THE UNITED STATES COURT OF INTERNATIONAL TRADE IN 2010: IS COMMERCE SUFFERING FROM ADVERSE DECISIONS IT WASN'T DOUBLE-COUNTING ON?

Craig A. Lewis, Jonathan T. Stoel, and Brian S. Janovitz*

A review of opinions issued by the U.S. Court of International Trade (CIT) in 2010 reveal particularly noteworthy developments in the recent antidumping and countervailing duty determinations by the U.S. Department of Commerce (Commerce). First, several 2010 opinions suggest that the CIT, with support from the Federal Circuit, is tightening disciplines on Commerce's application of "adverse facts available" (AFA). These cases demonstrate a more searching scrutiny by the CIT into the circumstances warranting application of AFA, the scope of information for which AFA may be applied, the parties to whom AFA may be applied, and the selected AFA rate itself. A true shift in judicial policy would be welcome as the previous lack of standards in this important area possibly encouraged increasing abuse of Commerce's AFA authority.

Second, the CIT continued to address the controversy over Commerce's decision to impose both countervailing duties and non-market economy antidumping duties on Chinese goods imported into the United States. In GPX II, *the CIT held that Commerce's remand solution to the "double remedy" problem did not adequately address the legal and practical difficulties the court had identified in* GPX I. *A second remand determination was issued in response to* GPX II, *and subsequently was appealed to the Federal Circuit. Commerce has refused to change its AD/CVD methodologies in subsequent investigations and administrative reviews involving Chinese exports until the final resolution of* GPX *in the Federal Circuit.*

Finally, it is difficult to discern whether the Supreme Court's recently enunciated standards in Twombly *and* Iqbal *have raised the bar to any significant degree in terms of the level of specificity and support required in a CIT complaint in order to withstand a motion to dismiss. However, it is still relatively early in the development of jurisprudence under* Twombly, *and its limited application may reflect a concomitant enhancement of the quality of complaints as practitioners face the uncertainty of its application.*

---

* Messrs. Lewis and Stoel are partners in the International Trade and Investment Practice Group of Hogan Lovells US LLP, Washington, DC. Mr. Janovitz is an associate in the International Trade and Investment Practice Group of Hogan Lovells US LLP. © 2011, Craig A. Lewis, Jonathan T. Stoel, Brian S. Janovitz.

TABLE OF CONTENTS

I. INTRODUCTION 48
II. ARE THE REINS ON AFA TIGHTENING? 52
  A. *Application of AFA—Is One Failure Grounds for Invalidating Everything?* 53
  B. *Lawfulness of the Selected AFA Rate—The Sky Is Not the Limit* 58
III. THE *GPX* CASES—CAN COMMERCE HAVE ITS CAKE AND EAT IT TOO? 64
  A. GPX *Appeal Background* 65
  B. GPX *Initial Decision* 66
  C. *Commerce's First Remand Decision and Second CIT Decision* 68
  D. *Commerce's Second Remand Decision and Final CIT Decision* 69
IV. DO *TWOMBLY* AND *IQBAL* MATTER? 70
V. CONCLUSION 74

I. INTRODUCTION

The U.S. Court of International Trade (CIT) in New York is an Article III court with the powers in law and equity of a federal district court,[1] but with a specialized docket limited to claims relating to federal international trade law and administration.[2] Most prevalent among the cases falling within the court's jurisdiction are claims against the United States contesting the denial of a protest by U.S. Customs and Border Protection (CBP) (so-called "(a)" jurisdiction claims, by reference to the relevant statutory subsection),[3] claims challenging determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) in antidumping duty and countervailing duty proceedings ("(c)" jurisdiction claims),[4] and "residual jurisdiction" claims that are not otherwise specified in the jurisdictional statute, but "arise" from federal laws relating to international trade that are within the CIT's jurisdiction

1. *See* 28 U.S.C. § 1585 (2006) ("The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States."); *see also id.* § 451 (defining "court of the United States" as including the U.S. Court of International Trade).

2. *See* 28 U.S.C. §§ 1581-85 (2006 & Supp. IV 2010).

3. *Id.* § 1581(a).

4. *Id.* § 1581(c).

("(i)" jurisdiction).[5] In addition to claims against the United States, claims *by* the United States for collection of duties, penalties, and liquidated damages also fall within the CIT's jurisdiction and are occasionally brought before the tribunal.[6]

During 2010, the CIT issued 142 opinions. This makes 2010 a relatively light year for CIT opinions,[7] a result that may not be surprising in light of the depressed economic circumstances during most of the last three years. The opinions issued in 2010 also reflect an ordinary range of subject matter. As in the past, the overwhelming majority of the opinions (83 in total) adjudicated "(c)" claims contesting antidumping and countervailing duty determinations or matters and a majority of the residual "(i)" jurisdiction cases also involved claims relating to the administration of antidumping and countervailing duty matters such as the timing and content of liquidation instructions issued by Commerce.[8] A relatively smaller, but by no means insignificant, share of the cases (28 in total) involved "(a)" claims contesting the denial of protests.[9] However, even these "(a)" cases in several instances involved claims relating to liquidations involving antidumping or countervailing duties.[10] Only seven opinions issued in 2010 involved claims by the United States seeking to collect duties, penalties and liquidated damages.[11]

---

5. More specifically, "(i)" jurisdiction encompasses claims against the United States arising from Federal laws providing for

> "(1) revenue from imports or tonnage; (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of [section 1581]."

Id. § 1581(i).

6. *Id.* § 1582.

7. The CIT issued 152 opinions in 2009, 146 opinions in 2008, 189 opinions in 2007, 191 opinions in 2006, 168 opinions in 2005, 162 opinions in 2004, 171 opinions in 2003, 154 opinions in 2002, and 154 opinions in 2001. *See Slip Opinions*, CT. INT'L TRADE, http://www.cit.uscourts.gov/slip_op/slip-op.html (last updated Sept. 23, 2011).

8. *See, e.g.*, Walgreen Co. v. United States, 33 I.T.R.D. (BNA) 1061, (Ct. Int'l Trade 2010); Target Corp. v. United States, 33 I.T.R.D. (BNA) 1017, (Ct. Int'l Trade 2010).

9. *See, e.g.*, Trumpf Med. Sys. Inc. v. United States, 753 F. Supp. 2d 1297 (Ct. Int'l Trade 2010); Dell Prods. LP v. United States, 714 F. Supp. 2d 1252 (Ct. Int'l Trade 2010); Pac. Nw. Equip., Inc. v. United States, 715 F. Supp. 2d 1319 (Ct. Int'l Trade 2010).

10. *See, e.g.*, FAG Holding Co. v. United States, 744 F. Supp. 2d 1353 (Ct. Int'l Trade 2010).

