71 at 21. With respect to the application of adverse facts available for Crownridge's failure to respond, the court noted that "a putative purchaser would insist upon full disclosure of all outstanding matter on a contemplated sale of assets that could reasonably affect their use and enjoyment." *Id.* at 22. Thus, if Valkia had known of the possible consequences it faced due to Crownridge's failure to respond to an antidumping investigation, it would have been in its best interests to insist on that response. *Id.* at 22-23. The court found that Valkia could not claim that it was totally unaware of the antidumping investigation, as

Valkia was comprised of at least one of Crownridge's directors. Id. at 23. Accordingly, the court upheld the application of adverse facts available to Valkia based on Crownridge's non-responsiveness to Commerce's questionnaires.

Privatization

Another hot litigation topic for the Department of Commerce in 2004 was the issue of privatization. In a countervailing duty proceeding, a company may receive a non-recurring subsidy, such as a one-time grant. In those situations, Commerce may allocate the benefit that the company received from the subsidy over a period of time. The question that arises is whether the benefit from that non-recurring subsidy is extinguished when the company experiences a change in ownership.

The statute addresses this situation:

A change in ownership of all or part of a foreign enterprise of the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction.

19 U.S.C. § 1677(5)(F). Prior to 2000, Commerce applied its "gamma" methodology, presuming that subsidies granted to the former owner passed through to a new owner after a sale. Delverde, SrL v. United States, 202 F.3d 1360, 1364 (Fed. Cir. 2000). The Federal Circuit found the gamma methodology to be an invalid interpretation of the statute, holding that Commerce cannot apply a *per se* rule as to whether an arm's length transaction extinguishes a countervailable subsidy. Id. at 1366. Rather, Commerce must examine all of the circumstances of the change of ownership to determine whether the subsidy has been extinguished. Id.

After Delverde, Commerce abandoned its gamma methodology, and adopted the “same person” test. Under this methodology, Commerce examined factors such as: (1) continuity of general business operations, including whether the successor holds itself out as the continuation of the previous enterprise, as may be indicated, for example, by use of the same name, (2) continuity of production facilities, (3) continuity of assets and liabilities, and (4) retention of personnel. Commerce applied this methodology to its remand determination concerning stainless steel sheet and strip in coils from France. Specifically, the Government of France privatized Usinor, a steel producing company, through the sale of stock. Commerce found that the only change occurring with respect to the four factors was the identity of the shareholders. Therefore, after the privatization, Usinor remained the same person and retained its pre-privatization subsidies. Allegheny Ludlum v. United States, 367 F.3d 1339, 1342 (Fed. Cir. 2004).

In 2004, the Federal Circuit rejected Commerce’s same person methodology, holding, “a change in ownership neither necessarily extinguishes nor necessarily carries over a countervailable subsidy.” 367 F.3d at 1344. Rather, “this statute requires a fact-intensive inquiry into the circumstances surrounding the transfer of ownership beyond the simple inquiry into whether the transaction occurred at arm’s length.” Id. The same person methodology “precluded consideration of all the particulars of the transactions and instead unnecessarily limited the assessment to non-market factors such as the identity of the pre- and post-privatization facilities and personnel.” Id. at 1346.

Commerce had argued that the situation in Allegheny Ludlum differed from that of Delverde in that Delverde concerned the sale of assets, whereas Allegheny Ludlum

concerned the sale of stock. The Federal Circuit rejected this argument. According to the Federal Circuit, Delverde

set forth three specific requirements of the statute, namely that Commerce must examine all facts and circumstances, including the terms of the transaction; that Commerce must determine whether the purchaser directly or indirectly received a countervailable subsidy; and that Commerce must not apply a *per se* rule.

367 F.3d at 1347. The court continued, "These principles apply even if the change of ownership occurs by a sale of assets rather than stock." Id. Moreover, creating a distinction between the sale of the assets of a company, and the sale of its stock "would elevate form over substance." Id.

The court concluded by noting that the Charming Betsy doctrine supported this analysis. Under the Charming Betsy doctrine, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"

Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). The Federal Circuit noted that the WTO rejected Commerce's same person methodology.

Specifically, "[t]he WTO specifically rejected the argument that sales of assets should be treated differently from sales of stock for assessing countervailing duties." 367 F.3d at 1348 (citing *United States -- Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, Report of the Appellate Body, adopted January 8, 2003). While the Charming Betsy doctrine was just a guideline, in this instance, the Federal Circuit found that it supported the CIT's judgment that the same person methodology was an impermissible interpretation of the statute. Id.

The CIT revisited the privatization issue in the case of Acciai Speciali Terni, S.p.A. v. United States, Crt. No. 99-06-00364, Slip Op. 04-140 (November 12, 2004).

