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# THE *NIPPON* QUAGMIRE: ARTICLE III COURTS AND FINALITY OF UNITED STATES COURT OF INTERNATIONAL TRADE DECISIONS

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The jurisdiction of the United States Court of International Trade (“CIT”), an Article III court with national jurisdiction,<sup>1</sup> extends to various challenges to governmental decisions involving imports.<sup>2</sup> In recent decades, most of the CIT’s work has involved review of decisions of the International Trade Commission (“ITC”) and the United States Department of Commerce (“Commerce”) in unfair trade cases.<sup>3</sup> Judicial review of such decisions is provided under 19 U.S.C. § 1516(a), and jurisdiction over such review is found in 28 U.S.C. § 1581(c). Various decisions of the Court of Appeals for the Federal Circuit (“CAFC”), to which decisions of the CIT may be appealed,<sup>4</sup> have raised the issue of whether the CIT is authorized to give complete relief through reversal of agency unfair trade decisions. This Article resolves that issue by concluding that the relief available in unfair trade cases is essentially the same as that permitted under the Administrative Procedure Act (“APA”) for reviews on the agency record,<sup>5</sup> and that agency decisions may be reversed if contrary to law and when the record will support only one result. Furthermore, as an Article III court, the CIT is empowered by the U.S. Constitution to issue final decisions subject only to appeal to higher courts. This Article discusses both statutory and constitutional law underlying these conclusions, as well as various decisions that have otherwise impeded efficient and effective final court relief.

The problem is easiest to understand in the context of ITC injury determinations, which gave rise to the CAFC decisions of

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1. 28 U.S.C. §§ 251, 1581 (2012).

2. 28 U.S.C. § 1581 (2012).

3. See generally 19 U.S.C. § 1671 (2012) (regarding countervailing of subsidies); 19 U.S.C. § 1673 (2012) (regarding antidumping duties).

4. 28 U.S.C. § 1295(a)(5) (2012).

5. See 5 U.S.C. § 706(2) (2012).

most concern here. Injury, except in very unusual circumstances, is a prerequisite to duties to offset the effects of unfair trade practices, namely, dumping or subsidization.<sup>6</sup> Only if injury to

6. 19 U.S.C. § 1671(a) (2012) provides:

General Rule

If—

(1) the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and

(2) in the case of merchandise imported from a Subsidies Agreement country, the Commission determines that—

(A) an industry in the United States—  
 (i) is materially injured, or  
 (ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy . . .

19 U.S.C. § 1673 (2012) provides:

If—

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

(A) an industry in the United States—  
 (i) is materially injured, or  
 (ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise . . .

a domestic industry is found may dumping or governmental subsidization be remedied through additional duties—that is, duties in addition to ordinary tariffs. Injury determinations are “thumbs up” or “thumbs down.” Either there is injury—including threat of injury—or not.<sup>7</sup> By way of contrast, Commerce calculates through complex methodologies the rates of dumping or governmental subsidization, rates which are to be converted into duty assessments.<sup>8</sup> In most cases where judicial relief is granted, rates change; they do not vanish. Thus, if the reviewing court finds the methodology applied by Commerce wanting, there are complex tasks for the agency to perform.

Some CIT decisions have found the affirmative injury determination in error to the degree that the determination cannot be supported by any reasonable reading of the record. These decisions have been difficult for the CAFC to accept. Why that is so is not a question this Article attempts to answer. In the course of rejecting such results, however, the CAFC has raised the issue, which this Article addresses.

The issue is set forth most clearly in *Nippon Steel Corp. v. United States*,<sup>9</sup> (“*Nippon VI*”), which cites the other cases of immediate concern. The relevant passage is set forth in its entirety:

The United States also argues that the Court of International Trade acted ultra vires in directing the Commission to enter a negative material injury determination, and asserts that [19 U.S.C.] § 1516a does not permit the court to reverse a determination of the Commission, directly or indirectly. We have stated in dicta that “[s]ection 1516a limits the Court of International Trade to affirmances and remand orders; an outright reversal without a remand does not appear to be contemplated by the statute.” *Altix, Inc. v. United States*, 370 F.3d 1108,] 1111 n.2 (Fed. Cir. 2004). However, we implied the opposite in *Atlantic Sugar[, Ltd. v. United States*, 744 F.2d 1556, 1561 (Fed. Cir. 1994)], also in dicta, where we said that if the evidence supporting a material injury determination is “in-

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7. For purposes of this Article we need not distinguish between determinations of injury or threat of injury. Compare 19 U.S.C. § 1677(7)(A)–(C) (2012) (concerning material injury) with § 1677(7)(F) (2012) (concerning threat of material injury).

8. See 19 U.S.C. §§ 1671e(a), 1673e(a) (2012).

9. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006).

substantial, then the reviewing court must either reverse the [Commission]'s determination or remand the case for further fact-finding." Because, here, substantial evidence supports the Commission's original affirmative material injury determination, we need not and do not decide the scope of Court of International Trade authority to reverse under § 1516a. It may well be that, in another situation, the trade court may be faced with a Commission determination that is unsupported by substantial evidence, and for which a remand would be "futile." *Nippon IV*, 350 F. Supp. 2d at 1222. We hold only that this is not the case today.

19 U.S.C. § 1516a(c)(3), innocently enough, provides:

(3) Remand for final disposition

If the final disposition of an action brought under this section is not in harmony with the published determination of the Secretary, the administering authority, or the Commission, the matter shall be remanded to the Secretary, the administering authority, or the Commission, as appropriate, for disposition consistent with the final disposition of the court.

