

CASES UNDER 28 U.S.C. § 1581(I)

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I. INTRODUCTION

The year 2005 was an active year for appeals under the Court of International Trade’s (“CIT”) section 1581(i) residual jurisdiction. In a series of decisions, the Court continued to clarify the criteria for invoking this residual jurisdictional provision. Moreover, two of the most interesting and significant antidumping law issues—involving the Continued Dumping and Subsidy Offset Act (“CDSOA” or “Byrd Amendment”) and the application of the antidumping law to “gray market” imports—reached the CIT via section 1581(i).

II. REVIEW OF THE COURT OF INTERNATIONAL TRADE’S JURISDICTION UNDER § 1581(i)

28 U.S.C. § 1581(i) jurisdiction has been referred to as a broad residual grant of jurisdiction, as compared to subsections (a)-(h) which delineate specific areas of exclusive jurisdiction.¹ Section 1581(i) provides that the CIT shall have exclusive jurisdiction over

any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

- (1) revenue from imports or tonnage;
- (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
- (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

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¹ See *Mukand Int’l Ltd. v. United States*, 412 F. Supp. 2d 1312, 1316 (Ct. Int’l Trade 2005), (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)).

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.²

In 2005, the CIT reaffirmed a few basic principles concerning its section 1581(i) jurisdiction. The CIT confirmed prior decisions holding that section 1581(i) jurisdiction may not be invoked when jurisdiction is, or could have been, available under another subsection of section 1581.³ The CIT reaffirmed that section 1581(i) jurisdiction is not appropriate if a party could have brought a request for relief under another provision of the statute—otherwise “the residual jurisdiction could, if not interpreted restrictively threaten to strip subsections (a) through (h) of any operative force.”⁴ The court restated this principle in *San Vicente Camalu S.p.R. de RI v. United States*.⁵ In *San Vicente*, where a plaintiff challenged a terminated sunset review, the government moved to dismiss for lack of jurisdiction. Upon termination of the sunset reviews at issue, San Vicente had first asked the International Trade Commission (“Commission”) and the Department of Commerce (“Commerce”) to reconsider their decisions. San Vicente then waited almost a year to bring an action before the CIT challenging the terminations. The government argued that the plaintiff could have availed itself of section 1581(c) jurisdiction had it brought its appeal within 30 days of the final determination terminating the sunset reviews. Having failed to do so, the plaintiff could not belatedly avail itself of section 1581(i) jurisdiction. San Vicente argued that it could not have availed itself of the court’s jurisdiction under section 1581(c) because the decisions to terminate the sunset reviews were not “final determinations” under 19

² 28 U.S.C § 1581(i) (2000).

³ See *Duferco Steel, Inc. v. United States*, 403 F. Supp. 2d 1281 (Ct. Int’l Trade 2005); see also *Mukand Int’l*, 412 F. Supp. 2d 1312 (holding that where challenge pertained to Commerce’s issuance of liquidation instructions and not Custom’s liquidation of the entries, jurisdiction was proper under section 1581(i) because Commerce’s decision was not a protestable decision within section 1581(a)).

⁴ *Duferco Steel*, 403 F. Supp. 2d at 1285.

⁵ 366 F. Supp. 2d 1373 (Ct. Int’l Trade 2005).

U.S.C. § 1675(c). Specifically, San Vicente argued that the contested agency decisions were not “final determinations” under the statute because the agencies had never reached a final determination as to whether termination of the suspended investigation would be likely to lead to the continuation or recurrence of material injury.⁶

The CIT rejected this argument and held that the Commerce and Commission determinations terminating the sunset reviews were “clearly the final and definitive actions in those proceedings.”⁷ The CIT held that actions not specifically identified in the applicable statute can be reviewed under 28 U.S.C. § 1581(c) and did not, by exclusion, fall within section 1581(i) jurisdiction.⁸ In addition, it was not necessary for the agencies to make the statutorily required findings in order for there to be a final determination. Because there were final determinations, San Vicente could have, and should have, filed an appeal from those determinations with the CIT under its section 1581(c) jurisdiction. Thus, relying on precedent, the CIT affirmed that having failed to properly initiate an action under section 1581(c), a plaintiff cannot avail itself of jurisdiction under 1581(i).⁹

The only exception to this principle is if the remedy provided under the other available subsection would be, or would have been, manifestly inadequate.¹⁰ Once it has been established that another remedy or subsection is or could have been available, “the party asserting § 1581(i)

⁶ San Vicente Camalu SPR De Ri v. United States, 366 F. Supp. 2d 1373 (Ct. Int’l Trade 2005).

⁷ *Id.* at 1378.

⁸ *See id.* at 1379-80.

⁹ *See id.* at 1380.

¹⁰ *See* Nufarm Am.’s Inc. v. United States, 398 F. Supp. 2d 1338 1373 (Ct. Int’l Trade 2005); *see also* Int’l Custom Prods., Inc. v. United States, 374 F. Supp. 2d 1311, 1373 (Ct. Int’l Trade 2005).

jurisdiction has the burden to show how that remedy would be manifestly inadequate.”¹¹ Two decisions highlighted the CIT’s interpretation of a “manifestly inadequate” remedy.