11. *See* United States v. Callanish Ltd., 32 I.T.R.D. (BNA) 2145 (Ct. Int'l Trade 2010); United States v. Pressman-Gutman Co., 721 F. Supp. 2d 1333 (Ct. Int'l Trade 2010); United States v. Tip

Thus, the CIT docket in 2010 remains overwhelmingly dominated by appeals contesting the issuance and administration of trade remedies. What have the issues been within this area? For the most part, they are familiar types of claims—challenges of principally case-specific relevance, such as the selection of "surrogate values"[12] and standards for classifying inputs as "direct" or "indirect" material[13] in non-market economy (NME) antidumping cases, the calculation of indirect selling expense adjustments,[14] or the lawfulness of a decision to rescind an antidumping duty new shipper review based on a finding that an export sale is not "bona fide."[15] Other opinions have addressed calculation methodologies of broader application in antidumping or countervailing duty proceedings, such as the proper basis for determining the recovery of costs,[16] the use of "zeroing" in the margin calculation,[17] the lawfulness of the test employed by Commerce to identify "targeted dumping,"[18] Commerce's authority to correct calculation errors after a final determination is issued,[19] whether Commerce has the authority to reinstate a respondent under an antidumping order pursuant to a "changed circumstances review,"[20] whether Commerce in NME cases can lawfully subject companies without separate rate to the "China-wide" margin when at least one named exporter fails to qualify for separate rate,[21] and whether Commerce is required to conduct a

---

Top Pants, Inc., 32 I.T.R.D. (BNA) 1818 (Ct. Int'l Trade 2010); United States v. Wilfran Agric. Indus., Inc., 716 F. Supp. 2d 1352 (Ct. Int'l Trade 2010); United States v. UPS Customhouse Brokerage, Inc., 714 F. Supp. 2d 1296 (Ct. Int'l Trade 2010); United States v. UPS Customhouse Brokerage, Inc., 686 F. Supp. 2d 1337 (Ct. Int'l Trade 2010); United States v. Tip Top Pants, Inc., 32 I.T.R.D. (BNA) 1106 (Ct. Int'l Trade 2010).

12. *See* Jining Yongjia Trade Co. v. United States, 32 I.T.R.D. (BNA) 2205 (Ct. Int'l Trade 2010).

13. *See* Bridgestone Ams., Inc. v. United States, 710 F. Supp. 2d 1359, 1363-65 (Ct. Int'l Trade 2010).

14. *See* U.S. Steel Corp. v. United States, 712 F. Supp. 2d 1330 (Ct. Int'l Trade 2010).

15. *See* Shandong Chenhe Int'l Trading Co. v. United States, 32 I.T.R.D. (BNA) 2176 (Ct. Int'l Trade 2010).

16. *See* Seah Steel Corp. v. United States, 704 F. Supp. 2d 1353 (Ct. Int'l Trade 2010).

17. *See, e.g.*, Dongbu Steel Corp. v. United States, 677 F. Supp. 2d 1353 (Ct. Int'l Trade 2010) (upholding use of "zeroing" in antidumping duty administrative review proceedings), *rev'd,* Dongbu Steel Corp. v. United States, 635 F.3d 1363 (Fed. Cir. 2011).

18. *See* Mid Continent Nail Corp. v. United States, 32 I.T.R.D. (BNA) 1461, 1466 (Ct. Int'l Trade 2010).

19. *See* Am. Signature, Inc. v. United States, 710 F. Supp. 2d 1376 (Ct. Int'l Trade 2010).

20. *See* Sahaviriya Steel Indus. Pub. Co. v. United States, 714 F. Supp. 2d 1263, 1274 (Ct. Int'l Trade 2010).

21. *See* Royal United Corp. v. United States, 714 F. Supp. 2d 1307 (Ct. Int'l Trade 2010).

circumvention inquiry in the context of an administrative review.[22]

Still other opinions issued in 2010 concerning trade remedy matters address issues of administrative and judicial procedure, such as whether redeterminations made pursuant to the implementation of adverse WTO rulings under Section 129 of the Uruguay Round Agreements Act (URAA)[23] can be applied retroactively,[24] under what circumstances Commerce can properly reject information submitted by respondents to correct data previously submitted,[25] whether a plaintiff can challenge Commerce's fifteen-day liquidation policy even though its entries are already enjoined from liquidation pursuant to a preliminary injunction,[26] and whether a party can intervene in an appeal of an ITC injury determination where it produced merchandise from one of the countries under investigation, but not from the country for which the appeal was specifically filed.[27]

Each of these cases, particularly those involving methodologies and practices of general application, such as the methodologies for "targeted dumping" and "cost recovery," are important and worthy of further explication. However, for purposes of this article, we have chosen two areas of law that are of particular systemic importance for practitioners in the trade remedies area. In particular, we focus in Part II on a series of opinions from the CIT that have been issued in the area of application and selection of "facts available" in antidumping proceedings. As discussed below, these cases have been issued in the wake of recent United States Court of Appeals for the Federal Circuit (Federal Circuit) rulings that suggest that Commerce determinations, particularly in the selection of "adverse facts available" (AFA) are coming under tighter scrutiny than in the past.

In Part III, we discuss in greater detail the series of CIT decisions in *GPX International Tire Corp. v. United States* addressing the legality of Commerce's policy to apply countervailing duty (CVD) law to the People's Republic of China (PRC) while simultaneously treating China as a non-market economy for purposes of antidumping duty (AD)

---

22. *See* Globe Metallurgical Inc. v. United States, 722 F. Supp. 2d 1372 (Ct. Int'l Trade 2010).

23. 19 U.S.C. § 3538 (2006).

24. *See* Andaman Seafood Co. v. United States, 675 F. Supp. 2d 1363, 1373-74 (Ct. Int'l Trade 2010).

25. *See* Fischer S.A. Comercio, Industria, & Agricultura v. United States, 746 F. Supp. 2d 1353 (Ct. Int'l Trade 2010).

26. *See* SKF USA Inc. v. United States, 32 I.T.R.D. (BNA) 1550 (Ct. Int'l Trade 2010).

27. *See* Shandong TTCA Biochemistry Co. v. United States, 710 F. Supp. 2d 1368 (Ct. Int'l Trade 2010).

proceedings. This case, which is currently on appeal before the Federal Circuit, will undoubtedly have a significant and lasting impact on the growing number of CVD investigations targeting imports from the People's Republic of China and other NME countries.

Finally, we briefly assess the impact, or lack thereof, on the CIT's jurisprudence as a result of the Supreme Court's rulings in *Bell Atlantic Corp. v. Twombly*[28] and *Ashcroft v. Iqbal.*[29]

II. Are the Reins on AFA Tightening?

A review of opinions issued in 2010 suggest that the CIT, with the encouragement of the Federal Circuit, is at long last tightening disciplines on Commerce's application of adverse facts available in AD and CVD investigations and reviews. If these recent opinions are evidence of a true shift in judicial policy toward a tightening of constraints in this area, this is indeed a welcome development as previous laxity by the courts has possibly encouraged increasing abuse of the AFA authority by Commerce, particularly as applied to Chinese respondents.[30]

Adverse facts available—often abbreviated as AFA—actually encompasses two distinct findings by Commerce. First, if necessary information is not available on the record, or if a party or other person withholds requested information, fails to provide information by deadlines in the proper form, significantly impedes a proceeding, or provides information that cannot be verified, Commerce may "use the facts otherwise available" in reaching its determination.[31] Second, Commerce may use an inference that is adverse to the interests of a party that it finds has failed to cooperate by not acting to the best of its ability to comply with a request for information.[32] The combination of facts otherwise available and an adverse inference is referred to as AFA.

Commerce issued numerous decisions in 2010 that will likely make it harder for Commerce to apply AFA in the future. In addition, when Commerce, in applying facts otherwise available, relies on secondary

28. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007).

29. Ashcroft v. Iqbal, 129 S. Ct.. 1937, 1949 (2009).

30. A recent example typifying the abuse of the facts available authority is Commerce's recent decision in the countervailing duty investigation of aluminum extrusions from China. In that case Commerce applied a punitive 374.15% AFA subsidy margin to exporters in the "all others" category, even though there was no finding that any of the "all others" respondents failed to cooperate or otherwise impeded the investigation. *See* Aluminum Extrusions from the People's Republic of China, 74 Fed. Reg. 18,521,18,523 (Dep't of Commerce Apr. 4, 2011).

31. 19 U.S.C. § 1677e(a) (2006).

