

2-17-2021

Balancing Trade and Economic Security: *Andritz v. United States* and the Role of Customs and Border Protection in Enforcing the Plant Protection Act

Alexandra Khrebtukova

Follow this and additional works at: <https://repository.law.miami.edu/umicl>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Alexandra Khrebtukova, *Balancing Trade and Economic Security: Andritz v. United States and the Role of Customs and Border Protection in Enforcing the Plant Protection Act*, 28 U. Miami Int'l & Comp. L. Rev. 17

()

Available at: <https://repository.law.miami.edu/umicl/vol28/iss1/4>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

**BALANCING TRADE AND ECONOMIC SECURITY:
ANDRITZ V. UNITED STATES AND THE ROLE OF CUSTOMS AND
BORDER PROTECTION IN ENFORCING THE PLANT PROTECTION ACT**

*By Alexandra Khrebtukova**

Prepared for the 20th Judicial Conference of the U.S. Court of
International Trade
November 18, 2019
Washington, D.C.

ABSTRACT

This paper examines the case of Andritz v. United States – first filed in the U.S. Court of International Trade then transferred to the U.S. District Court for the Southern District of Texas – as a demonstrative case study highlighting the collaboration between U.S. Customs and Border Protection (CBP) of the Department of Homeland Security and the Animal and Plant Health Inspection Service (APHIS) of the Department of Agriculture. CBP is charged with facilitating legitimate trade and travel while safeguarding the borders of the United States to protect against, inter alia, the entry of dangerous goods, including through agricultural import and entry inspection. Where these priorities overlap and potentially conflict, the agency is tasked with making reasonable decisions quickly, on the basis of the information available and in consultation with relevant subject matter experts across the Federal Government. To facilitate this process and, where challenged, its expeditious and effective judicial review, counsel advising the trading community should familiarize themselves with the legal sources governing the allocation of relevant authorities and providing for appropriate judicial review. The Andritz case provides a useful view of CBP’s enforcement of the importation-related aspects of the Plant Protection Act, and showcases the agency’s close collaboration with the Department of Agriculture. The case also suggests important lessons for international trade attorneys, concerning both the potential impact of agricultural laws upon importation and the appropriate avenue for judicial review in this context.

* Ms. Khrebtukova is a Senior Attorney with the Office of Chief Counsel, U.S. Customs and Border Protection. The views expressed herein are the author’s own, and do not necessarily represent the position of the Office of Chief Counsel, U.S. Customs and Border Protection, or the Government of the United States.

I.	INTRODUCTION	18
II.	BALANCING COMPETING PRIORITIES.....	18
III.	ANDRITZ V. UNITED STATES.....	20
	A. EMERGENCY AT THE PORT	21
	B. LEGAL CHALLENGE	25
IV.	IMPORTANT LESSONS.....	31
V.	CONCLUSION.....	35

I. INTRODUCTION

In the wake of the terrorist attacks of September 11, 2001, the Homeland Security Act of 2002 established the U.S. Customs and Border Protection (CBP) agency within the Department of Homeland Security (DHS), which was charged with safeguarding the country's borders and facilitating legitimate trade and travel.¹ At times these competing priorities may pull in different directions. The case of *Andritz v. United States*,² for example, involved on the one hand, a legitimate importation of the sort that CBP is statutorily required to facilitate – that is, the cargo itself did not appear to present any concerns as a matter of U.S. merchandise entry law. On the other hand, however, the cargo's wooden packaging was discovered to be infested with pests that posed a serious threat to valuable U.S. pine trees, including the forests in close proximity to the port. The following discussion explores the *Andritz* case as a case study, discussing the relevant factual circumstances and legal authorities, and suggesting some takeaways from this case for international trade attorneys.

II. BALANCING COMPETING PRIORITIES

The Homeland Security Act effected a major reorganization within the federal government of the United States – the largest such

¹ See Homeland Security Act of 2002, Pub. L. 107-296, § 411, 116 Stat. 2135, 2178-79 (2002), *as amended*, 6 U.S.C. §211(c)(3) (2017).

² See *Andritz Sundwig GMBH v. United States*, 322 F. Supp. 3d 1360, 1364 (Ct. Int'l Trade 2018) [hereinafter *Andritz CIT*]; *Andritz Sundwig GMBH v. United States*, No. CV 4:18-2061, 2018 WL 3218006, (S.D. Tex. July 2, 2018) [hereinafter *Andritz S.D. Tex.*].

reorganization since 1947.³ As a result of this reorganization, CBP now works with dozens of other federal agencies to enforce federal laws, spanning several Titles of the United States Code, at the border.⁴

Among the functions transferred to CBP by the Homeland Security Act are those related to the enforcement and administration of federal laws relating to agricultural import and entry inspection, including the importation-related provisions of the Plant Protection Act, Title IV of the Agricultural Risk Protection Act of 2000, Pub. L. 106-224, as amended, 7 U.S.C. §§ 7701 *et seq.*⁵

In the Plant Protection Act, Congress found that “the detection, control, eradication, suppression, prevention, or retardation of the spread of plant pests or noxious weeds is necessary for the protection of the agriculture, environment, and economy of the United States,” and provided that “it is the responsibility of the Secretary [of Agriculture] to facilitate exports, imports, and interstate commerce in agricultural products and other commodities that pose a risk of harboring plant pests or noxious weeds *in ways that will reduce, to the extent practicable, as determined by the Secretary, the risk of dissemination of plant pests or noxious weeds.*”⁶ Congress also determined, however, that “the *smooth movement of enterable plants, plant products, biological control organisms, or other articles into, out of, or within the United States is vital to the United State’s [sic] economy and should be facilitated to the extent possible,*” and directed that “decisions affecting imports, exports, and interstate movement of products regulated under this chapter shall be based on sound science.”⁷

Thus, like the Homeland Security Act, the Plant Protection Act requires a balancing of interests – facilitating legitimate trade on the one hand, while also preventing dangerous pests from entering the United States. The balance between facilitating legitimate movement across the border and protecting the national and economic security is,

³ See, e.g., Jonathan Thessin, *Department of Homeland Security*, 40 HARV. J. ON LEGIS. 513 (2003).