In *International Custom Products*, the CIT considered whether section 1581(i) jurisdiction was proper when a plaintiff argued that judicial review, under another subsection, would be manifestly inadequate in that it could not be heard on the merits of its case in time to provide meaningful relief.¹² Plaintiff International Custom Products (“ICP”) was an importer and distributor of dairy ingredients and had recently made a multi-million dollar investment in a U.S. manufacturing plant. Prior to becoming an importer, ICP had obtained a binding classification ruling from the Bureau of Customs and Border Protection (“Customs”) and since then had imported its goods in reliance on that ruling. Several years later, Customs issued a notice of action that it was reclassifying the product at issue. The result of this reclassification was a 2400 percent increase in duty. Due to the reclassification, ICP ceased importation and placed any unliquidated entries in a bonded warehouse. It then challenged the reclassification directly before the CIT.

The government argued that the court lacked jurisdiction to hear the case because ICP had failed to exhaust its administrative remedies and qualify for jurisdiction under section 1581(a). The court found that ICP had made a sufficient showing that the remedies available under subsections (a) through (h) would be manifestly inadequate and had justified retaining jurisdiction under section 1581(i).¹³ The CIT found that to require ICP to follow protest procedures would require multiple protests directed at current and future liquidations, resulting

¹¹ *Nufarm*, 398 F. Supp. 2d at 1347; *see also* U.S. Ass’n of Imp. of Textiles and Apparel v. United States, 366 F. Supp. 2d 1280 (Ct. Int’l Trade 2005) (stating that where delay would be prejudicial to the plaintiff, exhaustion of administrative remedies is not required).

¹² 374 F. Supp. 2d 1311.

¹³ *See id.* at 1319.

in multiple judicial challenges to protest denials. The court noted that if ICP was forced to wait and protest the very liquidations the company was trying to prevent by requesting the court to find the notice of action null and void, any remedy the court could grant would be moot.¹⁴ The CIT further held that “[a]ny recourse that may be available to ICP by pursuing a traditional administrative action of filing a protest or protests would be manifestly inadequate because it is likely that Plaintiff’s business will no longer exist by the time the administrative and judicial process are completed.”¹⁵ ICP argued that if it was unable to resume importation it would be unable to meet contractual commitments with its principal U.S. customer and risked millions in tax liabilities if unable to finalize its purchase of and installation of equipment for its manufacturing plant. Thus, ICP had presented sufficient facts to demonstrate that if forced to seek jurisdiction under another subsection, relief under that subsection would be manifestly inadequate and, therefore, jurisdiction under section 1581(i) was proper.

In *Nufarm*, the CIT addressed the issue of when it would be futile to require the exhaustion of administrative remedies before a dispute is ripe for judicial review.¹⁶ Under the doctrine of futility, if exhaustion of administrative remedies would be futile, a party may bring its complaint directly to the court and be properly within the court’s jurisdiction. Relying upon Federal Circuit precedent, the CIT held in *Nufarm* that the distinction between a regulation and a statute can be dispositive as to whether the exhaustion of administrative remedies is futile.¹⁷ Thus, while it had been held that a plaintiff does not have to exhaust its administrative remedies when there is a question as to the constitutionality of a statute, when an agency’s regulations are

¹⁴ *See id.* at 1321.

¹⁵ *Id.* at 1322.

¹⁶ *Nufarm*, 398 F. Supp. 2d 1338.

¹⁷ *Id.* at 1348.

at issue, exhaustion of remedies would not be futile because an agency has the authority to review, revise and ultimately repeal its own regulations.¹⁸ Furthermore, the inclusion of or characterization of a claim as a constitutional claim does not remove a plaintiff's obligation to exhaust its administrative remedies.¹⁹ The CIT further held that "[t]he CIT's jurisdiction under § 1581(i) is specifically circumscribed by and is mutually exclusive to jurisdiction under other subsections of § 1581."²⁰ Thus, a plaintiff whose case fell under the court's section 1581(a) jurisdiction could not also claim jurisdiction under section 1581(i).²¹

III. THE UNIQUE JURISDICTIONAL AND INTERPRETATIONAL ISSUES RAISED BY THE CONTINUED DUMPING & SUBSIDY OFFSET ACT

The CDSOA, a law ostensibly designed to assist domestic producers injured by unfairly traded imports, has been controversial since its enactment in October 2000. While the efficacy of the CDSOA is uncertain, what is certain is that this much-debated law, which was inserted into the U.S. trade laws at 19 U.S.C. § 1675c, has raised unique issues for the CIT's judicial review. Arguably, by virtue of the variety of disputes that have arisen under the CDSOA, the CIT's subject matter jurisdiction has considerably expanded. Lacking another jurisdictional basis on which to bring an action—determinations made under the CDSOA are not protestable Customs decisions nor are the determinations a result of administrative investigations or reviews—challenges to the CDSOA have been brought under the court's residual jurisdiction. Specifically,

¹⁸ See *id.* at 1348-49. However, the CIT noted in *Association of Importers of Textiles and Apparel*, that both it and the Federal Circuit have held that challenges that question the *very existence* of an agency's regulations do not require the exhaustion of administrative remedies. See 366 F. Supp. at 1285.

¹⁹ See *Nufarm*, 398 F. Supp. 2d at 1350.

²⁰ *Id.* at 1352.