Although this particular paragraph of § 1516a is not cited by the CAFC in *Nippon VI*, it is the only subsection of § 1516a that comes close to the idea expressed that perhaps the CIT can only affirm or remand, but never reverse. Obviously, a straight affirmance requires no action by the agency, but we assert here that anything else—specifically, remand to reconsider, remand to apply a different methodology, or remand to publish a totally different result—requires remand, and the last is effectively a reversal. In other words, 19 U.S.C. § 1516a reflects the procedures required to effectuate dumping and countervailing duties. It is not a provision that prohibits substantive reversals, as the *Nippon VI* court may have implied.

The way unfair trade duties are actually imposed is quite complicated. When ITC and Commerce make preliminary unfair trade determinations, the determination must be published, liquidation<sup>10</sup> of entries by the United States Customs

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10. "[L]iquidation[] [is] long honored in customs procedure as the final reckoning of an importer's liability on an entry. It is defined as 'the final computation or ascertainment of the duties or drawback accruing on an entry.'" *Farrell Lines, Inc. v. United States*, 69 C.C.P.A. 7, 12, 667 F.2d 1017, 1020 (1982) (Markey, C.J., dissenting) (quoting 19 C.F.R. § 159.1 (2014)); *accord* *Travenol Labs., Inc. v. United States*, 118 F.3d 749, 753 (Fed. Cir. 1997).

and Border Protection (“Customs”) must be suspended, and cash deposit rates must be calculated and imposed on new entries of merchandise.<sup>11</sup> When a final ITC decision is issued, if Commerce has reached a final determination of dumping or

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11. 19 U.S.C. § 1671b(d) (2012) provides:

If the preliminary determination of the administering authority under subsection (b) of this section is affirmative, the administering authority—

(1)(A) shall—

(i) determine an estimated individual countervailable subsidy rate for each exporter and producer individually investigated, and, in accordance with section 1671d(c)(5) of this title, an estimated all-others rate for all exporters and producers not individually investigated and for new exporters and producers within the meaning of section 1675(a)(2)(B) of this title, or

(ii) if section 1677f-1(e)(2)(B) of this title applies, determine a single estimated country-wide subsidy rate, applicable to all exporters and producers, and

(B) shall order the posting of a cash deposit, bond, or other security, as the administering authority deems appropriate, for each entry of the subject merchandise in an amount based on the estimated individual countervailable subsidy rate, the estimated all-others rate, or the estimated country-wide subsidy rate, whichever is applicable,

(2) shall order the suspension of liquidation of all entries of merchandise subject to the determination which are entered, or withdrawn from warehouse, for consumption on or after the later of—

(A) the date on which notice of the determination is published in the Federal Register, or

(B) the date that is 60 days after the date on which notice of the determination to initiate the investigation is published in the Federal Register, and

(3) shall make available to the Commission all information upon which its determination was based and which the Commission considers relevant to its injury determination, under such procedures as the administering authority and the Commission may establish to prevent disclosure, other than with the consent of the party providing it or under protective order, of any information to which confidential treatment has been given by the administering authority.

The instructions of the administering authority under paragraphs (1) and (2) may not remain in effect for more than 4 months.

The provisions of 19 U.S.C. § 1673b(d), applicable to antidumping duties, provide very similar procedures.

subsidization, Commerce publishes an antidumping or countervailing duty order and instructs Customs to assess the corresponding duties.<sup>12</sup>

*Diamond Sawblades Manufacturers Coalition v. United States*<sup>13</sup> illustrates very well the administrative necessity of a remand to effectuate the court's decision. In that case, the CAFC upheld the CIT decision sustaining a determination after remand by the CIT to the ITC.<sup>14</sup> On remand the ITC switched from a negative to an affirmative injury determination.<sup>15</sup> That switch required the issuance of the actual antidumping duty order by Commerce.<sup>16</sup> The court noted the duty of the ITC to advise Commerce of a final material injury determination under 19 U.S.C. § 1673d(d),<sup>17</sup> and that upon such

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12. 19 U.S.C. § 1671e(a) (2012) provides:

(a) Publication of countervailing duty order

Within 7 days after being notified by the Commission of an affirmative determination under section 1671d(b) of this title, the administering authority shall publish a countervailing duty order which—

(1) directs customs officers to assess a countervailing duty equal to the amount of the net countervailable subsidy determined or estimated to exist, within 6 months after the date on which the administering authority receives satisfactory information upon which the assessment may be based, but in no event later than 12 months after the end of the annual accounting period of the manufacturer or exporter within which the merchandise is entered, or withdrawn from warehouse, for consumption,

(2) includes a description of the subject merchandise, in such detail as the administering authority deems necessary, and

(3) requires the deposit of estimated countervailing duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited.

19 U.S.C. § 1673e(a), applicable to antidumping duties, is similar.

13. *Diamond Sawblades Mfrs. Coal. v. United States*, 626 F.3d 1374 (Fed. Cir. 2010).

14. *Id.* at 1377, 1383.

15. *Id.* at 1377.

16. *See* 19 U.S.C. § 1673e(a) (2012).