⁴ See Dep’t of Homeland Security, U.S. Customs & Border Protection, *Summary of Laws Enforced by CBP*, <https://www.cbp.gov/trade/rulings/summary-laws-enforced/us-code> (last visited December 18, 2020).

⁵ See 19 U.S.C. § 231(b)(4); 6 U.S.C. § 211(c)(11) (transferring functions from the Department of Agriculture to CBP).

⁶ 7 U.S.C. § 7701(1), (3) (emphasis added).

⁷ *Id.* at § 7701(4), (5) (emphasis added).

in its various forms, at the very heart of CBP's mission. This is because CBP is generally tasked with coordinating and integrating its security, trade facilitation, and trade enforcement functions, including facilitating and expediting the flow of legitimate trade and travel while simultaneously safeguarding the borders of the United States against the entry of dangerous goods, to include enforcement and administration of the laws relating to agricultural import and entry inspection.⁸ Where the authorities overlap and sometimes provide for competing priorities, collaboration with partner government agencies is critical to effective enforcement.

III. ANDRITZ V. UNITED STATES

The recent decision in *Andritz v. United States* provides an interesting case study. *Andritz* involved the importation of steel mill components into the Port of Houston in wood packaging infested by certain woodwasps that have been identified by the U.S. Department of Agriculture (USDA) as presenting a serious risk to United States pine trees and forests. Although the cargo itself did not appear to present any concerns as a matter of the customs laws governing the entry of merchandise – i.e., although the cargo appeared to be precisely the sort of legitimate trade that is part of CBP's mission to facilitate⁹ – CBP Inspectors and Agriculture Specialists detected the presence of woodwasps of the *Siricidae* family, as later identified by the CBP Laboratory and ultimately confirmed by USDA experts based on DNA testing, infesting the wooden crates in which the cargo was packaged.¹⁰ The USDA considers the *Siricidae* family woodwasp “a nonnative, invasive ... major pest of pine trees,”¹¹ and USDA

⁸ 6 U.S.C. § 211(c) (1), (3), (6) and (11).

⁹ The cargo itself consisted of two steel mills destined for installation in Arkansas, see *Andritz*, 2018 WL 3218006, at *1, imported after the President had recently taken measures intended to bolster domestic steel production in the interest of national security. See Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018).

¹⁰ *Andritz*, 2018 WL 3218006, at *1-2.

¹¹ U.S.D.A., APHIS, *Proposed Program for the Control of the Woodwasp *Sirex noctilio* F. (Hymenoptera: Siricidae) in the Northeastern United States: Environmental Assessment* (August 2008) at 1, available at https://www.aphis.usda.gov/plant_health/ea/downloads/SirexEA-final-northeast.pdf (last visited December 18, 2020) [hereinafter APHIS, *Siricidae Environmental Assessment*].

regulations specifically include the *Siricidae* family within the list of “organisms which are or contain plant pests.”¹²

A. Emergency at the Port

USDA’s regulations implementing the Plant Protection Act require that regulated wood packaging material (WPM)– including but not limited to, crates, pallets, boxes, and pieces of wood used to support or brace cargo – being imported into the United States must be heat treated or fumigated with methyl bromide. WPM must also bear a specific mark that certifies that the wood has been treated in accordance with the International Plant Protection Convention’s (IPPC) International Standards of Phytosanitary Measures (ISPM) concerning WPM in international trade, including any associated amendments, revisions or exemptions identified by the USDA’s Animal and Plant Health Inspection Service (APHIS).¹³ On September 16, 2004, the USDA adopted ISPM 15, and amended its regulations to require that all WPM imported into the United States be heat treated or fumigated with methyl bromide and marked with the IPPC logo and appropriate country code designating the location of treatment.¹⁴

¹² 7 C.F.R. § 340.2(a).

¹³ 7 C.F.R. § 319.40-3. *See also* Dep’t of Homeland Security, U.S. Customs & Border Protection, *Guidelines for Liquidated Damages and Penalties for Noncompliant Wood Packaging Material (WPM)* (July 2018), available at <https://www.cbp.gov/sites/default/files/assets/documents/2018-Oct/20180725GUIDELINES%20FOR%20LIQUIDATED%20DAMAGES%20AND%20PENALTIES%20FOR%20NC%20WPM.pdf> (last visited December 18, 2020) [hereinafter *CBP Noncompliant WPM Guidelines*]. “The mark must be approved under ISPM 15 to indicate that the article has been subjected to an approved measure and the mark must include the following elements: 1. The IPPC logo; 2. The International Organization for Standardization (ISO) 2-letter country code for the country that produced the wood packaging material; 3. The unique number code for the producer of the wood packaging material as assigned by the National Plant Protection Organization (NPPO); and 4. The treatment code using correct abbreviation according to Annex 1 (HT for heat treatment or MB for methyl bromide fumigation).” *Id.* ISPM 15 is the standard adopted by the Commission on Phytosanitary Measures, the governing body of the IPPC, that applies to the regulation of WPM in international trade. For a list of all adopted ISPMs, *see* <https://www.ippc.int/en/core-activities/standards-setting/ispms/> (last visited December 18, 2020).