²¹ See *id.* at 1338.

parties have relied on the CIT's residual jurisdiction to bring cases pertaining to the "administration and enforcement" of the CDSOA's statutory provisions.²²

To date, the CDSOA has been challenged before the CIT on a broad range of issues, including its constitutionality, consistency with international obligations, agency interpretation and agency implementation. During 2005, the CIT addressed some of these issues, while others remain under the court's consideration. Some of these other, larger issues concerning the legality of the CDSOA were not decided until 2006 but highlight the reach of the CIT's residual jurisdiction. For example, in *Canadian Lumber Trade Alliance v. United States*, the CIT was asked to determine whether the application of the CDSOA was contrary to U.S. law implementing the North American Free Trade Agreement ("NAFTA"). In an opinion issued on April 7, 2006, the CIT found that the CDSOA could not be applied to entries subject to the softwood lumber countervailing and antidumping duty orders, as such application was inconsistent with U.S. law implementing NAFTA, specifically the provision that any amendment to the U.S. dumping laws must specifically state if the amendment applies to goods covered under NAFTA.²³

Bypassing the usual committees through which subsidy and dumping matters usually travel and without any significant Congressional debate, the CDSOA was inserted at the midnight hour by Senator Byrd into an agriculture appropriations bill.²⁴ The CDSOA provides that funds collected by Customs pursuant to antidumping and countervailing duty orders be

²² 28 U.S.C. § 1581(i).

²³ *See Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321 (Ct. Int'l Trade 2006).

²⁴ *See, e.g., P.S. Chez Sidney v. United States International Trade Commission*, Slip Op. 06-103at 17 n.21 (Ct. Int'l Trade July 13, 2006) (noting that the CDSOA bypassed the usual committees through which subsidy and dumping matters usually travel and was passed without significant Congressional debate or analysis).

distributed to “affected domestic producers.”²⁵ “Affected domestic producers” are defined as any party that was a petitioner or supporter of an antidumping or countervailing duty petition and that remains in operation.²⁶ Even as to antidumping orders issued long before its enactment, the CDSOA acts retrospectively such that duties collected pursuant to pre-2000 antidumping orders are available for disbursement to “affected domestic producers” each fiscal year.

The statute placed responsibility for creating a list of affected domestic producers with the Commission. Specifically, the CDSOA requires the Commission to forward to Customs a list of eligible producers by compiling

a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response. In those cases in which a determination of injury was not required or the Commission’s records do not permit an identification of those in support of a petition, the Commission shall consult with the administering authority to determine the identity of the petitioner and those domestic parties who have entered appearances during administrative reviews conducted by the administering authority under section 1675 of this title.²⁷

The Commission is then directed to forward that list to Customs, which is required to publish the list in the *Federal Register* along with a notice of intention to distribute funds to those parties. Customs is responsible for managing the disbursement of funds from the collection of assessed duties. To qualify for CDSOA disbursements, a company must certify that it is eligible as an “affected domestic producer”²⁸ and that it incurred “[q]ualifying expenditure[s].”²⁹

Not long after the enactment of the CDSOA, the Commission attempted to comply with the statute and sent to Customs a list of petitioners and petition supporters for all antidumping

²⁵ 19 U.S.C. § 1675c(a) (2006).

²⁶ *See id.* at (b)(1).

²⁷ *See id.* at (d)(1).

²⁸ *See id.* at (b)(1).

²⁹ *See id.* at (b)(4).

and countervailing duty orders in place at the beginning of 2001. The list was accompanied by a letter from the Commission's chairman that, because the Commission is bound by 19 U.S.C. § 1677f which prohibits the Commission from disclosing business proprietary information, its list of affected domestic producers only included those companies that had indicated public support for the petition. Therefore, any party that had indicated support on confidential and protected documents and had not waived confidentiality as to that information was excluded from the list. Customs published both the list of eligible companies and the letter from the Commission on its website.³⁰ When Customs published in the *Federal Register* its proposed regulations governing the distribution of funds under the CDSOA, it did not repeat the information contained in the Commission's letter. Customs merely stated that any dispute regarding the list of eligible domestic producers for any case was the responsibility of the Commission.³¹ In August 2001, Customs published in the *Federal Register* notice of proposed distribution of CDSOA funds, along with an updated list of affected domestic producers.³² That notice provided potential recipients the deadline for filing certifications of eligibility.

The Commission, responsible for determining those persons that indicated support of the petition, has never promulgated regulations pertaining to its procedures for compliance with the CDSOA's directives. It was the Commission's chosen methodology, and lack of publication of that methodology, that was at issue before the CIT in *Cathedral Candle Co. v. USITC* and *Candle Artisans, Inc. v. USITC*. Customs' regulations on its procedures for disbursing funds were examined in *Dixon Ticonderoga Co. v. United States Customs & Border Protection*.

³⁰ See *Cathedral Candle Co. v. USITC*, 285 F. Supp. 2d 1371, 1373 (Ct. Int'l Trade 2003).

³¹ See *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers: Proposed Rule*, 66 Fed. Reg. 33,920-21 (Dep't Treasury June 26, 2001).

³² See *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers: Notice of Intent to Distribute*, 66 Fed. Reg. 33,920-21 (Dep't Treasury Aug. 3, 2001).