17. 19 U.S.C. § 1673d(d) (2012) provides:

advisement Commerce is required to issue the antidumping duty order under 19 U.S.C. § 1673e(a) and to collect duty deposits under 19 U.S.C. § 1673e(a)(3). As the appellate court stated:

Sections 1673d(d) and 1673e(a) apply when the Commission issues a material injury determination, regardless of whether that determination is made in the first instance or on remand, and regardless of whether there is any subsequent judicial review of that determination.<sup>18</sup>

The court held that the ITC was required to notify Commerce as soon as its decision on remand was issued, and Commerce was required to fulfill its statutory duties immediately.<sup>19</sup>

Finally, the court held that the CIT did not abuse its discretion in ordering Commerce to issue the order and to instruct Customs to collect duty deposits.<sup>20</sup> The important point for this Article is that it is the agency's action on remand that triggers the essential parts of the statutory scheme for the imposition of unfair trade remedies. That is why 19 U.S.C. § 1516a(c)(3) refers to matters "remanded."<sup>21</sup> There is no statutory bar to substantive reversal, expressed or implied. It is simply that reversal is accomplished through actions the agency takes pursuant to the court remand. Perhaps this is all that *Nippon VI* meant in suggesting remand might always be necessary in response to error. This interpretation of the statute is fully in accord with and is informed by 19 U.S.C. § 1516a(b)(1), which directs the reviewing court, the CIT, to "hold unlawful any determination, finding, or conclusion found . . . not in accordance with law," or, depending on the type of action, any determination that is arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence.<sup>22</sup>

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Whenever the administering authority or the Commission makes a determination under this section, it shall notify the petitioner, other parties to the investigation, and the other agency of its determination and of the facts and conclusions of law upon which the determination is based, and it shall publish notice of its determination in the Federal Register.

18. *Diamond Sawblades*, 626 F.3d at 1381 (footnote omitted).

19. *Id.* at 1378.

20. *Id.* at 1382–83.

21. 19 U.S.C. § 1516a(c)(3) (2012).

22. 19 U.S.C. § 1516a(b)(1)(A) (2012).



The standards of review for decisions under 19 U.S.C. § 1516a(b) and 5 U.S.C. § 706(2) (APA)<sup>23</sup> are essentially the same. Both require unlawful, arbitrary, and unsupported decisions to be set aside. This is what federal courts do when they exercise the judicial power of the United States in reviewing agency decisions. Anything else would make the statutes hollow promises of judicial review.<sup>24</sup>

Returning to the more common course of events which do not involve reversals, if there is no court affirmance, there will be remands for various purposes, such as to require reassessment under a different interpretation of the law than previously applied by the agency, to rethink methodologies, or to consider previously rejected or ignored evidence. Furthermore, rates often must be recalculated by Commerce for various exporters and producers, and changes to the “all others rate” for companies not individually examined may occur.<sup>25</sup> These are all deci-

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23. 5 U.S.C. § 706(1) refers to compelled agency action. The CIT does not enjoin action under Section 1516a and its corresponding jurisdictional provision, 28 U.S.C. § 1581(c). If such relief is necessary because actions under 28 U.S.C. § 1581(c) provide manifestly inadequate relief, 28 U.S.C. § 1581(i) jurisdiction is available. *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003) ((i) jurisdiction if no other subsection confers jurisdiction or remedy is manifestly inadequate). Thus, together the various trade statutes give the CIT all of the authority found in 5 U.S.C. § 706.

24. Apparently there is considerable controversy as to whether the CAFC should repeat this type of review. *See NSK Corp. v. U.S. Int'l Trade Comm'n*, 542 F. App'x 950, 951 (Fed. Cir. 2013) (nonprecedential). In voting to deny rehearing en banc, five judges observed that “The pertinent review provisions of the trade statutes track the APA. At the time it enacted those statutes, Congress expressed a desire that agency review by the Court of International Trade and this court would be modeled on APA review.” *Id.* at 953.

While not disputing this particular point as to CIT review, three judges voted for rehearing en banc to consider whether review in the CAFC of the CIT's APA type review should be more limited, giving enhanced deference to CIT decisions. *See id.* at 955-62 (Wallach, J., dissenting).

25. 19 U.S.C. § 1673b(d) states:

If the preliminary determination of the administering authority under subsection (b) of this section is affirmative, the administering authority—

(1)(A) shall—

(i) determine an estimated weighted average dumping margin for each exporter and producer individually investigated, and

sions that may be challenged anew. These matters are the results of substantive remands to reconsider or explain, not remands to effectuate a reversal. It is the latter type of remand that confronted the court in *Nippon VI*.

The finality problem discussed here likely is caused in part by the Court of Appeals' rejection of attempts by the United States to appeal remand orders that seem effectively to dispose of the case. While the CAFC has never really resolved whether reversals of ITC injury determinations are appealable, as indicated in *Nippon VI*, or even whether remands ordering reversal of ITC determinations are appealable, it has specifically rejected appeals of remand orders to Commerce.<sup>26</sup> In both *Badger-Powhatan v. United States* and *Cabot Corp. v. United States*, the appellate court concluded that it lacked appellate jurisdiction because the CIT's remand orders were not "final judgments," nor were they appealable collateral orders or appealable under any other exception to the final judgment rule.<sup>27</sup> Because these two cases seem to involve remand orders most like final judgments, it is fair to assume that there are no other types of remand orders issued by the CIT to Commerce pursuant to 28 U.S.C. § 1581(c) jurisdiction that will pass appellate jurisdictional muster under CAFC precedent.

We cannot fault the appellate court for not accepting these particular remands as collateral orders of the type found appealable in *Cohen v. Beneficial Industrial Loan Corp.*<sup>28</sup> After all, these remand orders resolved the central issue in the case. But the principle set forth in *Gillespie v. United States Steel*

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(ii) determine, in accordance with section 1673d(c)(5) of this title, an estimated all-others rate for all exporters and producers not individually investigated, . . . .