¹⁴ *Importation of Wood Packaging Material*, 69 Fed. Reg. 55,719 (Dep’t Agriculture Sept. 16, 2004) (final rule amending 7 C.F.R. Pt. 319). *See also* Dep’t of Homeland

The USDA's regulations mandate immediate re-exportation for noncompliant WPM.¹⁵

In *Andritz*, the WPM did appear to bear the mark certifying compliance with the treatment requirements of the ISPM.¹⁶ Nevertheless, whatever treatment the wooden crates had received was evidently ineffective against the *Siricidae* woodwasps that infested them.¹⁷ Since 2006,¹⁸ APHIS policy has required immediate re-exportation not only of any unmarked WPM that is not in compliance with the ISPM 15 treatment and marking standard, but also "the immediate re-exportation of any marked WPM that is found to be infested with a live wood boring pest of the families *Cerambycidae* (longhorned beetle), *Buprestidae* (woodboring beetles), *Siricidae* (woodwasps), *Cossidae* (carpenter moth), *Curculionidae* (weevils), *Platypodidae* (ambrosia beetles), *Sesiidae* (clearwing moths) and *Scolytidae* (bark beetles)."¹⁹ APHIS believes that this policy is "consistent with the intent of the [regulations] and the Plant Protection Act" because "plant pests that attack live trees prior to being manufactured into WPM will not survive the treatments prescribed in the regulation," such that "[i]f a wood boring pest is found in marked

Security, U.S. Customs & Border Protection, *Wood Packaging Materials*, available at <https://www.cbp.gov/border-security/protecting-agriculture/wpm> (last visited December 18, 2020), and additional resources linked to therein.

¹⁵ 7 C.F.R. § 319.40-3(b)(3).

¹⁶ *Andritz*, 2018 WL 3218006, at *1.

¹⁷ *Id.* at *1-2.

¹⁸ "[T]o give affected parties time to comply with the new requirements," implementation of the new wood packaging requirements was delayed until July 5, 2006, when APHIS and CBP began to enforce the new marking requirements. See U.S.D.A., APHIS, *APHIS Adopts International Standards On Wood Packaging Materials*, https://www.aphis.usda.gov/aphis/ourfocus/planthealth/import-information/wood-packaging-material/sa_hot_topics/ct_wood_packing (last visited December 18, 2020); See also U.S.D.A., APHIS, *Plant Pests in Marked Regulated Wood Packaging Material*, Memorandum to Dep't of Homeland Security, Customs and Border Protection (Feb. 16, 2006), available at <https://www.oocl.com/SiteCollectionDocuments/OOCL/Corporate%20Homepage/ppqpolicy2006.pdf> (last visited December 18, 2020) ("policy outlin[ing] procedures to be implemented by Customs and Border Protection (CBP) Agriculture Specialists on wood packaging material that is properly marked but found infested with certain insect pests") [hereinafter APHIS, *Plant Pests in Marked Regulated Wood Packaging Material*].

¹⁹ APHIS, *APHIS Adopts International Standards on Wood Packaging Materials*, *supra* note 18.

WPM, it confirms that the WPM has not been treated and marked in accordance with the regulation and will be reexported,” and “[t]he importer will be responsible for any costs or charges associated with the reexportation.”²⁰ In APHIS’s view, therefore, “[m]arked WPM, containing pests in the above mentioned families, is considered WPM that has not been treated and marked in accordance with section 319.40-3, and shall be immediately reexported pursuant to [7 C.F.R. § 319.40-3(b)(3), which provides for the immediate reexport of noncompliant WPM].”²¹

In *Andritz*, the wood packaging was discovered to contain larvae and live woodwasps, as well as insect exit holes indicating that some had already escaped into the surrounding environment.²² According to the experts at USDA, these insects pose a serious threat to valuable pine forests, plantations, and landscape plantings in the United States which, “[i]n addition to the large economic benefits of pine resources, ... also provide valuable and unique habitat to a variety of flora and fauna throughout the United States.”²³ When this invasive woodwasp was inadvertently introduced in the Southern Hemisphere, “it [] caused up to 80 percent tree mortality in plantations planted with North American pine species,” suggesting that it “has the potential to cause extensive damage and mortality in commercially mature timber and future-growing stock timber in the United States.”²⁴ Given the seriousness of this risk, swift action was required once live pests were discovered, in order to prevent their escape and dissemination into the pine trees near the Port of Houston.²⁵

²⁰ *Id.*

²¹ APHIS, *Plant Pests in Marked Regulated Wood Packaging Material*, *supra* note 18.

²² *Andritz*, 2018 WL 3218006, at *1-2.

²³ APHIS, *Siricidae Environmental Assessment*, *supra* note 11, at 16. “Softwood production in the United States is a multibillion dollar industry that provides numerous commodities. In the southern States where pine production typically occurs in large, even-aged, managed stands, the combined value of logs and bolts, lumber, veneer, and pulpwood production is greater than \$8 billion per year (USDA, APHIS, 2007a). The value of the same commodities in the western United States is greater than \$10 billion. Other commodities, such as Christmas tree production, result in a revenue of approximately \$2 million in the northeastern and north-central United States (USDA, APHIS, 2007a).” *Id.*

²⁴ *Id.* at 18.