A. THE COMMISSION’S METHODOLOGY FOR DETERMINING “AFFECTED DOMESTIC PRODUCERS”

In *Cathedral Candle Co. v. USITC*, two candle manufacturers challenged the methodology by which the Commission compiled its list of affected domestic producers, and in particular, the Commission’s determination that expressions of support found within questionnaire responses were considered confidential information.³³ Neither Cathedral Candle nor A.I. Root Company were included on the first list of affected of domestic producers that Customs published in the *Federal Register*. Both companies did not file certifications of eligibility for disbursements in 2001. It was not until autumn of 2002 that Cathedral Candle and A.I. Root Company contacted the Commission and waived confidentiality with respect to their

³³ Focusing solely on the Commission’s determination regarding confidentiality, *Cathedral Candle* did not address whether the Commission’s methodology raises any constitutional concerns. See *Cathedral Candle v. United States Int’l Trade Comm’n*, 285 F. Supp 2d 1371 (Ct. Int’l Trade 2003). Such concerns, however, were later addressed by the CIT in two stunning opinions finding that the CDSOA was unconstitutional. In *P.S. Chez Sidney v. United States International Trade Commission*, the plaintiff alleged that it was a violation of the First Amendment for the Commission to base affected domestic producer eligibility on an expression of support or non-support of an antidumping or countervailing duty petition. Slip Op. 06-103 (Ct. Int’l Trade July 13, 2006). The CIT held that “when, as a part of an act of Congress, the Government distributed benefits that are conditioned on what effectively amounts to political support by an otherwise qualified recipient for government action, that support requirement is subject to strict scrutiny under the Constitution. Where, as here, the provision fails that scrutiny, the Supreme Court authority renders the requirement facially invalid.” *Id.* at 6. In *SKF USA v. United States*, a domestic producer of antifriction bearings alleged that the CDSOA was unconstitutional because the CDSOA took a class, the domestic industry of antifriction bearing producers, and created a classification between petition supporters and those that did not support a petition. SKF USA Inc. alleged that this classification was unconstitutional as a violation of the Equal Protection Doctrine found in the Fourteenth and Fifth Amendments. On September 12, 2006, the court held that the CDSOA was unconstitutional because, as applied to SKF USA Inc., the law violated the equal protection doctrine. The CIT stated that the court, “based on the record before it, the statutory language and the legislative history, cannot find a rational basis nor is able to find any conceivable basis for the classification—distinguishing between those entities who supported a petition and those who either took no position or opposed the petition—and the purpose of the CDSOA.” Slip Op. 06-139 at 14. Thus, the court held that the “affected domestic producer” provision was unconstitutional.

support of the antidumping petition. The Commission subsequently added the two companies to the list of affected domestic producers after which the companies submitted certifications to Customs seeking distributions. The certifications were filed on October 2, 2002 and October 8, 2002, one month and a few days after the deadline for certifications had passed. Because the certifications were filed past the deadline set forth in its *Federal Register* notice, Customs rejected the certifications as untimely and did not distribute any portion of collected duties to Cathedral Candle or the A.I. Root Company.³⁴

Cathedral Candle and the A.I. Root Company brought an action before the CIT under 19 U.S.C. § 1581(i) challenging Customs' decision to reject their certifications. The companies argued that not only should they have received distributions in 2002, but also they should have been eligible in 2001. The CIT denied the companies' claims, holding that Cathedral Candle and A.I. Root Company had been put on notice of the deadline for filing certifications of eligibility and had had ample opportunity to submit such certifications on time and to seek amendments to the list of affected domestic producers prior to the certification deadline. Therefore, Customs properly rejected their certifications as untimely.³⁶

The companies also alleged that the Commission had unlawfully interpreted the requirements of the CDSOA so as to cause only those affected domestic producers who had waived confidentiality to appear on the list provided to Customs. While the CIT believed the issues of statutory interpretation were "not decisive to the case at bar," it did discuss the plaintiffs' contentions.³⁷ The CIT recognized that the CDSOA conflicted somewhat with the 19 U.S.C. § 1677f requirements that the Commission accord confidential treatment to all business

³⁴ See *Cathedral Candle*, 285 F. Supp. 2d at 1374-75.

³⁶ See *id.* at 1376.

³⁷ *Id.*

proprietary information submitted to the Commission. The Commission had for years interpreted section 1677f, and its own regulations, as requiring it to keep confidential the questionnaires received from parties participating in an investigation. It was within these questionnaires that the Commission asked parties whether they supported the antidumping or countervailing duty petition at issue. While the CIT recognized that nothing in the statute or the regulations required that the identity of petition supporters be kept confidential, it reasoned that since the questionnaires were labeled “business confidential,” respondents to the questionnaires had been put on notice that their answers would be kept confidential.³⁸

The court noted that neither the Commission nor Customs provided notice of this interpretation in the *Federal Register*. However, the court relied upon the fact that the Customs’ notice that was published in the *Federal Register* referenced the Commission’s letter interpreting the Commission’s responsibilities. The court concluded that such implicit notice was sufficient.³⁹ “Defendants were not required by either the Byrd Amendment or any other law to personally notify ADPs of the Act and its effects” nor was the companies’ failure to meet the deadlines excused by the failure of the Commission and Customs to give explicit notice in the *Federal Register* as to why names might have been excluded from the list of affected domestic producers.⁴⁰ Therefore, the CIT denied Cathedral Candle and A.I. Root Company entitlement to disbursements for 2001 and 2002.

