

2012 INTERNATIONAL TRADE LAW DECISIONS OF THE FEDERAL CIRCUIT

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INTRODUCTION

When the U.S. Court of Appeals for the Federal Circuit was established by the Federal Courts Improvement Act of 1982¹ it was vested with the former jurisdiction of its predecessor courts, the U.S. Court of Customs and Patent Appeals and the appellate function of the U.S. Court of Claims, as well as exclusive jurisdiction to hear appeals from the U.S. Court of International Trade (CIT) and the U.S. International Trade Commission (ITC or Commission).² The Federal Circuit's jurisdiction³ differs significantly from its twelve sister circuit courts in that it derives exclusively from statutory subject matter jurisdiction.⁴ Because the court's exclusive subject matter jurisdiction eliminates the possibility of a circuit split, international trade holdings of the Federal Circuit are infrequently reviewed by the Supreme Court, rendering the Federal Circuit the court of final appeal for most trade cases.⁵

This Article reviews cases decided by the Federal Circuit, on appeal from the CIT or ITC, during 2012. Though not the busiest docket the Federal Circuit has contended with in recent years in terms of international trade cases, 2012 still saw at least one statutory reversal of a landmark decision.⁶ Other precedential decisions included five trade remedy appeals from the CIT, six customs appeals, also from

1. Pub. L. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.).

2. See 28 U.S.C. § 1295(a)(5)–(6) (2006) (vesting exclusive jurisdiction over appeals from the CIT and appeals of ITC determinations under section 337 of the Tariff Act of 1930).

3. *Id.* § 1295.

4. Compare *id.* (granting jurisdiction to matters including, inter alia, the subsumed jurisdiction over appeals from the U.S. Court of Federal Claims, the Trademark Trial and Appeal Board, and the Board of Patent Appeals and Interferences of the U.S. Trademark Office, as well as appeals from the U.S. Merit Systems Protection Board and certain appeals from U.S. district courts relating to specific legislation), and 38 U.S.C. § 7292 (granting the Federal Circuit jurisdiction over decisions of the Court of Appeals for Veterans Claims), with 28 U.S.C. § 1291 (providing that the courts of appeals—except the Court of Appeals for the Federal Circuit—have jurisdiction over appeals from the federal district courts).

5. But see *United States v. Eurodif S.A.*, 555 U.S. 305 (2009) (reviewing a Federal Circuit decision overturning the U.S. Department of Commerce's (Commerce's) imposition of antidumping duties on imports of low enriched uranium).

6. *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011) (holding that countervailing duties cannot be applied to goods from nonmarket economy (NME) countries), *superseded by statute*, Pub. L. 112-99, 126 Stat. 266 (2012), *as recognized in* *GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308 (Fed. Cir. 2012).

the CIT, and four reviews of the ITC's section 337 determinations. Among the trade remedy cases, the Federal Circuit addressed two scope rulings,⁷ two appeals for relief under the Byrd Amendment,⁸ one request to overturn a constructed value determination rendered by the U.S. Department of Commerce (Commerce),⁹ and one countervailable subsidy determination.¹⁰ Customs cases included two requests for refund of import taxes,¹¹ one appeal of a customs classification ruling,¹² two requests to compel U.S. Customs and Border Protection (Customs or CBP) to liquidate entries,¹³ and one denial—with an accompanying dissent—of a request to compel liquidation.¹⁴ The patent-heavy section 337 determinations appealed from the ITC included cases concerning printer ink cartridges,¹⁵ wind power turbines,¹⁶ cellular telephone technology,¹⁷ and integrated circuit devices.¹⁸

The Article proceeds in three Parts, each containing a brief introduction to the statutory and procedural framework of the cases reviewed. Part I introduces antidumping (AD) and countervailing duty (CVD) laws and the administrative agencies that implement them. Part II lays out the general context of section 337 proceedings undertaken by the ITC. Part III sets forth the general framework of the customs laws and CBP's administration of those laws.