32. *Id.* § 1677e(b).

information rather than on information obtained in the current proceeding, Commerce must, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.[33] Furthermore, the application of AFA is intended to induce cooperation and may not be used as a punishment.[34] In the wake of the Federal Circuit's decision in *Gallant Ocean*, the CIT also stiffened its resistance to AFA rates relying on secondary information without proper corroboration and, more importantly, unusually high AFA rates that are potentially divorced from actual margins and, therefore, punitive. Cases in each of these areas are discussed below.[35]

A. *Application of AFA—Is One Failure Grounds for Invalidating Everything?*

In 2010, the CIT emphasized that AFA can be applied only where deficiencies in the record exist, and only where the relevant party was found not to have acted to the best of its ability. In *Since Hardware (Guangzhou) Co. v. United States*,[36] the plaintiff challenged the application of AFA in an administrative review of the antidumping order on floor standing metal-top ironing tables from China. In non-market economy cases, when determining normal value on the basis of the factors of production used in producing subject merchandise, Commerce normally uses information and data from a surrogate market economy country to value the inputs.[37] However, if a respondent purchases inputs from a market economy country at the market economy purchase price, Commerce uses the reported purchase prices to value inputs. The plaintiff thus submitted to Commerce information regarding its manufacturing inputs from claimed purchases from market economy sources.[38]

---

33. *Id.* § 1677e(c).

34. *See* Gallant Ocean (Thai.) Co. v. United States, 602 F.3d 1319, 1323 (Fed. Cir. 2010).

35. Although the cases discussed herein deal predominantly with remands or determinations sustained following one or more remands, there is no intent to suggest that these cases are exhaustive of the CIT's 2010 decisions or that Commerce's use of AFA never withstands judicial appeal. In at least 2 instances in 2010, Commerce's use of an AFA rate was sustained in its entirety by the CIT on the first appeal (*i.e.* without remand). *See* MTZ Polyfilms, Ltd. v. United States, 717 F. Supp. 2d 1346, 1358-63 (Ct. Int'l Trade 2010); Watanabe Group v. United States, 33 I.T.R.D. (BNA) 1012 (Ct. Int'l Trade 2010). In addition, there are likely numerous cases in which AFA was applied without the issue being appealed to the CIT. It is worth noting that the most legally questionable applications of AFA are more likely to be appealed and ruled upon by the CIT.

36. 32 I.T.R.D. (BNA) 1993 (Ct. Int'l Trade 2010).

37. *Since Hardware,* 32 I.T.R.D. (BNA), 1996.

38. *Id.*

In addition, in non-market economy cases, Commerce presumes that exporters are under state control and, therefore, part of the state entity.[39] Exporters that are deemed part of the state entity are assigned a country-wide rate. The presumption of state control can be rebutted, however, by affirmatively showing an absence of *de jure* and *de facto* government control. If such a showing is made, the respondent will be assigned its own separate rate. The plaintiff in *Since Hardware* consequently also submitted information pertaining to its separate rate status.[40]

In the preliminary results of the review, Commerce found that the plaintiff had demonstrated its entitlement to separate rate status, and calculated an antidumping duty rate of 1.53% based, in part, on the prices from the claimed market economy purchases.[41] However, Commerce eventually learned that the plaintiff had submitted false and fraudulent documentation regarding the country of origin and valuation of the claimed market economy purchases.[42] After the discrepancies went unexplained, Commerce concluded in its final results that the plaintiff had significantly impeded the proceeding and withheld information and, as a result, used facts otherwise available.[43] Commerce also made a finding that the plaintiff failed to cooperate to the best of its ability and therefore applied AFA.[44] Commerce further determined that the unreliable and inaccurate information regarding market economy purchases called into question all of the plaintiff's responses. Accordingly, Commerce rescinded the plaintiff's separate rate status and assigned it the PRC-wide rate of 157.68%.[45]

While the CIT agreed that the application of AFA was appropriate with respect to the production information, it found that Commerce erred in rescinding the plaintiff's separate rate status. The CIT explained that none of the unreliable information was relevant to the question of government control, and Commerce failed to make a specific finding that the responses concerning state control were inaccurate.[46] The court noted that when applying adverse inferences, "Commerce may not stray too far from the questionnaire responses

39. *See* Sigma Corp. v. United States, 117 F.3d 1401, 1405-06 (Fed. Cir. 1997).
40. *Since Hardware*, 32 I.T.R.D. (BNA), at 1995-96.
41. *Id.* at 1996.
42. *Id.* at 1996-97.
43. *Id.* at 1998.
44. *Id.*
45. *Id.*
46. *Id.* at 1999.

that justified the use of AFA."[47] Consequently, the court remanded the matter back to Commerce so that it could reexamine whether the plaintiff was entitled to separate rate status. In so doing, the court instructed Commerce that it may not assume that the portion of the record relating to independence from government control had been impacted by the Plaintiff's responses regarding unrelated matters.[48]

The CIT also restricted the scope of application of AFA in *KYD, Inc. v. United States*,[49] which involved a challenge by a U.S. importer to Commerce's determination in an administrative review of an antidumping duty order. In *KYD*, Commerce applied AFA to two exporters that failed to cooperate fully with the review, and assigned both a rate of 122.88%, which was equal to the highest transaction-specific rate found in the original investigation.[50] In so doing, Commerce ignored the plaintiff's request for a separate importer-specific assessment rate and implicitly declined to use the information the plaintiff submitted, which the plaintiff contended would allow Commerce to calculate such a rate.[51] The CIT held that substantial evidence did not support Commerce's decision to disregard the plaintiff's information. The court found fault with Commerce's determination in the absence of any finding under 19 U.S.C. § 1677e(b),[52] that KYD failed to cooperate, or any finding under 19 U.S.C. § 1677m(e),[53] that it could decline to consider KYD's information.[54]

The court further insisted that a cooperative party is entitled to have its margin determined accurately and according to the relevant information on the record of the administrative review, stating, "[t]o the

47. *Id.*

48. *Id.* at 2001.

49. 704 F. Supp. 2d 1323 (Ct. Int'l Trade 2010).

50. *Id.* at 1326.

51. *Id.* at 1327.

52. 19 U.S.C. § 1677e(b) (2006) provides for the use of adverse inferences if Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce] . . ."

53. 19 U.S.C. § 1677m(e) requires Commerce to consider information that is submitted by an interested party and is necessary to the determination, even if it does not meet all the applicable requirements established by Commerce, if (1) the information is submitted by the deadline established for its submission, (2) the information can be verified, (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and (5) the information can be used without undue difficulties.

54. *See KYD*, 704 F. Supp. 2d at 1324.

extent that Commerce believe[d] that it must treat a cooperative importer otherwise, it is misinterpreting a clear statutory mandate."[55] Accordingly, the court remanded the matter for Commerce to either consider the plaintiff's information in determining an importer-specific assessment rate, or explain why it can decline to do so under § 1677m(e).[56] Although the court noted that it was premature to decide whether Commerce may use inferences that are adverse to the plaintiff because the remand determination could moot such a question, the clear import of the decision strikes a blow to the use of "total adverse facts available" on the basis of limited failures in discrete areas of the investigation.[57] Even though the exporter's behavior without question warranted the application of AFA, the court insisted that a cooperative importer that placed the necessary information on the record be spared from the harsh treatment of AFA.