26. See, e.g., *Badger-Powhatan v. United States*, 808 F.2d 823 (Fed. Cir. 1986) (involving authority to amend antidumping duty order to conform to revised ITC injury determination); *Cabot Corp. v. United States*, 788 F.2d 1539 (Fed. Cir. 1986) (involving what constitutes a bounty or grant for countervailing duty law).

27. *Badger-Powhatan*, 808 F.2d at 825-26; *Cabot Corp.*, 788 F.2d at 1543.

28. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47, 552 (1949) (dealing with a state law claim for security for expenses of a potentially successful defendant in a stockholder derivative action. The Court was concerned that without a right to appeal the collateral order regarding security, the right conferred by the state statute at issue would be lost by the time the main action was resolved).

*Corp.*,<sup>29</sup> that finality is not a fixed concept and an appellate court should determine if the order appealed from essentially decides the case, does not seem to function in the area of concern here.<sup>30</sup> Principles of fundamental fairness and preservation of rights in a more than technical sense deserve some consideration. It is true that in many, if not most, cases there is room for something to occur on remand that will require further resolution by the CIT so that immediate appeal is not appropriate; this, however, is not true of every remand to Commerce, just as it is not true of every remand to the ITC. The result is that even when great expense and effort could be avoided by resolving the case at the appellate level immediately, the agency is faced with complying with a “non-final” remand. The remand results in a new draft determination, comments thereon, and then a “final” remand determination. The inability of the agency to obtain review of these “almost final” decisions may be one reason why the agencies often seem reluctant to comply fully with CIT remand orders, and why multiple remands are required to get to a stage where the CIT can approve the remand results.<sup>31</sup> Once the CIT approves the remand results, a judgment that is acceptably final for the CAFC appellate jurisdiction is entered. This lack of immediate appellate access is also somewhat hazardous for the agency, because when it finally does comply to the CIT’s satisfaction, it must

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29. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 149–155 (1964), involved a wrongful death action in which the district court restricted plaintiff’s claim to its Jones Act cause of action. The Supreme Court permitted the challenge to the pretrial dismissal of state law and unseaworthiness claims to go forward because, inter alia, the question presented was “fundamental to the further conduct of the case.” *Id.* at 154.

30. An efficient road to the conclusion of an unfair trade case is particularly important because in most cases no changes occur at the agency until there is a *conclusive*, not simply an appealable, final order. See *Timken Co. v. United States*, 893 F.2d 337, 339–40 (concluding that “final court decision” in 19 U.S.C. § 1516a(e) means a “conclusive” decision in the action). Essentially, if the government agency loses, it obtains an automatic stay pending appeal of its duty to publish a new effective determination.

31. Besides the saga represented by *Nippon Steel Corp. v. United States (Nippon VI)*, 458 F.3d 1345 (Fed. Cir. 2006), various other cases illustrate the problem of multiple remands. See, e.g., *Hontex Enters. v. United States*, 425 F. Supp. 2d 1315, 1319 (Ct. Int’l Trade 2006) (on fourth go-round, sufficient finality for appeal of Commerce determination achieved); *Elkem Metals Co. v. United States*, 2008 WL 4097463 (Ct. Int’l Trade Sept. 5, 2008) (on fifth go-round, ITC determination achieved sufficient finality for appeal).

take care to make clear that it is only complying under compulsion. If it is seen to acquiesce, presumably the appellate court would find no controversy to resolve.<sup>32</sup>

It is difficult to get out of this loop, but not impossible. First, in order to get the CIT to enter a remand order as a final judgment, the government, upon a decision not in its favor, would have to seek the kind of remand order that directs a result—a result that resolves the case. As indicated, this has not helped Commerce bypass potentially futile remand proceedings in the past. The ITC also would not seek the entry of such an order because apparently it confuses procedural remand with substantive reversal via remand.<sup>33</sup> If such a remand order or judgment effectively ending the case were then analyzed on practical grounds, such as those discussed in *Gillespie*, the CAFC might accept it as a final appealable judgment.

Second, the agencies could accept the status quo with respect to the appealability of remand orders at the CAFC but comply quickly and reasonably, neither under-interpreting nor over-interpreting the CIT remand order. This should end multiple remands. Finally, the agencies could request certification for interlocutory appeal more often.<sup>34</sup> If the agencies used the process wisely, the CIT likely would certify more issues, particularly if the CAFC exhibited more interest in such certifications.<sup>35</sup> This potentially would also lead to faster resolution of important issues.<sup>36</sup>

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32. The CIT described this process in *GPX Int'l Tire Corp. v. United States*, 942 F. Supp. 2d 1343, 1348 n.2 (Ct. Int'l Trade Oct. 30, 2013).

33. See, e.g., *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 932 (Fed. Cir. 1984) (discussing ITC's argument that even if the CIT were correct in finding no evidence to support the agency's finding, remand rather than reversal would be required).

34. 28 U.S.C. § 1292(d)(1) permits a CIT judge to certify for interlocutory appeal an issue the resolution of which will "advance the ultimate termination of the litigation" and that involves a controlling question of law as to which there is substantial ground for a difference of opinion. This parallels the procedure for certification for appeal by a district judge. See 28 U.S.C. § 1292(b) (2012).

35. See Alexandra Hess et al., *Permissive Interlocutory Appeals at the Court of Appeals for the Federal Circuit: Fifteen Years in Review (1995-2010)*, 60 AM. U.L. REV. 757, 779–83 (2011) (discussing limited instances of such appeals at the CAFC).