Cathedral Candle and the Root Company appealed to the Federal Circuit. The companies argued that the CDSOA imposed a duty upon the Commission to forward the names of all petition supporters to Customs to be published in the *Federal Register* and that this duty was not

³⁸ *See id.*

³⁹ *See id.* at 1378.

⁴⁰ *Id.* at 1380.

in any way limited or qualified by the Commission's duty not to disclose proprietary information that had been submitted to the Commission. The Federal Circuit recognized that there was a potential conflict between the broad disclosure requirement of the CDSOA and the restrictions of section 1677f regarding the disclosure of confidential information, including the Commission's interpretation of section 1677f to encompass the information submitted in response to questionnaires and expressions of support or non-support of antidumping and countervailing duty petitions.⁴¹ The Commission argued that its construction of section 1677f and the CDSOA was entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the Supreme Court enunciated the now familiar two-step test for reviewing an agency's interpretation of a statute.

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁴²

Utilizing the two-step test outlined in *Chevron*, the Federal Circuit concluded that section 1677f was ambiguous with regard to its application to expressions of petition support provided under a pledge of confidentiality. Therefore, Congress had not directly spoken to the precise issue and step one of the *Chevron* test could not resolve the question before the court.⁴³

⁴¹ See *Cathedral Candle*, 400 F.3d at 1361.

⁴² *Chevron, U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 842-43 (1984).

⁴³ See *Cathedral Candle*, 400 F.3d at 1362.

Furthermore, the Federal Circuit stated that while agency regulations are granted deference by the courts, deference to the Commission's regulation pertaining to confidential business information did not answer the question of whether the Commission's interpretation of section 1677f as applying to information regarding petition support was entitled to deference.⁴⁴ Rather, the gap between the regulation and section 1677f was filled by the Commission's interpretation of the regulation—the Commission interpreted its regulation as including information regarding a questionnaire respondent's support for a petition. Recognizing that such an interpretation was never articulated prior to the action before the court, the Federal Circuit nevertheless granted deference to the Commission's interpretation of its own regulation.⁴⁵ Moreover, the Court upheld the Commission's interpretation of its regulation as reasonable, noting that the Commission's interpretation was not contrary to the terms of the regulation, nor at odds with the purposes of the regulation. In drawing this conclusion, the Federal Circuit also looked at Commerce's regulation on the submission of confidential information, which explicitly included expressions of petition support within its categories of confidential information.

The Court then considered whether the Commission had properly concluded that the CDSOA did not require it to disclose the companies' expressions of support, as to which they had been promised confidentiality. To hold that the CDSOA required such disclosure would have required the Federal Circuit to find that the CDSOA implicitly repealed section 1677 insofar as it applied to petition support. In addition, the Commission was not entitled to *Chevron* deference in its interpretation of the CDSOA as the Commission had not been so authorized by Congress.

However, the Federal Circuit determined that the Commission's interpretation was entitled to lesser deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore*

⁴⁴ *See id.* at 1363.

⁴⁵ *See id.* at 1363-64.

requires courts to provide “some deference to informal agency interpretation of ambiguous statutory dictates.”⁴⁶ Recognizing that the Supreme Court has never precisely defined the level of deference owed to informal agency interpretations of statutes, the Federal Circuit did find that the Commission’s action “has many of the characteristics that the Supreme Court has identified as favoring deference to the agency’s interpretation.”⁴⁷ The Federal Circuit then outlined four of these characteristics which it found leads to the conclusion that an agency’s interpretation should be granted deference: 1) the interpretation represents an agency-wide position; 2) interpretation was contemporaneous with the enactment of statute at issue; 3) the agency has explained its reasons for its position; and 4) the interpretation is the result of the agency’s specialized knowledge.⁴⁸ Therefore, the Court granted the Commission’s interpretation considerable weight and found it to reflect a reasonable effort to resolve the potential conflict between section 1677 and the CDSOA.

The Federal Circuit then turned to whether the Commission was required to publish or make available for public inspection its interpretation of section 1677f and the CDSOA, as per the Administrative Procedure Act. The Court concluded that an agency interpretation that merely restates the requirements of a statute, either on its face or as construed, is not required to be published, since it is the statutory directive, not the agency’s interpretation that governs.⁴⁹ Therefore, the Commission’s failure to publish its interpretation did not bar the enforcement of the statute as construed by the Court.

Candle Artisans, Inc. v. USITC, 362 F. Supp. 2d 1352 (Ct. Int’l Trade 2005), concerned many of the same issues as *Cathedral Candle*. However, *Candle Artisans* raised the additional

⁴⁶ *Id.* at 1365.

⁴⁷ *Id.* at 1366.

⁴⁸ *See id.* at 1366-67.

⁴⁹ *See id.* at 1370.

issue of whether the Commission should have provided notice of its interpretation of 19 U.S.C. § 1677f and 19 C.F.R. § 201.6(a)(1). The CIT found, as it had in *Cathedral Candle*, that the Commission was not required to publish notice of its interpretation. The CIT also addressed whether support for a petition can be considered business proprietary information. The CIT held that it meets the criteria established under the Commission's regulation because a company's position as to a petition has commercial value and if such information were disclosed, companies could use that information against others or companies could be reluctant to provide such information which would impair the Commission's investigation.

