SIGNIFICANT RECENT DECISIONS OF THE COURT OF INTERNATIONAL TRADE AND OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT AFFECTING TRADE: SUMMARY AND COMMENTARY ON *BRATSK ALUMINUM SMELTER v. UNITED STATES*, 444 F.3d 1369 (Fed.Cir. 2006)

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CASE HISTORY

1. *Proceedings before the Agency*

On March 7, 2003, the U.S. International Trade Commission ("the Commission") unanimously determined that the U.S. industry producing silicon metal was being materially injured by reason of imports of silicon metal from Russia ("subject imports").[2] The Department of Commerce had made a final determination that the subject imports were being dumped in the U.S. market, and, as a result of both agencies' affirmative determinations, antidumping duties were imposed on the subject imports. 19 U.S.C. § 1673d(c)(2).

In finding that there was "material injury by reason of the subject imports," the Commission analyzed the statutorily mandated factors of the volume of subject imports, their price effects, and their impact on the U.S. industry in light of the conditions of competition, including the presence of other imports ("non-subject imports"), in the U.S. market. 19 U.S.C. §

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[2] Commissioner Deanna Tanner Okun did not participate in this investigation. Chairman Pearson and Commissioner Lane were not members of the Commission at the time of the first determination, but did participate in a subsequent remand from the Court of International Trade. Vice Chairman Aranoff was not a member of the Commission at the time of the original determination or the remand determination.

1677(7)(A)-(C). The Commission specifically addressed the statutory causation, or "by reason of," standard as articulated by the Federal Circuit – whether the subject imports are contributing to the injury in more than an incidental, minimal, tangential or trivial way. *Nippon Steel Corp. v. USITC*, 345 F.3d 1379, 1381 (Fed. Cir. 2003); *Taiwan Semiconductor Industry Ass'n v. USITC*, 266 F.3d 1339, 1345 (Fed. Cir. 2001); *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 722 (Fed. Cir. 1997). The Commission found that the subject imports were causing material injury despite the presence of non-subject imports in the market, based on a number of pertinent facts, including: the subject imports were generally the lowest priced product in the market, underselling the non-subject imports in 42 of 56 price comparisons; the subject imports increased the fastest over the period investigated and, by the end of the period, were the largest single source of imports, at 26.4 percent of all imports; sales of subject imports into the chemical sector of the market, the most important sector for sales of U.S. product, increased four-fold over the period and had the highest underselling margins; in 2001, when the U.S. industry first showed a financial loss, the subject imports increased by 38.6 percent and took market share both from the U.S. industry and from the non-subject imports; and in late 2002, when subject imports left the U.S. market due to the pending case but before a final decision, U.S. prices rose and U.S. producers experienced some recovery in their contract prices and levels of production.

2. *Proceedings Before the Court of International Trade*

Sual Holding and Zao Kremny ("Sual Holding") and another Russian producer of silicon metal, Bratsk Aluminum Smelter, appealed the Commission's determination to the Court of International Trade. Among other issues, plaintiffs argued before the Court of International Trade, as they had before the Commission, that under a proper causation analysis, the

Commission could not reach an affirmative determination, given the presence of non-subject imports in the U.S. market. The Court of International Trade remanded to the Commission for further explanation on two pricing issues unrelated to the causation issue, and did not question the causation analysis in the Commission's opinion. After remand, the Court of International Trade affirmed the Commission's determination in its entirety and with respect to all issues briefed and argued by the parties.

3. *Proceedings before the Court of Appeals*

Sual Holding appealed the Court of International Trade's decision to the U.S. Court of Appeals for the Federal Circuit. The sole issue on appeal to the Federal Circuit was the Commission's causation analysis. Specifically, appellants claimed that the Court of International Trade failed to analyze properly the presence of non-subject imports of silicon metal under the Federal Circuit's previous decision in *Gerald Metals*, 132 F.3d 716, given appellants' view that the fairly traded imports "are fully interchangeable with subject imports and the domestic product, readily available and a significant presence in the U.S. market and comparably priced below the domestic product." A split panel of the Federal Circuit agreed with appellants that the Commission is required to analyze not merely whether the subject imports were more than a minimal, tangential, incidental, or trivial cause of the injury, but whether non-subject imports would have replaced the subject imports and in so doing void any benefit that the domestic industry would obtain from the antidumping duty order.