36. Of course, finality and increased efficiency could be accomplished by eliminating two tiered judicial review and having trade determinations reviewed by a panel of three judges of the CIT. See Herbert C. Shelley, *The*

It was not only this legal quagmire that may have caused the court in *Nippon VI* to raise the issue of effective reversals, but the *Nippon VI* court also may have understood the practical problem of interpreting the statute to forbid reversals that would be final enough for appellate review. It described the futility of not reversing when a record could support only one result, and when that acceptable result was not the one the agency reached.<sup>37</sup> In a decision such as that of the ITC involving injury, where multiple economic factors are weighed to reach a “yes” or “no” result, it may be difficult to say in a particular case that there is no substantial evidence for a certain result, and that the record will support only the opposite. This assessment is difficult, but not impossible, at least theoretically. There is also the possibility that assessment of the record under a legal framework newly declared by the reviewing court can lead to only one result. Directing the agency to undertake a new substantive assessment in such situations is inefficient and futile. Effectively, reversal is required in such a case, and if the case needs to be remanded to trigger various actions under the statute, it is simply remanded for implementation of the reversal.

We must point out one more problem of reaching finality that has plagued these cases. There sometimes appears to be a lack of understanding that the two key litigating interests are not parties representing the United States and the entity with goods on which duties are imposed. The key combatants in the referenced cases are foreign exporters or producers and domestic industries.<sup>38</sup> Commerce—or the ITC—lines up through its determination on one side or the other of a particular claim. In

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*Standard of Review Applied by the United States Court of Appeals for the Federal Circuit in International Trade and Customs Cases*, 45 AM. U.L. REV. 1749, 1805 (1996); see also Thomas J. Aquilino, Jr., *The Third Dominick L. DiCarlo U.S. Court of International Trade Lecture: To Amend the Course of Judicial Review of International Trade Cases in the United States* (November 4, 2004) (on file with the Library, U.S. Court of International Trade); *Proceedings of the Sixth Annual Judicial Conference of the United States Court of International Trade, Judicial Review: Is It Proving Effective in Resolving Trade Cases?*, 131 F.R.D. 217, 305 (1990). Three judge panels are permitted now under 28 U.S.C. § 255(a) for cases of particular significance.

37. See *Nippon VI*, 458 F.3d at 1359.

38. The “foreign” interest may be a product, an exporter, a U.S. importer of foreign made goods, or a foreign country. 28 U.S.C. § 2631(j)(1)(B), (k) (2012); see 19 U.S.C. § 1677(9) (2012).

*SKF USA, Inc. v. United States*,<sup>39</sup> the court discounted the importance of finality and reaching the resolution of the case promptly. It stated that the CIT should grant voluntary requests for remand by the agency except in very limited circumstances.<sup>40</sup> It was almost as if the appellate court were viewing the case as a denial of benefits by the government. Although applicable to other areas of CAFC appellate jurisdiction,<sup>41</sup> this view does not reflect the true nature of these particular cases. Changes in policy, not required by the statute, can injure the domestic party just as they may lower the duty obligation of the importer of foreign goods. If the government asks for a remand for reasons of policy change rather than error, perhaps the court should be required to, or at least exercise its discretion to, deny such a request, contrary to one reading of *SKF*.<sup>42</sup> As noted in *SKF*, the agency may have a right to defend its position on grounds first asserted in litigation, and it may obtain a remand to apply its new position if it succeeds in such litigation, but changing a result that is entirely consistent with the statute is another matter. Here, there is another party, besides the government, with a valid interest in the finality of the victory obtained. The better rule would be one that values the finality of permissible agency decisions and which leaves policy changes to later cases.<sup>43</sup>

*Nippon VI* is almost the converse of *SKF*. It appears to assume the ITC is a neutral referee that will come to the right decision if only given a(nother) chance. Neither of these cases is a two party case where the United States acts as a referee or a source of benefits. These are three party cases. The government

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39. See *SKF USA Inc. v. United States*, 254 F.3d 1022, 1030 (Fed. Cir. 2001) (requiring remand at Commerce's request to recalculate an expense to exporters' or importers' benefit).

40. *Id.* at 1029–30.

41. See, e.g., 28 U.S.C. § 1295(a)(9) (2012) (Merit Systems Protection Board appeals); 38 U.S.C. § 7292(e) (2012) (Veterans Claims appeals).

42. *SKF*, 254 F.3d at 1029–30.

43. See *Am. Trucking Ass'ns v. Frisco*, 358 U.S. 133, 146 (1958) (finding that the Interstate Commerce Commission may not, without specific statutory authority, reconsider license and certificate decisions because of policy changes); *Corus Staal BV v. United States*, 259 F. Supp. 2d 1253, 1257 (Ct. Int'l Trade 2003) (discussing finality concerns and gathering cases in conflict with *SKF*).

has its own policy interests at stake in trade cases.<sup>44</sup> The government often makes some decisions in one side's favor and other decisions for the other side. What is important is for the government to be treated as other parties are. If it loses, it should comply, and it should be able to appeal promptly. Endless remands are not the answer, nor are midstream unfettered changes in policy.