²⁵ See DAVID J. NOVAK, U.S. DEP’T OF AGRICULTURE FOREST SERVICE, NE. RESEARCH STATION, ET AL., HOUSTON’S REGIONAL FOREST, 3 tbl.1 (Texas Forest Service

When evidence of the woodwasp infestation was first detected in the *Andritz* wood packaging by the CBP Inspector, the cargo was distributed in 439 crates of widely varying shapes and sizes scattered through the Manchester Terminal of the Port of Houston.²⁶ The Inspector had chiseled into one of the wooden crates and found live insect larvae inside that, based on his training and experience, he believed to be in the *Siricidae* (woodwasp) family.²⁷ The Inspector sent samples of the insects taken from the imported packaging to the CBP Laboratory in Houston, which confirmed that the insects were *Siricidae*.²⁸ Meanwhile, awaiting confirmation from the lab, the CBP Inspector ordered that any cargo and packaging that was covered by this entry and that had already left the port be redelivered back to customs custody, and that the cargo and packaging at the port “must be tarped immediately by a USDA compliant firm as a safeguarding measure to prevent the spread of live pests.”²⁹ To prevent insect escape before re-exportation, the USDA’s policy dictates that options “such as tarping or placing the products in a sealable container” should be explored, but provides that “[r]eexportation of the product [found to be infested with live *Siricidae*] will still be carried [] out after safeguarding against insect escape.”³⁰ The shipment was “placed on hold” with CBP.³¹

Three days after the shipment first arrived at the Port of Houston, the insect specimens taken from the shipment’s wood packaging were confirmed by the CBP Laboratory to be of the *Siricidae* family.³² CBP then issued an Emergency Action Notice (EAN), under

Communication/Urban and Community Forestry 2005), https://www.nrs.fs.fed.us/pubs/jrnl/2005/ne_2005_nowak_001.pdf (last visited December 18, 2020) (noting that pines comprise the most common native trees of Houston’s regional forest).

²⁶ *Andritz*, 2018 WL 3218006, at *1.

²⁷ *Id.*

²⁸ *Id.* The CBP Inspector had also discovered another pest specimen, in another crate from the same entry but covered by a separate bill of lading, which the Inspector also sent to the CBP Laboratory. This other pest was determined not to belong to the *Siricidae* family.

²⁹ *Id.* (quoting Emergency Action Notice (EAN) Serial No. 96029 (June 10, 2018) and EAN Serial No. 96030 (June 10, 2018)).

³⁰ APHIS, *Plant Pests in Marked Regulated Wood Packaging Material*, *supra* note 18 (alteration in original).

³¹ *Andritz*, 2018 WL 3218006, at *13 n.3 (quoting EAN Serial No. 96029).

³² *Id.* at *2.

authority of the Plant Protection Act,³³ requiring the re-exportation within seven days of the crates covered by the bill of lading under which the infestation was first discovered.³⁴ This EAN also required that the cargo and packaging must be “loaded in a sealed hold and cannot be opened while in US waters/ports.”³⁵

Two days later, a CBP Agriculture Specialist inspected the crates that remained scattered throughout the Manchester Terminal. He noted that the crates were neither loaded in a sealed hold nor properly tarped as required by the EANs.³⁶ He also found exit holes and excrement from insects, as well as live woodwasps and larvae in crates that were part of the same shipment but covered by a separate bill of lading from the one that already had been found to be infested and ordered to be re-exported. The Agriculture Specialist sent these specimens to the CBP Laboratory, which identified them as *Siricidae*.³⁷ The next day, CBP issued a new EAN, requiring re-exportation of the cargo and packaging covered by this separate bill of lading in addition to the re-exportation that had already been required of the prior bill of lading, and thus requiring re-exportation of the entire shipment.³⁸

B. Legal Challenge

The importer filed an administrative protest with CBP under 19 U.S.C. § 1514, “challenging the EANs and requesting permission to separate the Cargo from the infested WPM.”³⁹ Two days later, before CBP had formally issued a decision on this protest,⁴⁰ Andritz filed a

³³ See *Andritz*, 322 F. Supp. 3d at 1362 (quoting EAN Serial No. 96733).

³⁴ *Andritz*, 2018 WL 3218006, at *2.

³⁵ *Id.* (quoting EAN Serial No. 96081 (June 11, 2018)).

³⁶ *Id.*

³⁷ *Id.* at 1.

³⁸ *Id.* at 2 (discussing EAN Serial No. 96842 (June 14, 2018)).

³⁹ *Id.* (discussing the importer’s protest, attached as exhibit 2 to the complaint).

⁴⁰ Judge Atlas’s opinion for the Southern District of Texas states that “CBP, through the Assistant Port Director, responded [to Andritz’s protest] that, after consultation with the USDA, it was determined that separation [of the cargo from the infested packaging prior to re-exportation of the packaging] presented a pest risk,” *id.* (citing “Communication from Assistant Port Director to Andritz,” attached as exhibit 1 to the complaint in that case), but the protest had not been officially approved or denied under 19 U.S.C. § 1515 and 19 C.F.R. § 174.29. Although Andritz had requested accelerated disposition of its protest under 19 U.S.C. § 1515(b) and 19 C.F.R. §

complaint and application for a temporary restraining order in the U.S. Court of International Trade (CIT).⁴¹ The following day, CBP issued new EANs, in consultation with USDA, requiring the cargo and packaging to “be immediately loaded inside the sealed vessel hold(s) of the [shipping vessel] to prevent further spread of the pests,” and to be so safeguarded until further notice.⁴²

Andritz’s CIT complaint sought to invoke the court’s jurisdiction under 28 U.S.C. § 1581(a),⁴³ which provides that “[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515].”⁴⁴ Section 515 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1515, in turn provides for CBP’s decisions concerning administrative protests filed in accordance with the provisions of 19 U.S.C. § 1514.⁴⁵ The CIT, however, held that “[a]lthough this case potentially involves ‘the exclusion of merchandise from entry’ under [19 U.S.C. § 1514(a)(4)], it is not a decision by Customs made ‘under any provision of the customs laws,’” as required for protestability under 19 U.S.C. § 1514(a).⁴⁶

174.24, those provisions provide CBP with 30 days from “the date of mailing by certified or registered mail of a request for accelerated disposition” before “a protest which has not been allowed or denied in whole or in part ... shall be deemed denied on the thirtieth day following mailing of such request.” 19 U.S.C. § 1515(b). If Andritz mailed its request for accelerated disposition by certified or registered mail on the same day as the protest was filed, on June 15, 2018, then the protest had neither been formally decided nor been deemed denied by operation of law on June 17, 2018, when the summons was filed in the CIT.