The CIT's increased scrutiny with respect to Commerce's application of AFA extended to CVD cases as well. In *Essar Steel Limited v. United States*,[58] Commerce employed AFA when examining the benefit supposedly conferred on the plaintiff by a series of nine subprograms composing Chhattisgarh's Industrial Policy (the Program).[59] Commerce found as AFA that the Program provided a specific financial contribution to the plaintiff during the period of review.[60] In addition, finding that the plaintiff failed to cooperate to the best of its ability, Commerce found as AFA that the plaintiff used and benefitted from the Program during the period of review.[61] The latter finding, however, stood in stark contrast to Commerce's finding in the immediately preceding review that a letter from the local government demonstrated plaintiff's ineligibility to participate in the Program from 2004 through 2009.[62] The CIT ruled that Commerce may not ignore the evidence it previously recognized as valid. Accordingly, the court remanded the matter so that Commerce could reopen the record and admit the evidence from the previous review and consider that evidence in reassessing whether the plaintiff benefitted from the Program.[63] On remand, Commerce found

55. *Id.* at 1334.
56. *Id.*
57. *Id.* at 1334 & n.17.
58. 721 F. Supp. 2d 1285 (Ct. Int'l Trade 2010).
59. *Id.* at 1300.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 1301.

that the plaintiff did not benefit from the Program, a finding sustained by the CIT.[64]

These cases, taken together, suggest a more searching scrutiny by the CIT into the circumstances warranting application of AFA, the scope of information for which AFA may be applied, and the parties to whom the AFA may be applied. *Since Hardware* makes clear that application of AFA may be limited to specific areas in which a party has failed to cooperate or has impeded the proceeding, and record information that is untainted by the specific failures justifying the application of AFA may not be summarily disregarded, as Commerce has regularly done in the past. *Essar Steel* suggests that, even where a party has failed to cooperate to the best of its ability, AFA cannot be applied as a presumption if doing so would lead to a known incorrect result. And perhaps most notably, *KYD* limits the scenarios in which AFA can lawfully be applied to cooperative respondents.

Each of these rulings suggests prudent restraints on the use of AFA. The accuracy of the dumping margins—not punishment of respondents—remains the paramount goal of the administrative proceedings. Moreover, Congress has enacted relatively detailed statutory rules delineating the limited circumstances under which Commerce may disregard submitted data in favor of AFA. The Court's rulings suggest that Commerce may need to draw a better balance between the agency's interest in incentivizing cooperation from responding parties and the need to utilize the data that is available to accurately calculate margins of dumping. Commerce should not simply throw the baby out with the bath water whenever it encounters a reporting deficiency.

The finding in *KYD* may also signal a warranted shift to more rigid insistence that AFA only be applied to parties about whom Commerce has made a specific finding of non-cooperation. In *East Sea Seafoods LLC v. United States*, the CIT noted that "in most, if not all, cases involving a country-wide NME anti-dumping duty rate, the country-wide margin has been calculated using adverse inferences."[65] The court emphasized that, under 19 U.S.C. § 1677e(b), AFA can only be applied if Commerce "*finds* that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information."[66] The court concluded that "[i]t seems that the application of an antidumping duty rate that has been based on AFA to certain compa-

64. *See* Essar Steel Ltd. v. United States, 33 I.T.R.D. (BNA) 1118 (Ct. Int'l Trade 2011).

65. 703 F. Supp. 2d 1336, 1354 n.15 (Ct. Int'l Trade 2010).

66. *Id.*

nies by the operation of a "rebuttable presumption" of government-control, without the finding of failure to cooperate required by 1677e(b), may be *ultra vires*."[67] The court found that the issue was not before it in that case, however, and therefore did not ultimately consider it.[68]

But the CIT's decisions in the first half of 2011 support the view that such a shift may be underfoot. In *Tianjin Magnesium International Co. v. United States*,[69] Commerce encountered evidence that a producer that supplied a particular exporter had doctored records. Based on this behavior, Commerce concluded that the exporter's information was unreliable and assigned it an AFA rate of 111.73%.[70] The CIT ruled that Commerce's application of AFA to the exporter was in violation of 19 U.S.C. § 1677e(b) because Commerce made no finding that the exporter failed to cooperate to the best of its ability. This trend suggests that in the future Commerce may find it increasingly difficult to apply AFA broadly, including to parties that have not been found to be non-cooperative.

B. *Lawfulness of the Selected AFA Rate—The Sky Is Not the Limit*

In addition to restricting the scenarios in which AFA can be applied, the CIT has continued its increasingly stringent scrutiny of the selected AFA rate itself, even where application of AFA in some form is appropriate. As discussed above, where a gap in the record exists, and when there has been a finding that a party had not cooperated to the best of its ability, Commerce may apply AFA. However, even when the application of AFA is appropriate, the rate must be lawful.

The statute permits Commerce to rely on secondary information as AFA.[71] However, when relying on secondary information rather than on information obtained in the current proceeding, Commerce must, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.[72] In addition, an AFA rate must be "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to

67. *Id.*
68. *Id.*
69. 33 ITRD 1150 (Ct. Int'l Trade 2011).
70. *Id.* at 1152.
71. *See* 19 U.S.C. § 1677e(c) (2006).
72. *Id.*

non-compliance."[73] These two requirements are distinct, although they are often blurred in the case law.

The enhanced scrutiny of AFA rates with respect to both requirements is underscored, and perhaps prompted to some degree by the recent ruling of the Federal Circuit in *Gallant Ocean (Thailand) Co. v. United States*,[74] although that decision did little to clarify the distinction between the two requirements. The Federal Circuit recited that an AFA rate must be a reasonably accurate estimate of the respondent's actual rate.[75] The court further explained that "[t]he purpose of an AFA rate is 'to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins.'"[76] The court added that "Congress tempered the deterrent purpose with the corroboration requirement so as 'to prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrence.'"[77] Although the Federal Circuit in *Gallant Ocean* did not distinguish between the legal framework of the two separate requirements, it made findings pursuant to both.

In *Gallant Ocean*, the Federal Circuit struck down Commerce's application of an AFA rate of 57.64%—which was based on an adjusted petition rate from the investigation—to a non-cooperative respondent in an AD administrative review. The court found that dumping margins of 5.91% and 6.82% that were actually imposed on the same products since the initial investigation showed that the adjusted petition rate was "aberrational," "unreasonably high," and "did not represent commercial reality."[78] The court emphasized that the adjusted petition rate was more than ten times higher than the average dumping margin for cooperating respondents, and more than five times higher than the highest rate applied to a cooperating respondent.[79] Thus, the court concluded that Commerce must select secondary information that has some grounding in commercial reality.[80]

The court also ruled that Commerce failed to corroborate the rate

---

73. F. Ili Di Cecco De Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

74. 602 F.3d 1319 (Fed. Cir. 2010).

75. *Id.* at 1323 (quoting *Di Cecco*, 216 F.3d at 1032).

76. *Id.* (quoting *Di Cecco*, 216 F.3d at 1032).

77. *Id.* (quoting *Di Cecco*, 216 F.3d at 1032).

78. *Id.* at 1323-24.

79. *Id.* at 1324.

80. *Id.*

with independent sources reasonably at its disposal.[81] Specifically, the court found that "[b]ecause Commerce did not identify any relationship between the small number of unusually high dumping transactions [of mandatory respondents during the review] with Gallant's actual rate, those transactions cannot corroborate the adjusted petition rate."[82]

In finding a failure to corroborate, the Federal Circuit distinguished its prior rulings in *Ta Chen Stainless Steel Pipe, Inc. v. United States*[83] and *PAM, S.p.A. v. United States*.[84] In *Ta Chen*, the Federal Circuit noted, Commerce tied the AFA rate to an actual sale made by the respondent during the relevant review period. Not only did this provide the requisite substantial evidence to support the rate, but the reliance on primary information meant that *Ta Chen* was not a corroboration case.[85] Furthermore, in *PAM*, Commerce had tied the rate to a portion of PAM's in the previous administrative review that, although small, represented a reasonably accurate estimate of PAM's actual dumping margin.[86] By contrast, in *Gallant Ocean*, Commerce failed to show that a small percentage of transactions provided a reasonably accurate estimate in light of a large body of reliable information suggesting application of a much lower margin.[87]

If the Federal Circuit's decision in *Gallant Ocean* is not responsible for the CIT's prudent shift toward more stringent scrutiny of AFA rates, it will, at the very least, ensure the trend's continuation. Because *Gallant Ocean* explicitly rested on both grounds—the inaccuracy and unrealistic nature of the AFA rate as well as Commerce's failure to corroborate secondary information—it could have an effect on rulings in both contexts. However, many cases will involve one or the other, and the CIT's shift in one regard need not necessarily result in a shift in the other.