B. CUSTOMS' PROCEDURES FOR DISTRIBUTING FUNDS

In *Dixon Ticonderoga Co. v. United States Customs & Border Protection*, the CIT examined whether Customs must comply with timing requirements set forth in the statute and its regulations.⁵⁰ The CDSOA requires Customs to publish a notice of intent to distribute at least 30 days prior to the distribution of funds. Customs' regulations further require the notice of intent to be published at least 90 days prior to the end of the fiscal year. After the notice is published, affected domestic producers have 60 days from the date of publication to file certifications for eligibility.

In 2003, Customs published the notice of intent to distribute twelve days after the regulatory deadline. Dixon Ticonderoga filed its certification late as well, 102 days after the notice was published. Customs denied Dixon's certification because Dixon's certification was received more than 60 days after the publication date.⁵¹ Dixon appealed to the CIT arguing that it was a double standard for Customs to treat its own deadline for publishing notice as a guideline but the certification deadline as a strict rule. Dixon argued that, having missed its own deadline,

⁵⁰ 366 F. Supp. 2d 1352 (Ct. Int'l Trade 2005).

⁵¹ *See id.* at 1353-54.

Customs should have waived the deadline for domestic producers' certifications or provided notice of a reasonable extension.

Finding no legislative intent that Customs should lose its authority to administer for failing to comply with a timing requirement, the CIT concluded that the timing requirements within Customs' regulations were merely procedural aids in applying the requirements of the CDSOA.⁵² Since the timing requirements were merely procedural aids, Dixon was required to demonstrate that it was prejudiced by Customs' non-compliance with its regulations. The CIT found that there was a clear Congressional purpose of protecting domestic producers through the CDSOA. Moreover, "Dixon's interest in receiving its share of the anti-dumping duties assessed against Chinese pencil manufacturers was clearly injured by Customs failure to give timely notice of its intent to distribute—the only notice that Customs' regulations direct domestic producers to expect."⁵³ Thus, Customs' failure to comply with its regulations resulted in serious prejudice and was therefore entitled to distribution from Customs for 2003.⁵⁴

IV. THE FEDERAL CIRCUIT ISSUES A DEFINITIVE RULE ON THE RATES APPLICABLE TO UNAUTHORIZED RESELLERS OF MERCHANDISE SUBJECT TO ANTIDUMPING DUTY ORDERS

In 2005, the Federal Circuit issued a decision that would impact the importation and sale in the United States of gray market goods, goods that are often sold at deeply discounted prices and compete with other imported products and U.S. manufactured goods. "A gray-market good is a foreign-manufactured good, bearing a valid United States trademark, that is imported without the consent of the United States trademark holder."⁵⁵ While the gray market problem

⁵² *See id.* at 1356.

⁵³ *Id.* at 1358.

⁵⁴ *See Dixon Ticonderoga*, 27 I.T.R.D. (BNA) 2085 (Ct. Int'l Trade 2005).

⁵⁵ *K Mart Corp. v. Cartier, Inc., et al.*, 486 U.S. 281, 285 (1988).

dates back to the early 1900s, the gray market in the United States has grown markedly over the past few decades. In 1988, the gray market problem in the United States was estimated to be approximately \$7 to \$10 billion, annually.⁵⁶ In some industries, the annual growth of this problem has been estimated to be as high as twenty-two percent.⁵⁷ More recently, reports in the technology sector have valued the gray market with respect to information technology products alone to be approximately \$40 billion.⁵⁸

In the context of international trade, the gray market problem arises when there is parallel importation by an unauthorized third party who purchases branded goods abroad and sells them in the United States without the authorization of the U.S. trademark holder, thus creating a gray market and infringing a U.S. trademark.⁵⁹ While parallel importation is primarily a trademark and intellectual property issue, the gray market and its concomitant problems spill over into the regulation of international trade and antidumping. Trademark holders have urged Commerce and Customs to assist in the fight against gray market goods by not permitting unauthorized resellers to obtain more favorable dumping rates by entering goods under the manufacturer's rate rather than the typically much-higher "all others rate." The issue of which rate is applicable when there is an unauthorized reseller involved and a manufacturer, rather than the reseller, has participated in proceedings before Commerce came under close scrutiny in *Consolidated Bearings Co. v. United States*.⁶⁰

⁵⁶ See Frank V. Cespedes, et al., *Gray Market: Causes and Cures*, HARVARD BUS. REVIEW, at 75-82 (Jul-Aug. 1988).

⁵⁷ See Larry S. Lowe and Kevin F. McCrohan, *Minimize the Impact of the Gray Market*, J. OF BUS. STRATEGY at 47-50 (Nov.-Dec. 1989).

⁵⁸ See *The Gray Market*, KPMG/Anti-Gray Mkt. Alliance, 2003, at 1, available at http://www.kpmg.de/library/pdf/030211_The_Grey_Market_en.pdf.

⁵⁹ See *K Mart Corp.*, 486 U.S. at 285.

⁶⁰ 412 F.3d 1266 (Fed. Cir. 2005).

Manufacturers of merchandise subject to an antidumping duty order, as well as domestic producers of the merchandise, may request review of previously established duty rates. A manufacturer's request for review may include authorized importers or resellers of their merchandise. In *Consolidated Bearings*, the CIT and Federal Circuit were asked to determine what rate was applicable to resellers and importers not covered by a manufacturer's request for review. In 2005, the Federal Circuit issued a final decision resolving a long-standing dispute on this issue.