⁴¹ *Andritz*, 322 F. Supp. 3d at 1360.

⁴² *See Andritz*, 2018 WL 3218006, at *2 (quoting EAN Serial No. 97291 (June 18, 2018) and EAN Serial No. 97296 (June 18, 2018)).

⁴³ *Andritz*, 322 F. Supp. 3d at 1363 (Ct. Int’l Trade 2018) (“Plaintiff pleads jurisdiction on the basis of 28 U.S.C. § 1581(a) ...”). As the court noted, the complaint also asserted 28 U.S.C. § 1331 as an alternative basis for jurisdiction. *Id.* at n.3. But as the CIT explained, “[t]hat provision grants the district courts with original subject matter jurisdiction over ‘all civil actions arising under the Constitution, laws, or treaties of the United States[,]’ [whereas the CIT] is one of limited jurisdiction by statute, and therefore Plaintiff’s invocation is erroneous.” The plaintiff later also “raised 28 U.S.C. § 1581(i)(4) as a potential avenue for jurisdiction over this matter,” but the CIT held that 28 U.S.C. § 1581(i)(4) was not applicable. *Id.* at 6-7.

⁴⁴ 28 U.S.C. § 1581(a).

⁴⁵ 19 U.S.C. § 1515(a).

⁴⁶ *Andritz*, 322 F. Supp. 3d at 1364.

Accordingly, the CIT held that, “[b]ecause the protest does not involve the exclusion of merchandise pursuant to customs laws, but rather agricultural laws, it is not a proper protest according to 19 U.S.C. § 1514(a) and is [therefore] not reviewable by this Court.”⁴⁷ Noting that “[c]laims originating from the Plant Protection Act are properly filed in the U.S. district courts,”⁴⁸ the court dismissed the case from the CIT for lack of subject matter jurisdiction, and transferred the case to the U.S. District Court for the Southern District of Texas.⁴⁹ On the same day, CBP issued new EANs requiring that the entire shipment “be loaded in a sealed hold and not opened while in US waters or ports,” and be immediately re-exported.⁵⁰

That same evening, however, before the vessel had left the port, a U.S. Magistrate Judge issued an *ex parte* order that “the status quo regarding the vessel and cargo must be maintained,” and the parties were to report to a conference before Judge Atlas of the U.S. District Court for the Southern District of Texas the following morning.⁵¹ The next day Judge Atlas ordered the “status quo remain[] in effect until a ruling is made” on the application for a temporary restraining order to restrain enforcement of the EANs.⁵²

An evidentiary hearing was then held, where the United States presented the testimony of the CBP Inspector and the CBP Agriculture Specialist who collected the pest specimens from the wood packaging of the subject shipment, as well as from the USDA Officer in Charge of Plant Protection and Quarantine in Houston. The importer presented testimony from its company President and a corporate representative of its U.S. customer, as well as a representative from a fumigation company. The fumigation company representative testified concerning possible fumigation plans but admitted that “his ideas [were] not a full fumigation plan, for which he would need to develop

⁴⁷ *Id.*

⁴⁸ *Id.* at 7 (quoting 7 U.S.C. § 7736(a) (“The United States district courts . . . are vested with jurisdiction in all cases arising under this chapter.”)).

⁴⁹ *Id.* (explaining that 28 U.S.C. § 1631 allows the court to transfer an action if it finds that “there is a want of jurisdiction” and “if it is in the interest of justice”). See *Andritz v. United States*, S.D. Tx. No. 4:18-2061.

⁵⁰ *Andritz*, 2018 WL 3218006, at *2 (discussing EAN Serial No. 97819 (June 20, 2018) and EAN Serial No. 97820 (June 20, 2018)).

⁵¹ *Id.* at *7.

⁵² *Id.* at *8.

more details and to confer with the USDA," which would require breach of the USDA seals that were then in place over the sealed vessel hold containing the infested shipment.⁵³ In addition, a representative of the shipment's "project forwarder" testified that the fumigated packaging could be removed and the cargo repackaged in new packaging while the infested packaging was re-exported, but that this would take at least 48 hours if done "in or near the Port of Houston" and that "it would be difficult to ship the Cargo in its current condition to any other country, because it is unlikely that another country would allow entry of the siricidae-infested WPM."⁵⁴ Finally, both Andritz and the Government presented entomology experts. While plaintiff's expert agreed that the *Siricidae* woodwasp "is a serious pest, causing an 80%+ mortality rate in the pine trees it attacks," and that "Texas has a large lumber industry that is worth protecting," he "believed [that] fumigation could be performed in a ship's hold," while admitting that he also had not examined the hold in question, which would need to be unsealed and examined before a fully effective fumigation plan could be formulated.⁵⁵ The plaintiff's expert "also testified that at least a portion of the Manchester Terminal would need to be shut down for a number of hours to complete [plaintiff's proposed fumigation] plan," and that "[h]e was uncertain if the necessary time would be a day, or more, or less."⁵⁶ The Government's expert, on the other hand, an entomologist at the Smithsonian Institute who works with the USDA, suggested that unsealing the hold in order to evaluate potential fumigation plans would risk letting the flying woodwasps escape into the surrounding pine forests, since the samples taken from the shipment's packaging had "included siricidae at different stages of the life cycle, increasing the likelihood that there are currently adult siricidae flying in the sealed hold, given that two weeks had passed since the samples had been taken and the temperatures in the hold were very high,"⁵⁷ which accelerates the woodwasp's lifecycle.⁵⁸

⁵³ *Id.* at *9.

⁵⁴ *Id.*

⁵⁵ *Andritz*, 2018 WL 3218006, at *3-4.

⁵⁶ *Id.* at *3.