The panel majority ordered the Commission to find "whether non-subject imports would have replaced subject imports without any beneficial effect on domestic producers" in cases such as the underlying silicon metal case where "the antidumping investigation is centered on a

commodity product, and price competitive non-subject imports are a significant factor in the market." *Bratsk*, 444 F.3d at 1375. The Federal Circuit described a commodity product as being "generally interchangeable regardless of its source," *Bratsk*, 444 F.3d at 1371, and was not specific as to what it meant by non-subject imports being "price competitive" and "a significant factor" in the U.S. market. The court further noted that, in order to carry out the analysis it required, the Commission would have to consider, and therefore presumably to collect, data on such factors as non-subject foreign producers' prices and production capacity, *Bratsk*, 444 F.3d at 1376, notwithstanding that non-subject producers are not entitled under the statute to participate as "interested parties" in Commission investigations.

Senior Circuit Judge Archer dissented. He found that the Commission adequately considered the effect of both the subject imports and the interchangeable non-subject imports on the domestic industry and that there was substantial evidence in the record to support the Commission's determination. *Bratsk*, 444 F.3d at 1376. He found that "[n]either the statute nor *Gerald Metals* imposes the rigidity in findings or analysis that the majority seems to require," and he "fail[ed] to see what more the Commission should be required to do to explain its decision." *Bratsk*, 444 F.3d at 1378-79.

The Commission, as well as the defendant-intervenors, petitioned the Federal Circuit for rehearing en banc of the *Bratsk* opinion. Other domestic firms and trade groups representing a variety of U.S. industries filed amici curiae briefs in support of the petition for rehearing en banc. The court allowed each of these entities to intervene, and accepted all four of the proffered amici briefs. At the invitation of the court, Sual Holding filed a response in which it opposed the petition for rehearing en banc, essentially arguing that the holding was a narrow one. The

Federal Circuit denied the petitions for rehearing en banc on July 24, 2006.

Although the Commission moved to stay issuance of the mandate pursuant to Fed. R. App. P. 41(d)(2)(A), the court denied the motion (with Judge Archer dissenting) and issued the mandate vacating the judgment and remanding the case to the Court of International Trade. The Court of International Trade then remanded the case to the Commission, giving the Commission 90 days to issue a remand determination. On September 22, 2006, however, the Court of International Trade granted the Commission's motion to stay the remand proceedings pending consideration of whether to file a petition for a writ of certiorari to the U.S. Supreme Court.

SOME ISSUES RAISED BY THE BRATSK DECISION

1. *The "Benefits" Test*

The *Bratsk* decision requires the ITC to undertake what it terms an "additional causation inquiry" as to "whether non-subject imports would have replaced subject imports without any beneficial effect on domestic producers," or, stated alternatively, "why the non-subject imports would not replace the subject imports and continue to cause injury to the domestic industry." *Bratsk*, 444 F.3d at 1375, 1376. Read literally, the *Bratsk* decision could be interpreted as requiring the Commission to undertake an extra-statutory analysis to determine whether a U.S. industry would derive no benefit from the application of antidumping duties on the entry of subject imports when non-subject imports would replace them.[3] Although the opinion is couched in terms of the causation analysis, the requirements imposed by the panel seem to

[3] Not inconsequentially, another panel of the Federal Circuit subsequently treated the *Bratsk* holding as establishing a legal test, and in that subsequent opinion, remanded the matter for a *Bratsk* finding. *Caribbean Ispat Ltd. v. United States*, 450 F.3d 1336, 1341 (Fed. Cir. 2006).

address matters beyond the causation issue, specifically whether the domestic industry would have benefitted or would benefit were subject imports not in the market. The statutory scheme, however, contemplates that a domestic industry may be suffering material injury from multiple causes at the same time, that the injury may continue even after relief is imposed, and that consideration of whether or not import relief against the subject imports will be effective is not relevant to the issue of whether the subject imports caused material injury. Statement of Administrative Action ("SAA") on Uruguay Round Agreements Act, 103d Cong., H.R. Doc. 103-316, Vol. I at 851-52, 885, 889-90 (1994). As the Commission has explained:

> [W]e note that nothing in the statute or case law requires (or allows) us to consider the likely effectiveness of a dumping order in making our injury determination. The possibility that non-subject imports will increase in the future after an antidumping order is imposed is . . . not relevant to our analysis of whether subject imports are currently materially injuring the industry.