Consolidated Bearings concerned the antidumping duty orders against antifriction bearings ("AFBs") from several countries, including Germany. Orders were issued by Commerce in 1989. Between 1989 and 1997, Consolidated Bearings, a domestic distributor of AFBs, purchased and imported AFBs manufactured by the German manufacturer FAG into the United States. Consolidated, however, did not purchase its AFBs directly from FAG but rather from an unaffiliated reseller. Upon importation, Consolidated paid cash deposits of estimated antidumping duties. The cash deposit rates applied by Customs to Consolidated were based on the rates Commerce had assigned to FAG in the antidumping duty orders.⁶¹

Commerce initiated the first administrative review in June 1990. Consolidated neither requested an administrative review for the reseller's sales to Consolidated nor did Consolidated or the reseller participate in the review. When Commerce published the final results of the administrative review, the results established new antidumping duty rates for the manufacturer FAG and its participating importers. However, Commerce did not establish new rates for Consolidated or the reseller because neither party participated.⁶²

⁶¹ *See id.* at 1266-67.

⁶² *See id.*

In September 1997, Commerce instructed Customs to liquidate AFBs pursuant to the final results of the first administrative review. In August 1998, Commerce issued second liquidation instructions directing that any entries not liquidated after applying the 1997 instructions—which required liquidation at the rates determined in the first administrative review—should be liquidated at the deposit rate required at the time of entry.⁶³ Because FAG had obtained a lower rate in the administrative review than in the original investigation, the cash deposit rate was higher than that established for the named FAG importers after the first administrative review. Thus, liquidation of Consolidated’s entries occurred at a higher rate than for FAG’s importers.⁶⁴

Because Consolidated had not participated in the administrative review, it did not have a right to appeal the administrative review final results under 19 U.S.C. § 1581(c). Instead, Consolidated filed suit before the Court of International Trade under the court’s residual jurisdiction, seeking to invalidate Commerce’s liquidation instructions. In finding that residual jurisdiction was properly invoked, the CIT stated that the liquidation instructions were not reviewable under subsection 1581(c) because they were not part of the final results of the administrative review.⁶⁵ The CIT concluded that the liquidation instructions were arbitrary and capricious for failing to specify a basis for Commerce’s decision to assess the FAG merchandise and Consolidated’s entries of FAG merchandise at different rates.⁶⁶

When Commerce failed to comply with the court’s original order to take action not inconsistent with the court’s opinion and refused to liquidate Consolidated’s entries at the FAG

⁶³ *See id.* at 1268.

⁶⁴ *See id.*

⁶⁵ *See* *Consol. Bearings Co. v. United States*, 166 F. Supp. 2d 580, 583 (Ct. Int’l Trade 2001).

⁶⁶ *See id.* at 590-93.

rate, the CIT specifically ordered Commerce to do so.⁶⁷ After some additional legal wrangling with the CIT, both the government and Consolidated appealed to the Federal Circuit.

The Federal Circuit first upheld the CIT’s jurisdiction over the action, agreeing with the CIT that Consolidated could not have brought the case under subsection 1581(c) as it was not a challenge to the final results of the administrative review. Rather, the case was “squarely within the provisions of subsection (i)” because “an action challenging Commerce’s liquidation instructions is not a challenge to the final results, but a challenge to the ‘administration and enforcement’ of those final results.”⁶⁸

Turning to the merits of the appeal, the Federal Circuit noted at the outset that different importers of the same merchandise can have different antidumping duties—“[t]he simple fact that one importer imports the same merchandise as another importer does not necessarily lead to the conclusion that they are subject to the same antidumping duties. Because sales prices vary from exporter to exporter and from time to time, separate entries of the same good may have different rates.”⁶⁹

The Federal Circuit found that 19 U.S.C. § 1675(a)(2)(C) required Commerce to apply the final results of an administrative review to all entries covered by the review.⁷⁰ Thus, “[i]f the review did not examine a particular importer’s transaction, then the importer’s entries enjoy no statutory entitlement to the rates established by the review.”⁷¹ Therefore, the Federal Circuit reversed the CIT to the extent that the CIT had held that Commerce must apply the final results of an administrative review to entries of merchandise not covered in the review.

⁶⁷ See *Consol. Bearings Co. v. United States*, 182 F. Supp. 2d 1380 (Ct. Int’l Trade 2002).

⁶⁸ *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003).

⁶⁹ *Id.* at 1005.

⁷⁰ See *id.* at 1005.

⁷¹ *Id.* at 1005-06.

Consolidated further argued that Commerce's instructions were contrary to its well-established liquidation practices and disrupted Consolidated's reasonable expectations that it did not have to participate in the review in order for Commerce to apply a weighted-average of the final results to its entries.⁷² The Federal Circuit attempted to examine what Commerce's practices were on this issue but found the record lacked sufficient evidence to determine whether Commerce had a consistent past practice of either not applying a manufacturer's rate, as Commerce argued, or of applying the manufacturer's rate to unreviewed entries, as Consolidated argued. Therefore, the Federal Circuit remanded the case for a determination of whether Commerce had a consistent past practice with respect to imports from unrelated resellers not covered by an administrative review and, if so, whether Commerce had arbitrarily departed from such past practice.⁷³

On remand, Commerce stated that its past practice was to assess a reseller's sales separately from those of a manufacturer if that manufacturer does not have knowledge that its sales are ultimately destined for the United States. Commerce further clarified that if a reseller requests review and the manufacturer does not know that the reseller is exporting merchandise to the United States, then Commerce calculates a separate rate for the reseller. However, if a reseller does not request review, then the reseller is assessed a duty at the entered rate.⁷⁴ Based on Commerce's representations, the CIT found a past practice and held that Commerce's instructions as to Consolidated's entries were consistent with this past practice.⁷⁵ Therefore, the CIT upheld Commerce's liquidation instructions with respect to Consolidated.