⁵⁷ *Id.* at *4.

⁵⁸ See Dep't of Agriculture, Animal and Plant Health Inspection Service, *Proposed Program for Management of the Woodwasp Sirex noctilio Fabricius (Hymenoptera:*

The District Court ultimately held, *inter alia*, that the plaintiff had “failed to demonstrate a likelihood of success on the merits of its challenge to the USDA’s decisions” in this case,⁵⁹ because “articles infested with non-native siricidae are not ‘enterable’ into the United States.”⁶⁰ Furthermore, “[w]hen inspection of a means of conveyance arriving into the United States reveals a plant pest, ‘or provides a reason to believe such a pest is present,’ which pest is ‘new to, or not theretofore known to be widely prevalent or distributed within and through the United States, the inspector shall employ procedures necessary to prevent the dissemination of the plant pest.’”⁶¹ The court noted that “[t]he re-export provision of [USDA’s wood packaging] regulation [7 C.F.R. § 319.40-3(b)(3)] states specifically that it is in addition to other first arrival procedures required by 7 C.F.R. § 319.40-9,” which in turn include the requirement that wood packaging “that is so infested with a plant pest that, in the judgment of the inspector, the regulated article cannot be cleaned or treated, ‘the entire lot may be refused entry into the United States,’” and that “[t]he presence of a ‘heat treatment’ mark on pest infested [WPM] does not preclude its re-exportation.”⁶²

Concerning the Plant Protection Act’s requirement that less drastic action than re-exportation be considered,⁶³ the court held that there was evidence in this case that USDA had considered the plaintiff’s proposed fumigation plan and that “the USDA officials questioned the effectiveness of the fumigant to kill the siricidae

Siricidae), Environmental Assessment (June 2007), available at https://www.aphis.usda.gov/plant_health/ea/downloads/sirex-ea.pdf (last visited December 18, 2020), at 1-2.

⁵⁹ *Andritz*, 2018 WL 3218006, at *10.

⁶⁰ *Id.* at *7 (citing 7 U.S.C. § 7712(a)).

⁶¹ *Id.* (quoting 7 C.F.R. § 330.106).

⁶² *Id.* at *8 n.9 (quoting 7 C.F.R. § 319.40-9(a)).

⁶³ See 7 U.S.C. § 7714(d) (Application of least drastic action) (“No plant, biological control organism, plant product, plant pest, noxious weed, article, or means of conveyance shall be destroyed, exported, or returned to the shipping point of origin, or ordered to be destroyed, exported, or returned to the shipping point of origin under this section unless, in the opinion of the Secretary, there is no less drastic action that is feasible and that would be adequate to prevent the dissemination of any plant pest or noxious weed new to or not known to be widely prevalent or distributed within and throughout the United States.”).

remaining inside the inaccessible portions of the WPM,"⁶⁴ because the proposed fumigation "would involve a new and untested process not covered by the USDA manual," and there was "no guidance regarding the amount of chemical to use and, importantly, how safe the process would be for crew members on this ship."⁶⁵ Additionally, it was not clear "how to access the Cargo to develop the details of the treatment plan without releasing flying siricidae from the hold."⁶⁶ Noting that the record also contained evidence that "the USDA officials [had also] considered other potential alternatives to re-exportation of the Cargo,"⁶⁷ the court concluded that USDA's determination that "none [of the less drastic means of dealing with the infestation] was both feasible and adequate to prevent a serious risk of siricidae infestation of pine trees in the neighborhood and beyond" was "rational." Furthermore, USDA "is not required to expend time and resources to conduct detailed analysis of each conceivable alternative to re-exportation when confronted with an immediate risk of pest infestation" and, "[i]n these circumstances, the Secretary [of Agriculture] was not required to gamble with the vitality of the United States pine forests."⁶⁸

Accordingly, the court held that the importer had "failed to satisfy its burden to demonstrate that CBP's decision to require re-exportation of the Cargo and the infested WPM in which the Cargo is packaged was arbitrary and capricious," denied plaintiff's application for a temporary restraining order, and vacated its prior *status quo*

⁶⁴ *Andritz*, 2018 WL 3218006, at *10 ("The crates [were] tightly packed within the vessel's hold, and the tops of the crates [were] covered with water impermeable plastic sheeting that may retard the flow of the fumigant to all of the infested WPM. Plaintiff's witnesses acknowledged this problem and failed to present adequate solutions.").

⁶⁵ *Id.* at *11; see U.S. DEP'T OF AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERVICE, Manuals, <https://www.aphis.usda.gov/aphis/ourfocus/planthealth/complete-list-of-electronic-manuals> (last visited December 18, 2020); see also U.S. DEP'T. OF AGRIC., Treatment Manual (2016), https://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/treatment.pdf (last visited December 18, 2020) (incorporated by reference into 7 C.F.R. § 305).

⁶⁶ *Id.* at *10.

⁶⁷ *Id.* at *9.

⁶⁸ *Id.* at *10 (quoting *Intercitrus Ivertrade Commercial Corp. v. U.S. Dep't of Agriculture*, No. CIV.A. 02-1061, 2002 WL 1870467 at *6 (E.D. Penn. Aug. 13, 2002)).

order, effectively reinstating the June 20, 2018, EANs requiring immediate re-exportation of the shipment.