As in 2010, there will be cases where there is no suggestion that the application of an AFA rate is unlawful, but Commerce simply has not taken the necessary steps to support the rate selected. For example, in

81. *Id.*

82. *Id.*

83. 298 F.3d 1330 (Fed. Cir. 2002).

84. 582 F.3d 1336 (Fed. Cir. 2009).

85. *See id.*; *see also* 19 U.S.C. § 1677e(c) (2006) (requiring corroboration of *secondary* information relied upon in the application of AFA).

86. *See Gallant Ocean*, 602 F.3d at 1325.

87. *See id.*

Fujian Lianfu Forestry Co. v. United States,[88] the CIT originally sustained the use of total AFA, but remanded the matter "because Commerce had failed to corroborate the rate by tying it to Starcorp (or explaining why it was impractical to do so)."[89] On remand, Commerce tied the AFA rate to Starcorp's model-specific margins in the investigation, demonstrating that the AFA rate falls within the range of Starcorp's actual margins in a previous segment of the proceeding.[90] Accordingly, relying on the decisions of the Federal Circuit in *Ta Chen Stainless Steel Pipe, Inc. v. United States*[91] and *PAM, S.p.A. v. United States*,[92] the CIT sustained the remand determination.[93]

Other cases will implicate the CIT's increased scrutiny of the selected AFA rates that may be unfairly punitive. For example, similar to *Since Hardware*, in *Qingdao Taifa Group Co. v. United States (Taifa I)*,[94] the CIT ruled that Commerce could apply AFA to all of the facts relevant to Taifa's sales and factors of production, but could not apply AFA to conclude that Taifa was government-controlled.[95] On remand, Commerce found that Taifa was not government-controlled and therefore was entitled to a separate rate. Commerce determined that separate AFA rate to be 227.73%.[96] The CIT in *Taifa II* ruled that Commerce misconstrued the CIT's remand order by shifting the burden to itself to show that Taifa was government-controlled, instead of considering whether Taifa had met its burden of demonstrating the absence of government-control.[97] Accordingly, the CIT did not address the separate rate of 227.73% assigned to Taifa.[98] In the second remand determination, the CIT found that Commerce had failed to adequately explain its decision regarding Taifa's separate rate status and again remanded the matter for Commerce's consideration.[99]

---

88. 700 F. Supp. 2d 1361 (Ct. Int'l Trade 2010).

89. *Id.* at 1362. The opinion remanding the original appeal can be found at *Fujian Lianfu Forestry Co. v. United States*, 638 F. Supp. 2d 1325 (Ct. Int'l Trade 2009).

90. *Fujian Lianfu*, 700 F. Supp. 2d at 1362-63.

91. 298 F.3d 1330 (Fed. Cir. 2002).

92. 582 F.3d 1336 (Fed. Cir. 2009).

93. *See Fujian Lianfu*, 700 F. Supp. 2d at 1362-63.

94. 637 F. Supp. 2d 1231 (Ct. Int'l Trade 2009).

95. *See id.* at 1238-40.

96. Qingdao Taifa Grp. Co. v. United States (*Taifa II*), 710 F. Supp. 2d 1352 (Ct. Int'l Trade 2010).

97. *Id.* at 1355.

98. *Id.* at 1358.

99. *See* Qingdao Taifa Grp. Co. v. United States (*Taifa III*), 760 F. Supp. 2d 1379, 1385 (Ct. Int'l Trade 2010).

However, in an attempt to avoid yet another remand, the court addressed the 227.73% separate rate determined by Commerce in its first remand determination. The court indicated that "[b]ased on the results of the investigation and reviews cited by the parties, the court doubts that this AFA rate reflects reality."[100] The rate was not an actual rate derived from an overall rate calculated for anyone by anyone, but rather, unlike a petition rate, was for a portion of Taifa's sales.[101] The court recognized that a portion of sales are sometimes used to corroborate an overall rate, but suggested that when rates are in multiples of 100%, one might assume that a bit more corroboration or record support is warranted.[102] The court stressed that Commerce should calculate a supported rate, "particularly one grounded in the realities of this industry," to avoid the imposition of a punitive rate.[103] Thus, although couched to some degree in the language of corroboration, the *Taifa* court's ruling seems to strike at the heart of the requirement that AFA rates be accurate and not punitive.

It is these decisions regarding the preclusion of punitive AFA rates where the evidence of a shift in the CIT's approach is most compelling and most important. To be sure, instances of unfairly punitive AFA rates will often violate the corroboration requirement as well. An AFA rate that is not based in reality is necessarily uncorroborated because no information, whether at Commerce's disposal or not, can reliably support the accuracy of an inaccurate rate.[104] Thus, in some cases, as in *Gallant Ocean*, both requirements may be implicated.[105] But the increased scrutiny of very high AFA rates has more far-reaching consequences for Commerce's ability to apply AFA in future cases.

The distinction between the two requirements, and the relative importance of recent decisions in each context, can perhaps best be seen in the CIT's rulings in *Shandong Machinery Import & Export Co. v. United States (Shandong II)*.[106] In Commerce's original determination in the AD administrative review, Commerce assigned as AFA a PRC-wide

100. *Id.* at 1386.

101. *Id.*

102. *Id.* at 1386 & n.7.

103. *Id.* at 1386.

104. *See* 19 C.F.R. § 351.308(d) (2011) (stating Commerce must examine whether the secondary information to be used has probative value); Ferro Union, Inc. v. United States, 23 Ct. Int'l Trade 178, 202 (1999) (stating that probative value means that the rate must be both reliable and relevant).

105. Of course, in other cases, the corroboration requirement may not apply, for instance, when the AFA rate relies on primary information collected during the current proceeding.

106. 32 I.T.R.D. (BNA) 1806 (Ct. Int'l Trade 2010).

rate of 45.52%, which was the rate calculated as the best information available[107] during the original investigation in 1991.[108] The CIT noted that Commerce used information submitted by the petitioner that was not corroborated instead of using verified information.[109] Accordingly, the court ruled that the 45.52% rate was not reliable, and instructed Commerce to assign a different rate that has been corroborated according to its reliability and relevance to the country-wide entity as a whole.[110]

On remand, Commerce applied a new PRC-wide rate of 109.16% based on a single transaction of the plaintiff during the 2004–2005 administrative review. In *Shandong II*, the CIT ruled that "the selected rate [wa]s aberrational and punitive."[111] The court found it significant that Commerce had previously found the 45.52% rate sufficient to fulfill the goal of ensuring compliance.[112] If a rate of 45.52% could serve this purpose, the court reasoned, "then a rate of over twice as much must necessarily be punitive."[113]

The court thus remanded the matter again for Commerce to determine a non-punitive PRC-wide rate.[114] The court further instructed that if Commerce can corroborate the 45.52% rate, then it may do so on remand.[115] Commerce did just that, and the CIT eventually affirmed Commerce's second remand determination.[116]

The *Shandong* case demonstrates the distinction between an AFA rate being punitive, which the CIT found the 109.16% rate to be, and an AFA rate being uncorroborated, which the CIT found the 45.52% to be originally, but later found to be corroborated following the second remand. It also demonstrates why decisions regarding punitive rates have greater implications for Commerce's future use of AFA. In *Shandong*, the remand for failure to corroborate the AFA rate ultimately resulted in the same rate being applied after Commerce did more to explain and substantiate it. *Fujian Lianfu* ended with essentially the same result.