Wooden Bedroom Furniture From China, Inv. No. 731-TA-1058 (Final), USITC Pub. 3743 at 27, n.222 (Dec. 2004).

2. *Present Industry Condition versus Future Industry Condition*

In addition to shifting the focus from causation to the effectiveness of the remedy, the opinion could also be read to re-focus the injury analysis away from the present condition of the industry. Yet, as the Federal Circuit itself has recognized in other cases, the focus of the statute is on the current condition of the industry, *i.e.*, on whether the U.S. industry *in the present* is suffering material injury or whether current conditions are indicative of an imminent threat of material injury. *See* SAA at 883 ("Under the material injury standard, the Commission determines whether there is current material injury by reason of imports of subject merchandise"); *Nucor Corp. v. United States*, 414 F.3d 1331, 1336-38 (Fed. Cir. 2005)

(affirming ITC's focus on most recent import levels and current condition of domestic industry in analyzing present material injury); *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1104 (Fed. Cir. 1990) ("[t]he injury requirement mandates a determination of whether an industry suffers *present* material injury" (emphasis in original); *citing American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984), *aff'd sub nom. Armco, Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985)).

The requirement imposed by the *Bratsk* panel is not among the statutory factors Congress has required the Commission to consider. The test raises a number of questions in light of the statutory intent, which is not to bar subject imports from the U.S. market or award subject import market share to U.S. producers, but is meant instead to "level[] competitive conditions" by imposing a duty on subject imports and thus enabling the industry to compete against fairly traded imports. *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1380 (Fed. Cir. 2003). The statutory scheme in fact contemplates that subject imports may remain in the U.S. market after an order is imposed and even that the industry afterwards may continue to suffer material injury. SAA at 883-85, 889-90. Indeed, the dumping of subject imports may have no impact on respective market shares, but may impact the domestic industry's selling price and profitability alone.

3. *What About the Substantial Evidence Standard of Review*?

The *Bratsk* panel did not suggest that the Commission failed to apply the statutory criteria for determining material injury by reason of the subject imports, nor did it address whether the ample evidence cited by the Commission in its opinion constituted substantial

evidence.[4] Rather, the panel concluded that the Commission's analysis must fail because it did not apply the new test articulated by the panel – *i.e.*, "why the elimination of subject imports would benefit the domestic industry instead of resulting in the non-subject imports' replacement of the subject imports' market share without any beneficial impact on domestic producers." *Bratsk*, 444 F.3d at 1373. Dissenting Judge Archer, by contrast, correctly summarized the evidence considered by the Commission on each of the statutory factors and concluded that there was substantial evidence in the record to support the Commission's material injury determination. *Bratsk*, 444 F.3d at 1376.

The *Bratsk* panel focused on out-of-context language in the Federal Circuit's previous *Gerald Metals* opinion rather than on the statute or the facts specific to the case at hand. It also gave short shrift to the Commission's analysis in the underlying *Silicon Metals* investigation of evidence showing that when subject imports left the market because of Commerce's preliminary affirmative dumping determination, spot prices rose and the U.S. industry was able to negotiate more favorable price terms in its contracts despite the presence of non-subject imports in the market. *Bratsk*, 444 F.3d at 1375-76. In the Commission's view, this evidence was consistent with the causal link it had already found between the subject imports and the material injury to the U.S. industry. This evidence, along with evidence that the non-subject imports were generally higher priced than the subject imports, also indicates that, had the non-subject imports begun to replace the subject imports, it would have been at a higher price, and thus with less

[4] The panel's failure to view the Commission's findings through the substantial evidence lenses is particularly confusing in light of the subsequent decision of another panel in *Nippon Steel Corp. v. United States*, 458 F.3d 1345 (Fed. Cir. 2006), which teaches strict adherence to the substantial evidence standard.

harm to the domestic industry. The *Bratsk* panel, while noting this evidence, *Bratsk*, 444 F.3d at 1375-76, would nevertheless have the Commission perform an analysis that is neither statutorily required nor relevant to the causation issue, and which arguably would be superfluous in light of the evidence already considered by the Commission.