IV. IMPORTANT LESSONS

One of the main lessons of the *Andritz* case is that when facilitating legitimate trade while safeguarding the nation from the risk of dangerous plant pest dissemination, time is of the essence once the shipment is already at a U.S. port. On the one hand, the threat presented by live *Siricidae* woodwasps discovered in imported wood packaging is an emergency that must be dealt with as swiftly as possible to prevent this flying insect from reaching and devastating the nearby pine trees and forests.⁶⁹ On the other hand, U.S. entry law also recognizes that timely release of legitimate trade should be facilitated.⁷⁰ Balancing these competing interests requires quick decision-making, and there is little time for a comprehensive analysis of all available alternatives. When making such calls with respect to actual shipments presenting potential risk at a U.S. port, the USDA and CBP must avoid acting “arbitrarily or capriciously”⁷¹ – that is, the agencies must act reasonably, “based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the [authorizing] statute”⁷² and, when applying the law to specific circumstances, based on “such relevant evidence as a reasonable mind might accept as adequate to support” the agencies’ findings and conclusions,⁷³ but they are “not required to gamble with the vitality’ of the United States pine forests.”⁷⁴

⁶⁹ See sources discussed *supra*, Section III.A.

⁷⁰ See, e.g., 19 U.S.C. § 1499(c) (providing time limits for CBP’s decision concerning release of merchandise presented for customs examination); *cf.* Rule 3(g)(3) of the Rules of the United States Court of International Trade (providing that actions to contest the denial of a protest involving the exclusion or redelivery of merchandise may be expedited and given precedence over other pending actions).

⁷¹ See 5 U.S.C. § 706.

⁷² *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

⁷³ See *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966).

⁷⁴ *Andritz*, 2018 WL 3218006, at *10 (quoting *Intercitrus Ivertrade Commercial Corp. v. U.S. Dep’t of Agriculture*, No. CIV.A. 02-1061, 2002 WL 1870467 at *6 (E.D. Penn. Aug. 13, 2002)).

Creative solutions may, however, perhaps be employed more effectively *in advance* of an importation. The USDA has issued several manuals providing approved procedures for dealing with specific emergencies.⁷⁵ In particular, the Plant Protection and Quarantine Treatment Manual contains approved treatment schedules for agricultural commodities.⁷⁶ The problem in *Andritz* was that the importer's proposed less drastic means of dealing with the infestation, short of re-exportation – fumigation in the vessel hold – has not been formally evaluated by the USDA and other appropriate regulatory bodies for safety and effectiveness, and is not currently covered or provided for by the Plant Protection and Quarantine Treatment Manual.⁷⁷ If importers are interested in developing the option of vessel hold fumigation for potential future wood packaging infestations, the relevant considerations could be examined together with USDA and other appropriate experts, with the aim of USDA issuing pre-approved procedures to govern such fumigation. These procedures could then be readily applied, should another pest emergency similar to the *Andritz* case present itself, to facilitate both the effective mitigation of the pest risk and the expeditious entry and release of legitimate cargo.⁷⁸ As fumigation involves the potential release of toxins into the air, appropriate federal, state and local air quality regulatory bodies, as well as the port authorities and other potential post-fumigation repackaging sites, would also likely need to be consulted.

At the same time, it is important to know where and when to file suit in order to challenge a re-exportation order issued under the

⁷⁵ See U.S. DEP'T OF AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERVICE, Manuals, <https://www.aphis.usda.gov/aphis/ourfocus/planthealth/complete-list-of-electronic-manuals> (last visited December 18, 2020).

⁷⁶ See U.S. DEP'T. OF AGRIC., Treatment Manual (2016), https://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/treatment.pdf (last visited December 18, 2020) (incorporated by reference into 7 C.F.R. § 305).

⁷⁷ See *Andritz*, 2018 WL 3218006 at *11; see also U.S. DEP'T. OF AGRIC., Treatment Manual (2016), https://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/treatment.pdf (last visited December 18, 2020). *But see* U.S. DEP'T OF AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERVICE, Manuals, <https://www.aphis.usda.gov/aphis/ourfocus/planthealth/complete-list-of-electronic-manuals> (last visited December 18, 2020).

⁷⁸ See 7 C.F.R. § 305.3 (providing processes for adding, revising, or removing treatment schedules in the Plant Protection and Quarantine Treatment Manual).

authority of the Plant Protection Act. As the CIT noted in *Andritz*, jurisdiction over actions arising out of the Plant Protection Act is vested in the U.S. District Courts.⁷⁹ And unless the importer can demonstrate imminent irreparable harm and the other requirements for the extraordinary relief of a prejudgment restraining order or injunction, the statutory remedy for actions taken under the Plant Protection Act that are believed to be unlawful is to file, within one year of the challenged agency action, an action under the Plant Protection Act “to recover just compensation for the destruction or disposal of the plant, plant biological control organism, plant product, plant pest, noxious weed, article, or means of conveyance (not including compensation for loss due to delays incident to determining eligibility for importation, entry, exportation, movement in interstate commerce, or release into the environment).” However, this remedy is available “only if the owner establishes that the destruction or disposal was not authorized under [the Plant Protection Act].”⁸⁰

Finally, it is important to be aware that, in addition to requiring the immediate re-exportation of the infested wood packaging, without permitting separation of the cargo prior to re-exportation, as was ordered in *Andritz*, the Plant Protection Act also authorizes the

⁷⁹ *Andritz* CIT, *supra* note 2, at 7 (quoting 7 U.S.C. § 7736(a) (“The United States district courts . . . are vested with jurisdiction in all cases arising under this chapter.”)). On the other hand, the CIT is vested with exclusive jurisdiction over “any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for – (1) revenue from imports or tonnage; (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.” 28 U.S.C. § 1581(i). In *Natural Resource Defense Council v. Ross*, for example, the CIT exercised jurisdiction under 28 U.S.C. § 1581(i)(3), despite the fact that the underlying challenged agency decision was taken not by CBP as a matter of entry law but by the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service, within the Department of Commerce, under the Marine Mammal Protection Act, because the CIT “has exclusive jurisdiction over any civil action arising out of any law of the United States providing for ‘embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety.’” 331 F. Supp. 3d 1338, 1353 (Ct. Int’l Trade 2018).