We note the case of *Essar Steel Ltd. v. United States*<sup>45</sup> where the CAFC seemed to be moving in a direction of valuing efficiency and finality by limiting the CIT's discretion to order reopening of the agency record.<sup>46</sup> In normal practice, reopening of the record is left to the discretion of the agency if the court finds fault with specific findings of the agency.<sup>47</sup> *Essar Steel* did not hold that an order to reopen the record is never appropriate, although it mentioned only a few "exceptions" where reopening may be directed, finally concluding that reopening could not be directed in "this case."<sup>48</sup> The CAFC's espoused goal of finality would not be served by allowing the agency to make the reopening decision in virtually all instances. Sometimes it is the court that needs to end a case by barring reopening. Sometimes reopening is required where the agency fails to do its investigative duties, or when it disobeys the law by not accepting

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44. The government collects duties, but the financial impact of duties is very limited, in contrast to the early days of the Republic. Although duties were imposed to protect nascent American industries, customs duties were also used to meet the revenue needs of the new nation. WILLIAM B. FUTRELL, *THE HISTORY OF AMERICAN CUSTOMS JURISPRUDENCE* 26–29 (1941). See *United States v. Laurenti*, 581 F.2d 37, 40 n.12 (2d Cir. 1978) (citing *ENCYCLOPEDIA OF AMERICAN HISTORY* 733 (R. Morris ed., Harper & Row bicentennial ed. 1976)). Income taxes did not appear until the 1913 ratification of the Sixteenth Amendment to the Constitution. The Historical Budget Data of the Congressional Budget Office, August 2013, shows customs duties as about 1% of total revenue. See CONGRESSIONAL BUDGET OFFICE, *HISTORICAL DATA—AUGUST 2013*, available at [www.cbo.gov/publication/44507](http://www.cbo.gov/publication/44507). Today, control and oversight of trade issues is at the forefront, rather than duty collection. The ITC is an independent agency, but the commissioners often have different institutional concerns and views of trade policy. There is no reason to conclude that commissioners do not have the usual decision makers' preference for their previous conclusions, which can become difficult to set aside as a case proceeds through numerous remand proceedings.

45. *Essar Steel Ltd. v. United States*, 678 F.3d 1268 (Fed. Cir. 2012).

46. *Id.* at 1276–77.

47. See *id.* at 1277–78.

48. *Id.* at 1278.

certain documents. *Essar Steel* may be seen as a case where the party seeking to have information newly considered did not meet its burdens, but it is also a case where the CAFC may have failed to recognize Commerce's investigative responsibilities and the CIT's obligations to ensure fair agency proceedings.<sup>49</sup>

Finality is important, not just because it preserves properly obtained administrative and litigation results, but also because it aids prompt judicial review of the entire case and conclusive resolution of the dispute. The agencies and the courts, however, settle the problem of reaching finality for purposes of resolving the case quickly or for purposes of appellate review. It seems clear that any attempt to read 19 U.S.C. § 1516a(c)(3) to forbid substantive reversal of agency decisions through specific remand directions must be rejected as a matter of statutory construction. Perhaps more importantly, the ability of the court to effectively order reversal is the only statutory interpretation that will pass constitutional muster.

As an Article III court, the CIT is statutorily and constitutionally empowered to issue decisions that are final, subject only to review by higher courts in the Article III hierarchy. It is fundamental that Article III courts cannot be required to decide cases that are subject to revision by an executive branch agency, such as Commerce, or an independent regulatory agency, such as the ITC. Whatever its constitutional status, the ITC is not a part of the Judicial Branch.<sup>50</sup> These fundamental principles are also at play where the executive branch agency or independent regulatory agency is a key party to the litigation, as is almost always the case with CIT cases, and when control of the timing of the litigation is important, as is often the case with the court's decisions in trade matters.<sup>51</sup>

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49. *Id.* at 1279 (Newman, J., dissenting).

50. The peculiar status of independent agencies has been addressed in various cases. *See, e.g.,* *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (Federal Trade Commission); *Morrison v. Olson*, 487 U.S. 654, 685–96 (1988) (gathering independent agency cases in addressing independent counsel provisions of Ethics in Government Act).

51. For example, high duties have been alleged as the reason for failure of a business. *See, e.g., More on GPX Bankruptcy, Alliance Acquisition*, TIRE REVIEW (Oct. 27, 2009), [www.tirereview.com/Article/67688/more\\_on\\_gpx\\_bankruptcy\\_alliance\\_acquisition.aspx](http://www.tirereview.com/Article/67688/more_on_gpx_bankruptcy_alliance_acquisition.aspx). *See also In Re GPX Int'l Tire Corp.*, No. 09–20170–JNF, 2009 WL 8032840 (Bankr. D. Mass.) (July 21, 2010). And, concomitantly, low duties



As discussed, under CAFC holdings, unless the agency invokes something close to the magic words—we are following the CIT's direction, with which we disagree—an appeal to the CAFC is not available to the agency absent extraordinary circumstances. This may have led to a lack of immediate and full compliance with, at a minimum, the intent of the CIT decision on the part of the agency in a number of cases.<sup>52</sup> If the agency is forced to comply with a judicial ruling that it views as fundamentally flawed, it must resist the natural tendency not to comply fully and reasonably. Because remand is needed to effectuate judicial review, however, the United States, a party to the litigation, effectively obtains control of the case's timing and, if the agency is never compelled to comply with the court's order because reversal is not available, control of the outcome as well.<sup>53</sup> This raises serious constitutional problems.

It is well settled that a statute should be interpreted to avoid constitutional issues.<sup>54</sup> The extreme interpretation of 19 U.S.C. § 1516a(c) to prohibit reversals raises serious constitutional questions as to an Article III court's powers. Several questions are presented, including the power of an Article III court to issue a final decision, whether one constant party in these cases—the United States government—would be favored by giving it effective control of the disposition of the case, and whether the CIT would, in essence, issue an advisory opinion.