107. Best information available ("BIA") is the predecessor to AFA.
108. *Shandong II,* 32 I.T.R.D. (BNA) 1807.
109. *Id.* at 1807-08.
110. *Id.* at 1808.
111. *Id.* at 1809.
112. *Id.* at 1810.
113. *Id.*
114. *Id.*
115. *Id.*
116. *See* Shandong Mach. Imp. & Exp. Co. v. United States, No. 07–00355, 2011 WL 1584024 (Ct. Int'l Trade Apr. 26, 2011).

This is not to suggest that corroboration decisions are always without consequence. In *Changzhou Wujin Fine Chemical Factory Co. v. United States*,[117] the CIT had originally ordered Commerce to reconsider whether it had corroborated the AFA rate it used to calculate a separate rate. On remand, Commerce determined that it could not corroborate the original AFA rate and, consequently, calculated a revised AFA rate based upon information obtained during the investigation.[118] Thus, the court's emphasis on this statutory requirement resulted in Commerce having to select a new AFA rate. Nevertheless, even if the CIT has become more vigilant in enforcing the corroboration requirement despite no evidence that the rate is punitive or unrealistic, the practical effect in many instances will simply be that Commerce must provide a more detailed explanation of its selected rate.

By contrast, heightened scrutiny of unusually high AFA rates may force Commerce to revise its approach to how such rates are assigned. Findings that AFA rates are excessive cannot be cured by more detailed explanation; they will necessarily result in lower AFA rates. As the CIT's shift in this regard mirrors the Federal Circuit's ruling in *Gallant Ocean*, this remains an important area to monitor in the near future.

III. The *GPX* Cases—Can Commerce have its Cake and Eat it Too?

One of the most important trade remedies issues to develop over the past decade is the issue of whether the U.S. Department of Commerce acted lawfully in deciding to impose both CVD's and non-market economy antidumping duties on Chinese goods imported into the United States. In 2007, Commerce reversed its two-decade long practice that the U.S. CVD law did not apply to NMEs, including China. In a fundamental change of policy, Commerce decided to begin applying the CVD law to China in *Coated Free Sheet Paper from the People's Republic of China*.[119] Commerce's simultaneous imposition of both CVD and NME AD remedies against Chinese exports to the United States has led to significant and protracted litigation at both the World Trade Organization and the CIT. The CIT litigation culminated in a remand determination affirmed by the court in *GPX International Tire Corp. v. United*

117. 32 I.T.R.D. (BNA) 1789 (Ct. Int'l Trade 2010).

118. *Id.*; *see also* 19 U.S.C. § 1677e(c) (2006) (requiring corroboration of *secondary* information relied upon in the application of AFA).

119. 72 Fed. Reg. 60,645 (Dep't of Commerce Oct. 25, 2007) (final affirmative countervailing duty determination).

States[120] on October 1, 2010 that is now on appeal before the Federal Circuit.

Since Commerce changed its policy, the agency has imposed twenty-one CVD orders.[121] Four more countervailing duty investigations were pending at the time of this article's writing.[122] The question of whether CVD remedies can lawfully be applied to Chinese imports while China remains subject to NME methodologies in simultaneous antidumping proceedings involving the identical products is therefore of critical importance to participants on both sides of the border as it will impact the scope of trade remedies available to petitioners now and in the future.

A. GPX *Appeal Background*

The lead CIT case regarding Commerce's decision to impose both NME AD and CVD remedies against Chinese exports to the United States is *GPX International Tire Corp. v. United States*. The underlying antidumping and countervailing duty investigations concerned more than $600 million of Chinese exports of off-the-road tires (OTR Tires) to the U.S. market. Commerce concluded in its OTR Tires final antidumping and countervailing duty determinations that, following its precedent in *CFS Paper from China*, Commerce could lawfully impose both countervailing duties and NME antidumping duties against Chinese exports. Chinese producers and exporters of OTR Tires, GPX International Tire (GPX) and Tianjin United Tire & Rubber International Co., Ltd. (TUTRIC), appealed Commerce's final determinations to the CIT.[123]

---

120. No. 08-00285, 2010 WL 3835022 (Ct. Int'l Trade Oct. 1, 2010).

121. CVD orders have been imposed on light-walled rectangular pipe and tube, laminated woven sacks, sodium nitrite, off-the-road tires, raw flexible magnets, lightweight thermal paper, circular welded steel pipe, stainless steel pressure pipe, citric acid, lawn groomers, kitchen appliance shelving racks, oil country tubular goods, prestressed concrete wire strand, potassium phosphate salts, steel grating, narrow woven ribbons with selvedge, magnesia carbon bricks, seamless steel pipe, coated paper, drill pipe, and aluminum extrusions. *See Import Injury*, U.S. INT'L TRADE COMM'N, http://www.usitc.gov/trade_remedy/ (last visited Sept. 26, 2011).

122. Those cases involve certain multilayered wood flooring, steel wheels, galvanized steel wire, and high pressure cylinders. *See Trade Remedy Investigations – Active Investigations*, U.S. INT'L TRADE COMM'N, http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/active/index.htm (last visited July 21, 2011).

123. The *GPX* litigation also deals with certain other important issues, aside from "double counting." These issues are not addressed herein.

B. GPX *Initial Decision*

The *GPX* appeal was assigned to then-CIT Chief Judge Restani. The primary argument raised by the appellants was that the Federal Circuit's decision in *Georgetown Steel Corp. v. United States*[124] precluded Commerce from imposing both AD NME and CVD remedies on Chinese exports to the United States. Appellants asserted that the Federal Circuit had held that the U.S. CVD law could not be applied to NMEs and specifically had found that Commerce itself had stated (in earlier CVD final determinations) that the CVD provisions are "inapplicable to nonmarket economies."[125] The United States disagreed with appellants' claims, arguing that the U.S. trade remedy laws must be interpreted and analyzed separately, and that Congress had provided ample authority for Commerce to impose both CVD and NME AD remedies on Chinese exports (the United States similarly argued at the WTO that the Agreement on Subsidies and Countervailing Measures and the Anti-dumping Agreement permit the imposition of both remedies). The United States further contended that the U.S. CVD law (19 U.S.C. § 1671) required the application of countervailing duties to Chinese exports if Commerce determines that a country (i.e., China) is providing a countervailable subsidy.

Chief Judge Restani issued her initial decision, *GPX International Tire Corp. v. United States (GPX I)*,[126] on Commerce's new CVD/NME AD practices on September 18, 2009. The court found that Commerce's change of practice—applying the CVD law to Chinese exports while categorizing China as an NME for antidumping purposes—was unreasonable because it resulted in "double counting."[127] Chief Judge Restani explained that if Commerce were to apply CVD remedies to the same merchandise on which the agency also applied its NME methodologies in an AD proceeding, its actions would be serving the same (duplicative) purpose because "the AD and CVD law when applied to NME countries both work to correct government distortion of market prices."[128] Accordingly, the court found that Commerce "must adopt additional policies and procedures for its NME AD and CVD methodologies to account for the imposition of the CVD law to products from

---

124. 801 F.2d 1308 (Fed. Cir. 1986).

125. *See id.* at 1310 (citing Commerce's 1984 final countervailing duty determinations in the carbon steel wire rod from Czechoslovakia and from Poland investigations).

126. 645 F. Supp. 2d 1231 (Ct. Int'l Trade 2009).

127. *See id.* at 1234, 1251.