⁸⁰ See 7 U.S.C. § 7716(a).

Secretary of Agriculture to assess a civil penalty, after notice and an opportunity to comment, to anyone who violates the Act.⁸¹ In determining the amount of such penalty, the statute requires the USDA to “take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider, with respect to the violator – (A) ability to pay; (B) effect on ability to continue to do business; (C) any history of prior violations; (D) the degree of culpability; and (E) any other factors the Secretary considers appropriate.”⁸²

In addition, CBP may impose a penalty under § 596 of the Tariff Act of 1930, as amended,⁸³ with respect to any “trade entity who has a documented WPM violation for failing to comply with the WPM regulation.”⁸⁴ Separately, CBP may also impose a penalty under § 592 of the Tariff Act of 1930, as amended, if the agency finds that materially false information or omission was used to “enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United

⁸¹ 7 U.S.C. § 7734(b)(1).

⁸² *Id.* § 7734(b)(2). “The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty that may be assessed under this subsection.” *Id.* at § 7734(b)(3). “The order of the Secretary assessing a civil penalty shall be treated as a final order reviewable under chapter 158 of Title 28,” but “[t]he validity of the Secretary’s order may not be reviewed in an action to collect the civil penalty.” *Id.* § 7734(b)(4). “Any civil penalty not paid in full when due under an order assessing the civil penalty shall thereafter accrue interest until paid at the rate of interest applicable to civil judgments of the courts of the United States.” *Id.* Finally, “[w]hen construing and enforcing this chapter, the act, omission, or failure of any officer, agent, or person acting for or employed by any other person within the scope of his or her employment or office, shall be deemed also to be the act, omission, or failure of the other person.” *Id.* at § 7734(c).

⁸³ 19 U.S.C. § 1595a(b). *See also* Dep’t of Homeland Security, U.S. Customs & Border Protection, *Mitigation Guidelines: Importations Contrary to Law* (July 2019), https://www.cbp.gov/sites/default/files/assets/documents/2019-Jul/H301633%20-%201595a-c%20Mitigation%20Guidelines_7-25-19.508.pdf (last visited December 18, 2020).

⁸⁴ CBP *Noncompliant WPM Guidelines*, *supra* note 13, at 5. *See also* Dep’t Homeland Security, U.S. Customs & Border Protection, *Guidelines for the Cancellation of Claims for Liquidated Damages and Mitigation of Penalties Relating to the Wood Packaging Material Regulations* (Oct. 2019), https://www.cbp.gov/sites/default/files/assets/documents/2019-Oct/H301635_WPM%20Mitigation%20Guidelines_cwp%2010-25-19.508.pdf (last visited December 18, 2020) [hereinafter *CBP WPM Mitigation Guidelines*].

States.”⁸⁵ In a case like *Andritz*, for example, the wood packaging was found to be properly marked as treated in accordance with the USDA regulations,⁸⁶ but was also found to nevertheless be infested with *Siricidae*. According to USDA policy, the infestation confirms that the WPM has not been treated and marked in accordance with the regulation.⁸⁷ Was the wood in fact treated as required and as marked? Was there a failure of reasonable care?⁸⁸ These and other questions must be resolved when considering whether a basis for penalty under § 592 may exist in such or similar circumstances.⁸⁹

V. CONCLUSION

In sum, the *Andritz* case presents an interesting case study of CBP’s role in the enforcement of importation-related aspects of the Plant Protection Act. The case also serves to remind the trading community (1) that pest infestations discovered when the shipment is already in port are emergencies requiring urgent action to address the risk of pest dissemination, leaving little time to develop or evaluate

⁸⁵ See 19 U.S.C. § 1592.

⁸⁶ *Andritz*, 2018 WL 3218006, at *1.

⁸⁷ See *CBP Noncompliant WPM Guidelines*, *supra* note 13, at 3 (“WPM that is infested with a named pest confirms that the WPM has not been treated in accordance with 7 C.F.R. § 319.40-3(b)(1). Named pests are live wood boring pests of the families *Cerambycidae*, *Buprestidae*, *Siricidae*, *Cossidae*, *Curculionidae*, *Platypodidae*, *Sesiidae*, or *Scolytinae*.”).

⁸⁸ 19 U.S.C. § 1592 (2004) (providing different penalty levels depending on whether the degree of culpability is negligence, gross negligence, or fraud); see 19 C.F.R. Pt. 171 App. B(C)(1) (further providing that failure to exercise reasonable care will generally amount to at least negligence).

⁸⁹ A liquidated damages claim may also be issued for failure to comply with remediation orders, *i.e.* failure to comply with an EAN, against “the party whose bond is obligated at the time of the discovery of the violation [and who] has received an Emergency Action Notification (EAN) requiring action on WPM and the party fails to take such action.” *CBP Noncompliant WPM Guidelines*, *supra* note 13, at 4; see also *CBP WPM Mitigation Guidelines*, *supra* note 83. A liquidated damages claim may also be issued for failure to comply with remediation orders, *i.e.* failure to comply with an EAN, against “the party whose bond is obligated at the time of the discovery of the violation [and who] has received an Emergency Action Notification (EAN) requiring action on WPM and the party fails to take such action.” *CBP Noncompliant WPM Guidelines*, *supra* note 13, at 4; see also *CBP WPM Mitigation Guidelines*, *supra* note 83.

new creative solutions; (2) that CBP's emergency action orders in such circumstances are issued in close consultation with the USDA and based on the USDA's subject matter expertise, subject to judicial review in the U.S. District Courts rather than under the customs administrative protest procedures that are reviewable in the CIT; and (3) that importers and their agents should carefully review USDA regulations and policy concerning regulated WPM used in international trade, ensuring that reasonable care is exercised to meet all requirements, and should comply with any EANs issued by CBP.