In regard to Article III courts, the constitutional infirmities of a lack of finality and advisory opinions are often conflated and perhaps represent mirror images of each other. Decisions of

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may not give the domestic industry the protection it requires to survive. Duty deposits at the rate determined by Commerce continue to be paid to the United States until litigation is conclusively resolved. *See* *Diamond Sawblade Mfrs. Coal. v. United States*, 626 F.3d 1374, 1380–82 (Fed. Cir. 2010) (discussing 19 U.S.C. § 1516a(e)). Obviously, failure to resolve a case promptly can have disastrous business consequences.

52. *See supra* note 31 and accompanying text; *see also, e.g.*, *Qingdao Taifa Grp. Co. v. United States*, 780 F. Supp. 2d 1342, 1346 n.2 (Ct. Int'l Trade July 12, 2011).

53. While the court sets time limits for the return of remand results, agency needs often delay the results, and failures to comply fully often require further remands, as noted. Obviously, if outright contempt were involved, other remedies are available as the CIT has all the power in law and equity of a district court. *See* 28 U.S.C. § 1585.

54. *See, e.g.*, *Ashwander v. Tennessee*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

Article III courts must include the element of finality. The infirmity of a lack of finality creates an advisory opinion, which is beyond the powers of an Article III court. In its decision in *Plaut v. Spendthrift Farm, Inc.*,<sup>55</sup> the U.S. Supreme Court declared:

[T]he Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that “a judgment conclusively resolves the case” “because a ‘judicial power’ is one to render dispositive judgments.”<sup>56</sup>

The CIT’s decisions are, of course, subject to CAFC review and, ultimately, review by the U.S. Supreme Court. But finality is not achieved if a decision of an Article III court is subject to revision by an executive agency outside the judicial branch, such as the ITC or Commerce, and, concomitantly, not effectively subject to appeal to a higher Article III court.

It has been a fundamental principle, as far back as *Hayburn’s Case*,<sup>57</sup> that Article III courts cannot be required to decide cases subject to further action by an agency—legislative or executive—outside the judicial branch because such decisions then lack finality. If remands are endless because the CIT cannot direct a result or because the CAFC will not accept an “interlocutory” appeal, there is no finality. *Hayburn’s Case* is not ancient lore; rather it has been reinforced by later decisions—*United States v. Ferreira*<sup>58</sup> and *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*<sup>59</sup>—that emphasize the constitutional infirmity of revision by the executive branch.

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55. *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 218-19 (1995).

56. *Id.* at 218-19 (citation omitted). In *Plaut*, the Supreme Court recognized that Congress could change the law and thus, the outcome of a particular case, so long as that case had not yet been decided by the highest court available to resolve the matter. The CAFC had reason to cite *Plaut* in *GPX Int’l Tire Corp. v. United States*, 678 F.3d 1308, 1312 (Fed. Cir. 2012), when amendments to the countervailing duty law were made to overturn a CAFC decision before the Supreme Court could act or the CAFC’s mandate had been issued.

57. *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792).

58. *United States v. Ferreira*, 54 U.S. (13 How.) 40, 49-52 (1851).

59. *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948). *Waterman* itself was cited for the same proposition in *Nat’l Cable &*

*Ferreira* involved an 1849 statute that authorized an Article III federal district judge to assess specified war damage claims against the United States, as required by the 1819 Treaty between the United States and Spain that ceded Florida to the United States.<sup>60</sup> As in *Hayburn's Case*, however, the determinations of the judge were subject to review by an executive branch officer—in this case the Secretary of the Treasury—who retained the ultimate authority to settle these claims.<sup>61</sup> The Supreme Court ruled that “the power [given to the federal judge] was not judicial within the grant of the Constitution.”<sup>62</sup> Consequently, the district judge was acting as “a commissioner”<sup>63</sup> rather than as a judicial officer, and thus there was no judgment from which to appeal.<sup>64</sup> In *Waterman*, the statute involved review of actions of the Civil Aeronautics Board granting or denying air routes for foreign air carriers or denying foreign air routes to U.S. carriers.<sup>65</sup> As in *Ferreira*, the final decisions of the Article III courts would be subject unconditionally to the president’s approval. The Supreme Court ruled that the reviewing court’s decision would be an impermissible advisory opinion:

This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action.<sup>66</sup>

If an agency’s decisions are reviewed by the courts for lawfulness, as the CIT does under 19 U.S.C. § 1516a(b), they may not then be subject to revision by that agency, whether the revision is by means of further tasks assigned by Congress or be-

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*Telecomm. Assn. v. Brand X Internet Serv.*, 545 U.S. 967, 1017 (2005) (Scalia, J., dissenting).

60. *Ferreira*, 54 U.S. at 45.

61. *Id.* at 45–47.

62. *Id.* at 51.

63. *Id.* at 47.

64. “But the acts of Congress certainly do not authorize him to convert a proceeding before a commissioner into [a] judicial one, nor to bring an appeal from his award before this court.” *Id.* at 49.

65. *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 105–06 (1948).

66. *Id.* at 113–14.

cause noncompliance is permitted. The long accepted holdings of *Plaut*, *Ferreira*, *Waterman*, and *Hayburn's Case* teach that the Constitution bars such practices.