128. *Id.* at 1240.

an NME country and avoid to the extent possible double counting of duties."[129] Viewing Commerce's actions in the starkest terms, Chief Judge Restani stated that:

> Commerce has a choice. The unfair trade statutes, as *Georgetown Steel* recognized, give Commerce the discretion not to impose CVDs as long as it is using the NME AD methodology. Thus, Commerce reasonably can do all of its remedying though the NME AD statute, as it likely accounts for any competitive advantages the exporter received that are measurable. If Commerce now seeks to impose CVD remedies on the products of NME countries as well, Commerce must apply methodologies that make such parallel remedies reasonable, including methodologies that will make it unlikely that double counting will occur.[130]

The CIT's initial *GPX I* decision thus represented a substantial victory for the plaintiffs. Moreover, the court's analysis of the relevant legal issues disagreed in principal part with the United States' and Commerce's contention that the U.S. countervailing duty law and the U.S. antidumping duty law must be considered entirely separate. Rather, the court considered the combined effects of Commerce's antidumping and countervailing determinations on imports of OTR Tires from China to find that there was "double counting of duties." As a result of the court's holding, Commerce's antidumping and countervailing final determinations were remanded for further consideration.

In one important aspect, however, Chief Judge Restani did not side with plaintiffs' claims. That is, the court disagreed with plaintiffs that the U.S. trade remedy statutes and the Federal Circuit's *Georgetown Steel* decision categorically precluded Commerce from simultaneously imposing CVDs and its NME AD methodologies. The court further found that it could not "say from the statutory language alone that Commerce does not have the authority to impose CVDs on products" from a country designated as an NME for AD purposes.[131] The court instead, as described above, determined that Commerce's approach to applying both remedies in the context of the *OTR Tires* antidumping and countervailing duty investigations was "unreasonable" and thus could

---

129. *Id.* at 1234-35.
130. *Id.* at 1243.
131. *Id.* at 1239.

not be upheld.[132] The court invited Commerce on remand to reconcile its approach to Chinese exports in trade remedy proceedings.

C. *Commerce's First Remand Decision and Second CIT Decision*

The Commerce strongly protested Chief Judge Restani's legal conclusions in *GPX* in its April 26, 2010 remand decision. In particular, Commerce disagreed with the court's specific finding that "there is a high potential for double remedies from the concurrent application of the NME AD methodology and our CVD methodology [in the OTR Tires investigations], such that additional policies or procedures are necessary to 'adapt' the two methodologies."[133] Commerce thus complied with the court's order, "under protest," and "decided to continue to impose CVD remedies on imports" of OTR Tires from China. Commerce also elected to offset the CVD remedy against the exporting parties' calculated NME AD margins.[134]

On August 4, 2010, Chief Judge Restani issued *GPX International Tire Corp. v. United States* (*GPX II*),[135] providing a firm rebuke to Commerce. First, the court noted that, in accordance with its NME AD methodology, Commerce "compares a subsidy-free constructed normal value (essentially using information from surrogate countries) with the original subsidized export price to calculate the AD margin."[136] The court then reasserted that this methodology, in conjunction with Commerce's application of countervailing duties to Chinese exports, "result[s] in a high likelihood of double counting because they effectively counteract the same behavior twice."[137] The court further expressed concern that Commerce "stubbornly adheres to the position that it does not have the discretion" to refrain from applying CVDs to Chinese imports of OTR Tires, stating that Commerce's interpretation of the CVD law "is misguided."[138] Second, the court clarified that Commerce's remand solution to the "double remedy" problem created by its change in practice—i.e., to offset the CVD remedy against the exporting parties' calculated NME AD margins—did not adequately

132. *Id.* at 1234.

133. *See* DEP'T OF COMMERCE, CERTAIN NEW PNEUMATIC OFF-THE-ROAD TIRES FROM THE PEOPLE'S REPUBLIC OF CHINA: FINAL RESULTS OF REDETERMINATION PURSUANT TO REMAND 2 (Apr. 26, 2010) *available at* http://ia.ita.doc.gov/remands/09-103.pdf (last visited Sept. 26, 2011).

134. *See id.*

135. 715 F. Supp. 2d 1337 (Ct. Int'l Trade 2010).

136. *Id.* at 1345 (quoting *GPX I,* 645 F. Supp. 2d at 1241).

137. *Id.*

138. *Id.*

address the legal and practical difficulties the court had identified in *GPX I*. Specifically, the court explained that Commerce's proposal is inconsistent with 19 U.S.C. § 1677a and "is also unreasonable due to the expense associated with conducting an additional investigation that is essentially *useless*."[139]

Chief Judge Restani thus left Commerce with little discretion to determine how to act on remand. The court asserted:

> Commerce must *forego* the imposition of the countervailing duty law on the nonmarket economy ("NME") products before the court because its actions on remand clearly demonstrate its inability, at this time, to use improved methodologies to determine whether, and to what degree double counting occurs when NME antidumping remedies are imposed on the same good, or to otherwise comply with the unfair trade statutes in this regard.[140]

Chief Judge Restani then remanded the case back to Commerce to forego the imposition of the CVD law on certain Chinese exports.

D. *Commerce's Second Remand Decision and Final CIT Decision*

On September 3, 2010, Commerce issued its second *GPX* remand redetermination in order to comply with the court's second decision. Once again, Commerce voiced its strong disagreement with Chief Judge Restani's findings:

> At the outset, the [Commerce] Department notes that it respectfully disagrees with much of the Court's opinions in *GPX I* and *GPX II* regarding the concurrent application of the AD and CVD laws in non-market economy ("NME") countries. In particular, we disagree that there is a high potential for double remedies from the concurrent application of the NME AD methodology and our CVD methodology in this case. We disagree with the Court's conclusion that the Department "is not statutorily required to apply CVD law under 19 U.S.C. § 1671." We further disagree that the statute necessitates the "coordination" of concurrent antidumping and countervailing duties. As a result, we do not agree that the Department must

139. *Id.* (emphasis added).

140. *Id.* at 1341-42 (emphasis added).

> forego application of the CVD law to Starbright and TUTRIC until we develop new methodologies to determine whether, and to what extent, "double counting" occurs when we concurrently apply the CVD law and the NME AD methodology.[141]

In addition, Commerce excluded, under protest and consistent with the court's second decision, both GPX and TUTRIC from the OTR Tires CVD order.[142] Following review of Commerce's second remand determination, in an October 1, 2010 opinion, *GPX International Tire Corp. v. United States* (*GPX III*),[143] the court concluded that Commerce had complied with its order to forgo the imposition of countervailing duties on countries Commerce designates as NMEs. This decision has since been appealed.

Although the *GPX* decisions represent a significant victory for Chinese respondents, uncertainty remains regarding how Commerce will proceed in AD/CVD proceedings involving Chinese exports. In fact, consistent with agency practice in similar situations, Commerce has steadfastly refused to change its AD/CVD methodologies in subsequent investigations and administrative reviews involving Chinese exports until the final resolution of *GPX* in the Federal Circuit. Commerce's refusal to act in conformity with the CIT's decisions while *GPX* remains pending on appeal has impacted billions of dollars in subsequent Chinese exports to the United States and spawned numerous additional CIT appeals challenging Commerce's application of CVD law on similar grounds.

IV. DO *TWOMBLY* AND *IQBAL* MATTER?

A third, and final area addressed in this article is what has turned out to be an absence of any material impact on the CIT's jurisprudence as a result of the Supreme Court's 2007 decisions in *Bell Atlantic Corp. v. Twombly*[144] and *Ashcroft v. Iqbal.*[145] The *Twombly* and *Iqbal* decisions addressed the sufficiency of notice pleadings. Rule 8(a) of the Rules of the U.S. Court of International Trade provides that a complaint shall contain "a short and plain statement of the claim showing that the

141. *See* DEP'T OF COMMERCE, *supra* note 33, at 2-3.