The case involved the question of whether a 1994 sale of Acciai Speciali Terni S.p.A. ("AST") to private parties extinguished subsidies that had been provided by the Government of Italy. After a remand, Commerce applied a "full value" test, determining that because the new owners paid the full value for AST, the benefit had been extinguished. *Id.* at 6. The CIT found that this methodology essentially applied a *per se* test that the receipt of "full value" extinguished the original subsidy. *Id.* at 9. Relying on Delverde and Allegheny Ludlum, the CIT rejected this test, instructing Commerce to "instead employ a methodology which explains, upon consideration of the factual aspects of the sale, whether the [fair market value] transaction extinguished the subsidy as well as the benefit conferred." *Id.* at 13.

Zeroing

Commerce's offset methodology was the subject of litigation before the CIT, the CAFC, a NAFTA panel, and the WTO in 2004. Under this methodology, Commerce refuses to allow respondents to offset the weighted-average margin of dumping with sales made at greater than normal value. In an antidumping proceeding, Commerce first calculates the "dumping margin," which is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). Commerce then calculates the "weighted average dumping margin" "by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of" a single exporter or producer. 19 U.S.C. § 1677(35)(B). In the calculation of the dumping margin, Commerce includes only those sales where normal value exceeds export price or constructed export price. Where the export price or constructed export price are greater

than normal value, there is no dumping margin. However, sales where export price or constructed export price exceed normal value are included in the denominator of the calculation of the weighted average dumping margin.

In January of 2004, the Federal Circuit upheld Commerce's offset methodology as a reasonable interpretation of the statute in Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir.), cert. denied sub nom. Koyo Seiko Co. v. United States, 160 L. Ed. 2d 352, 125 S. Ct. 412 (2004). The CIT has since followed Timken in several cases. See, e.g., NSK Ltd. v. United States, No. 02-00627, slip op. 04-105 (Ct. Int'l Trade Nov. 1, 2004); SNR Roulements v. United States, 341 F. Supp. 2d 1334, 1344 (Ct. Int'l Trade 2004).

However, in August of 2004, the WTO Dispute Settlement Body adopted the Appellate Body's report in *Softwood Lumber*.⁵ The WTO Appellate Body found that Commerce's offset methodology was inconsistent with the obligations of the United States under the WTO Antidumping Agreement.⁶ This development fueled arguments that under the Charming Betsy doctrine, Commerce was obligated to abandon its offset methodology. Indeed, in an unusual move, the Federal Circuit ordered supplemental briefing in the case of Corus Staal BV v. Department of Commerce, to allow the parties to argue the relevance of the *Softwood Lumber* report. The relevance of the *Softwood Lumber* report also was raised in the NAFTA litigation over Commerce's antidumping order against softwood lumber from Canada.

⁵ *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, report of the Appellate Body, adopted August 31, 2004 [hereinafter *Softwood Lumber*].

⁶ *Id.* at para. 98.

On January 21, 2005, the Federal Circuit issued its opinion in Corus Staal, holding that WTO reports had no binding effect on the United States until the United States Trade Representative ("USTR") implemented the reports. Corus Staal BV v. Department of Commerce, Ct. No. 04-1107, Slip Op. at 9-10 (January 21, 2005). The court noted that Congress enacted legislation to address the conflict created when a WTO report finds a U.S. measure to be inconsistent with its WTO obligations. Namely, USTR, in consultation with Congress and other executive agencies, is charged with deciding whether and to what extent to implement an adverse WTO report. Id. at 9 (citing 19 U.S.C. §§ 3533(f), 3538). The Federal Circuit accorded no deference to the WTO reports, noting that the conduct of foreign relations is constitutionally committed to the political branches of the Government (Congress and the Executive). Id. at 10. The court concluded:

In this case, section 1677(35) presented Commerce with a choice as to how it calculates weighted-average dumping margins. We give Commerce substantial deference in its administration of the statute because of the foreign policy implications of a dumping determination. See Fed. Mogul Corp. v. United States, 63 F.3d 1572, 1582 (Fed. Cir. 1995). We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme.

Id.

Conclusion

It is interesting to note that a tension seems to exist between the Federal Circuit's decision in Allegheny Ludlum and its decision in Corus Staal. In one instance, the court did use a WTO report to bolster its holding that Commerce's interpretation of the statute was impermissible. In the other, the court clearly stated that WTO reports have no

binding effect unless and until USTR implements the report. The difference, however, is that the Federal Circuit has not yet used a WTO report as the basis for overturning a Commerce determination. In Allegheny Ludlum, the court had already found Commerce's same person methodology to be contrary to the statute before it addressed the WTO reports on the privatization issue. By contrast, Commerce's offset methodology was affirmed by the court as a permissible interpretation of the statute prior to Corus Staal. In Corus Staal, the court refused to overturn its prior decision, and thus overturn Commerce's determination, based solely on an adverse WTO report that had not yet been implemented pursuant to the statutory scheme.