The question also arises whether prohibiting reversals would cross the constitutional line of an imposed rule of decision forcing favoritism to the government, a line drawn by *United States v. Klein*<sup>67</sup> and reinforced by *United States v. Sioux Nation of Indians*.<sup>68</sup> By this we do not mean deference to agency interpretations of ambiguous statutes under *Chevron*,<sup>69</sup> or abuse of discretion review for necessarily discretionary decisions, such as reasonable methodological choices.<sup>70</sup> Such deference to resolution of issues necessarily delegated to an agency with particular expertise is not the same as forced resolution of a particular case in the government's favor.

The plaintiff in *Klein* was the administrator of the estate of a deceased owner of cotton which was sold by representatives of the U.S. government during the Civil War and the proceeds of which were placed in the United States Treasury.<sup>71</sup> The plaintiff sued to recover those proceeds of the sale under legislation authorizing recovery by noncombatant Confederate owners upon proof of loyalty.<sup>72</sup> The Supreme Court had earlier held that loyalty could be established by a presidential pardon.<sup>73</sup> After the plaintiff won in the U.S. Court of Claims and during the pendency of the government's appeal to the Supreme Court, Congress enacted legislation providing not only that a presidential pardon would not be admissible as proof of loyalty, but that acceptance, without a written disclaimer, of a pardon that reported that the claimant had supported the Confederates would be conclusive evidence of the claimant's disloyalty.<sup>74</sup> The statute directed the Court of Claims and the Supreme Court to

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67. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 136, 147 (1871).

68. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 402–04 (1980).

69. *See generally* *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1987).

70. *See, e.g.*, *Magnesium Corp. of America v. United States*, 166 F.3d 1364, 1372 (Fed. Cir. 1999) (Commerce has discretion in choosing methods of calculating normal value for goods of nonmarket economy origin.).

71. *Klein*, 80 U.S. at 132.

72. *Id.* at 139–41.

73. *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542 (1870).

74. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 143 (1871).

dismiss for lack of jurisdiction any pending claims based upon a presidential pardon.<sup>75</sup>

In *Klein*, the Supreme Court held the supervening Congressional statute unconstitutional for two reasons. First, by forbidding the Court "to give the effect to evidence which, in its judgment, such evidence should have"<sup>76</sup> and directing the Court "to give it an effect precisely contrary . . . Congress ha[d] inadvertently passed the limit which separates the legislative from the judicial power."<sup>77</sup> Second, "the rule prescribed [was] also liable to just exception as impairing the effect of a pardon, and thus infring[ed] the constitutional power of the Executive."<sup>78</sup> The Court thus sought to protect the judicial and executive branches in the exercise of their core constitutional responsibilities from the intrusion of Congress.

Much debate has ensued about the significance and implications of the *Klein* decision. A key interpretation of *Klein* relating to this Article was made by the Supreme Court in *United States v. Sioux Nation of Indians*: "[I]t prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor."<sup>79</sup> And, while distinguishing the circumstances of *Sioux Nation*, the decision stated: "First, of obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor. Thus, Congress' action could not be grounded upon its broad power to recognize and pay the Nation's debts."<sup>80</sup> *Sioux Nation* was a long-running and complex dispute involving an 1877 taking of Sioux Treaty lands based upon an 1877 statute and subsequent claims under a 1978 Act that provided for de novo review by the Court of Claims and waived a valid defense to the legal claim against the United States.<sup>81</sup> The Court reinforced *Klein* but distinguished its result by determining that a waiver of a defense by the United States was different from seeking to force a decision in favor of the United States.<sup>82</sup> As

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75. *Id.* at 143–44.

76. *Id.* at 147.

77. *Id.*

78. *Id.*

79. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 404 (1980).

80. *Id.* at 405.

81. *Id.* at 382–83, 389.

82. *Id.* at 402–07.

discussed, if taken literally, the inability of a court to reverse is a direction to affirm, and here, because it is the decision of the United States or an agency thereof that is reviewed, it is the United States that would obtain the victory. This is *Klein*.

Lack of finality also creates an advisory opinion. Leaving the result to action of another branch of government following the final decision of an Article III court makes the decision an advisory opinion. Relying upon *Hayburn's Case* and *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*,<sup>83</sup> Dean Erwin Chemerinsky concludes that the Supreme Court holds: “[A] case is a nonjusticiable request for an advisory opinion if there is not a substantial likelihood that the federal court decision will have some effect.”<sup>84</sup> The lack of real world effect is the consequence of permitting foot dragging and noncompliance by the reviewed agency and thus is a mirror image of the lack of finality. In a dissenting opinion Justice Stewart concluded that the Article III bar to advisory opinions precludes Article III courts from deciding issues that do not directly affect the parties,<sup>85</sup> a somewhat different statement of the same proposition. The continual remands caused partly by the CAFC’s refusal to accept, or discouragement of, appeals following dispositive remands by the CIT, together with lack of clear recognition of the authority of the CIT to issue a substantive reversal, can result in decisions that have no effect upon the parties and thus are purely advisory opinions. Under current practice, the CIT’s decisions cease to be advisory and have some effect only when the administrative agency agrees to accept the CIT’s direction, under protest, often after several remands, and the case proceeds to a final conclusive result. This is not a rational system for resolving cases in our constitutional system. This Article suggested various practical remedies, but the one principle that is clear is that Article III courts reviewing agency action for lawfulness have the power to reverse the decision of the reviewed agency. It may take more steps to get to this point than is optimal, but this is the only answer to the question posed by *Nippon VI*.

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83. *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792).

84. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 2.2 (6th ed. 2012).

85. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 127–33 (1974) (Stewart, J., dissenting, writing for four justices) (involving mootness).