142. *See id.* at 3.

143. No. 08-00285, 2010 WL 3835022, at *2 (Ct. Int'l Trade Oct. 1, 2010).

144. Bell Atlantic Corp. v. Twombley, 550 U.S. 544, 545 (2007).

145. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

[plaintiff] is entitled to relief."[146] Although a complaint need not contain detailed factual allegations, the Supreme Court in *Twombly* and *Iqbal* clarified that "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the complaint's allegations are true."[147] Practitioners have been closely watching the impact of *Twombly* and *Iqbal* as implemented by the district courts, and the Court of International Trade, to determine whether it signals a stricter requirement of specificity and support in complaints.

The track record for application of *Twombly* and *Iqbal* in the CIT is sparse. During 2010, only twelve of the CIT's 142 opinions even referenced the cases. Nonetheless, there is evidence that CIT judges are applying that precedent by imposing perceptibly stricter pleading requirements. The most recent example of this is the CIT's opinion in *NTN Corp. v. United States*.[148] At issue was a motion filed by plaintiff-intervenors seeking an injunction. The CIT denied the injunction motion based upon plaintiff-intervenor's failure to show a likelihood of success on the merits. The plaintiffs challenging a Commerce antidumping duty administrative review determination were asserting three claims, the third of which stated broadly:

> [b]ased on information and belief, NTN alleges that the ITA [or International Trade Administration] may have made other programming, clerical, or methodological errors, including errors that can only be determined by reference to the confidential administrative record. The administrative record has not been filed with this Court, and, therefore, NTN has not yet been able to review it.[149]

In rejecting the injunction motion, the court, referring specifically to *Twombly,* observed that "plaintiff-intervenors are seeking to intervene in support of a claim that is based only upon speculation that something contrary to law may have happened."[150] The motion was denied for lack of a showing of a likelihood of success on the merits.

Another 2010 CIT case invoking the *Twombly/Iqbal* standard is *FAG*

146. U.S. CT. INT'L TRADE R. 8(a)(2) (2010).

147. *Twombly,* 550 U.S. at 545; *see also Iqbal,* 129 S. Ct. at 1949-50.

148. 744 F. Supp. 2d 1370 (Ct. Int'l Trade 2010).

149. *Id.* at 1376.

150. *Id.*

Holding Corp. v. United States.[151] The plaintiff in *FAG Holding* challenged U.S. Customs and Border Protection's liquidation of two entries with assessed antidumping duties claiming that the entries in question had liquidated by operation of law prior to the purported CBP liquidations. The government defendant moved to dismiss the claim under Rule 12(b)(5) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted. Reviewing the face of the complaint, the CIT agreed with the defendant and granted the motion to dismiss. The court observed that the entries at issue were entered under special procedures for "immediate delivery" and that corresponding CBP regulations specify that the date of entry for imports under immediate delivery procedures is the date of filing of the entry summary, not the date of release as is normally the case.[152] Based on this reading, the entries at issue did not liquidate by operation of law prior to CBP's liquidation actions:

> While all of the factual allegations in a complaint are taken as true in a motion to dismiss, any "[t]hreadbare recitals of the elements of a cause of action supported by mere conclusory statements do not suffice." Plaintiff's assertion that the dates of entry are April 20 and 21, 1992, is not a fact in dispute, but instead is a "legal conclusion" that, as such, is not entitled to the presumption of truth.
>
> The Court's ultimate task is to determine whether Plaintiff is entitled to offer evidence in support of its claim—not whether Plaintiff will prevail on the merits . . . . As a matter of law, there is no "reasonable expectation" that discovery will reveal anything and thus the pleadings do not provide a basis to infer that Plaintiff can plausibly prove its claim in subsequent stages of litigation . . . . A deficient claim should be "exposed at the point of minimum."[153]

Another possibly more striking example of the application of the *Twombly/Iqbal* standard is found in the holding of *United States v. Callanish.*[154] This case involved a suit brought by the United States to recover a civil penalty under Section 592 of the Tariff Act of 1930, as

151. 744 F. Supp. 2d. 1353 (Ct. Int'l Trade 2010).

152. *See id.* at 1357-58 (citing 19 C.F.R. § 141.68 (2009)).

153. *Id.* at 1358-59 (citations omitted).

154. 32 I.T.R.D. (BNA) 2145, (Ct. Int'l Trade 2010).

amended.[155] The defendant failed to appear in person or through counsel and the court clerk therefore entered a default. The government thereupon applied for a judgment by default against the defendant in the amount of $17.735 million. While the court upheld the entry of a default judgment, the court did not accept that the government was entitled to the relief requested. Apparently relying on the *Twombly/Iqbal* standard, the court observed that:

> The amended complaint seeks a penalty of $17,734,926, which plaintiff alleges to be the domestic value of the fifty-two consumption entries of EPO that it alleges to have been fraudulently imported in violation of the statute. Am. Compl. ¶ 93. The complaint lacks any well-pled fact concerning the domestic value of the merchandise or how that value was determined. Plaintiff provides only the conclusory statement of the domestic value of the imported EPO. The mere allegation of an amount offered as the "domestic value," absent anything more, does not constitute a well-pled fact. *See Dudnikov v. Chalk & Vermilion Fine Arts, Inc.,* 514 F.3d 1063, 1070 (10th Cir.2008) (defining well-pled facts as those that are "plausible, non-conclusory, and non-speculative" (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007) (emphasis added))). Absent such a well-pled fact, the court is unable to enter a judgment by default in this case, and plaintiff's application must be denied. The court will allow plaintiff the opportunity to move for leave to amend its complaint.[156]

United States v. Pressman-Guttman Co.[157] similarly involved a suit brought by the United States to recover liquidated damages on an import bond for a defendant importer's alleged failure to timely redeliver merchandise. The court similarly scrutinized the government's complaint and concluded from the facts asserted therein that the CBP request for redelivery was untimely. On the basis of this analysis, the court dismissed the government's complaint noting that "[i]n the instant case, the nuances of *Iqbal* and *Twombly* are purely academic. As detailed below, whether considered under *Iqbal, Twombly*, or any other standard, it is not just implausible that the government

155. 19 U.S.C. § 1592 (2006).

156. *Callanish,* 32 I.T.R.D. (BNA) 2148.

157. 721 F. Supp. 2d 1333 (Ct. Int'l Trade 2010).

could prevail in this case; it is impossible."[158]

It is difficult to discern from these cases whether the *Twombly/Iqbal* standard has in fact raised the bar to any significant degree in terms of the level of specificity and support required in a complaint to withstand a motion to dismiss. As the CIT observed in *Pressman-Guttman*, the CIT would likely have reached the same result whether or not it applied the "nuances" of *Iqbal* and *Twombly* because the complaints at issue, even construing all of the facts alleged therein as true, simply did not support a ruling in the plaintiffs' favor. That said, it is still relatively early in the jurisprudence under *Twombly*, and it is also possible that the limited examples of its decisive application may reflect a concomitant enhancement of the quality of complaints as practitioners face the uncertainty of its application.

V. Conclusion

The year 2010 has provided a rich array of opinions from the U.S. Court of International Trade in a wide range of substantive and procedural areas arising from the international trade laws. As in the past, the weight of opinions has been in the trade remedies area, with particularly noteworthy developments in the area of "facts available" and the Commerce Department's controversial decision to apply countervailing duty law to NME countries. To a lesser extent, litigation before the CIT is also experiencing the impact of *Twombly* and *Iqbal*. These developments will be closely monitored in the future as the U.S. Court of Appeals for the Federal Circuit is called upon to review those opinions, and as the CIT continues to develop its jurisprudence in these areas.

158. *Id.* at 1338.