⁷² *See id.* at 1006.

⁷³ *See id.* at 1006-08.

⁷⁴ *See* *Consol. Bearings Co. v. United States*, 346 F. Supp. 2d 1343, 1345-46 (Ct. Int'l Trade 2004).

⁷⁵ *See id.* at 1347-48.

Consolidated again appealed to the Federal Circuit, arguing that Commerce's instructions did not reflect a consistent past practice.⁷⁶ The Federal Circuit reviewed the CIT's decision for the limited purpose of determining whether substantial evidence supported its conclusion that there was a consistent past practice. The court found that there was substantial evidence supporting that Commerce's liquidation instructions reflected a consistent past practice of liquidating unreviewed entries from unrelated resellers at the cash deposit rate rather than the manufacturer's review rate. The Federal Circuit relied upon several pieces of evidence in its findings. First, the court noted that Commerce's regulations at 19 C.F.R. § 353.22(e)(1) stated that if it does not receive a timely request for review, entries are to be assessed antidumping duties at rates equal to the cash deposit required at the time of entry.⁷⁷ Second, the court agreed with Commerce that notice appeared in both the preliminary and final determinations that Commerce calculates exporter/importer specific assessment rates whenever possible, which reflected its policy of calculating importer-specific duty rates during administrative reviews.⁷⁸ Finally, the Court relied upon the fact that Commerce had issued several instructions to Customs, all of which were similar to the instructions issued regarding the German AFBs and pertained to the same administrative review as that which Consolidated disputed.⁷⁹ Therefore, the Federal Circuit held that substantial evidence supported Commerce's determination and that Commerce had a consistent past practice of liquidating unreviewed entries from unrelated resellers at the cash deposit rate.

⁷⁶ *See* *Consol. Bearings Co. v. United States*, 412 F.3d 1266 (Fed. Cir. 2005).

⁷⁷ *See id.* at 1270.

⁷⁸ *See id.*

⁷⁹ *See id.* at 1270-71.

In a similar case, *Nissei Sangyo Am. Ltd v. United States*,⁸⁰ the Federal Circuit reversed the CIT's decision holding that Commerce had deviated from a past practice of liquidating entries at a manufacturer's rate as determined in an administrative review. Nissei Sangyo imported DRAMs which it purchased from a reseller that was not affiliated with the manufacturer, LG Semicon. LG Semicon participated in the first administrative review during which Commerce calculated a dumping margin for LG Semicon of zero percent. A second administrative review resulted in a similarly low margin for the manufacturer. When Commerce issued liquidation instructions for the subject entries, Commerce instructed Customs to liquidate Nissei's entries at the entered rate rather than the *de minimis* rates determined for LG Semicon during the administrative reviews. The CIT found this action to be arbitrary and not in accordance with law.⁸¹

On appeal to the Federal Circuit, the court relied upon its *Consolidated Bearings* decision to reverse the trial court. Consistent with *Consolidated Bearings*, the Federal Circuit held that since Nissei had not requested a separate rate determination for the importers or resellers, Nissei did not have a statutory right to liquidation at the manufacturer's rate established in the administrative reviews. Rather, consistent with what the court had found in *Consolidated Bearings* to be Commerce's past practice, unreviewed entries from unrelated resellers should be liquidated at the entered cash deposit rate.⁸²

V. CONCLUSION

⁸⁰ See 27 ITRD 1704, 2005 WL 1540161 (Fed. Cir. 2005).

⁸¹ See *Nissei Sangyo America, Ltd. v. United States*, 25 ITRD 2045, 2003 WL 21972722 (Ct. Int'l Trade 2003).

⁸² See also *Renasis Tech. Am., Inc. v. United States*, 27 ITRD 1544 (Fed. Cir. 2005) (holding that unreviewed entries should be liquidated at the entered rate, not a manufacturer's rate as established in an administrative review).

As demonstrated above, the CIT’s residual jurisdiction served, as intended, as a “catch-all” provision, allowing the court to entertain cases that it would have otherwise been jurisdictionally barred from hearing. Indeed, section 1581(i) provided a vehicle whereby two important issues, the CDSOA and gray market imports, could come before the court that has the expertise necessary to resolve such issues. If Congress had not included section 1581(i) and the CIT did not have its residual jurisdiction, the plaintiffs in such cases as *Cathedral Candle*, *Consolidated Bearings* and *Canadian Lumber* would have been forced to bring actions before a district court, a court that would not have the experience and specialized knowledge that the CIT has in reviewing international trade matters. Thus, section 1581(i) permits parties to bring actions before the court best prepared to entertain the case. In addition, section 1581(i) permits the CIT to stretch its wings a little beyond its “bread and butter” review of Customs, Commerce and Commission determinations.