I. ANTIDUMPING AND COUNTERVAILING DUTY LAWS

The AD and CVD laws attempt to provide domestic U.S. industries a remedy for so-called unfair trade practices.¹⁹ Investigations under these laws are undertaken simultaneously at Commerce and the

7. *Arcelormittal Stainless Belg. N.V. v. United States*, 694 F.3d 82 (Fed. Cir. 2012); *King Supply Co. v. United States*, 674 F.3d 1343 (Fed. Cir. 2012).

8. *PS Chez Sidney, L.L.C. v. U.S. Int'l Trade Comm'n*, 684 F.3d 1374 (Fed. Cir. 2012); *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041 (Fed. Cir.), *cert. denied*, 133 S. Ct. 126 (2012).

9. *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751 (Fed. Cir. 2012).

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

11. *Shell Oil Co. v. United States*, 688 F.3d 1376 (Fed. Cir. 2012); *Ford Motor Co. v. United States*, 676 F.3d 1054 (Fed. Cir. 2012).

12. *Aromont USA, Inc. v. United States*, 671 F.3d 1310 (Fed. Cir. 2012).

13. *Ford Motor Co. v. United States*, 688 F.3d 1319 (Fed. Cir. 2012); *Norman G. Jensen, Inc. v. United States*, 687 F.3d 1325 (Fed. Cir. 2012).

14. *Hitachi Home Elecs. (Am.), Inc. v. United States*, 676 F.3d 1041 (Fed. Cir. 2012) (per curiam).

15. *Ninestar Tech. Co. v. Int'l Trade Comm'n*, 667 F.3d 1373 (Fed. Cir. 2012).

16. *Gen. Elec. Co. v. Int'l Trade Comm'n*, 685 F.3d 1034 (Fed. Cir. 2012).

17. *Interdigital Commc'ns, LLC v. Int'l Trade Comm'n*, 690 F.3d 1318 (Fed. Cir. 2012).

18. *Amkor Tech., Inc. v. Int'l Trade Comm'n*, 692 F.3d 1250 (Fed. Cir. 2012).

19. See 19 U.S.C. §§ 1671–1677n (2006) (codifying AD and CVD provisions of the Tariff Act of 1930, as amended).

ITC.²⁰ Commerce is responsible for determining whether dumping or subsidization took place, while the ITC determines whether a domestic industry has been injured (or threatened with injury) by imports.²¹

A. GPX International Tire Corp. v. United States

In *GPX International Tire Corp. v. United States*,²² the Federal Circuit addressed claims raised in the wake of the March 2012 enactment of Public Law 112-99,²³ whose section 1 confirmed the applicability of the CVD law to products originating in countries classified for antidumping purposes as nonmarket economies (NMEs).²⁴ The Federal Circuit had previously sided with GPX in holding that the CVD law could not be applied to NME products,²⁵ but Public Law 112-99 prevented the Federal Circuit from finalizing a decision (issuing a mandate) on that basis and brought the matter back in front of the court.

Public Law 112-99 took out of play the claim that imposing CVD relief on products GPX imported from China was automatically unlawful.²⁶ Remaining for the Federal Circuit to address were GPX's claims that (1) the CVD measure should still be voided because the retroactive element of Public Law 112-99, reaching existing cases and orders like the one on pneumatic tires, was unconstitutional; and (2) GPX was at least entitled to a recalculated (lower) total duty because domestic subsidies identified by Commerce had been double counted.²⁷

The Federal Circuit summarized GPX's constitutional claim as asserting that

20. See *id.* §§ 1671a–1671d (detailing investigation and decision-making procedures for the dual system in countervailing duty investigations); *id.* §§ 1673a–1673d (detailing investigation and decision-making procedures for the dual system in antidumping duty investigations); *id.* § 1677(1)–(2) (defining the agencies involved in the investigation and decision-making process).

21. *Id.* §§ 1671d(b)(1), 1673d(b)(1).

22. 678 F.3d 1308 (Fed. Cir. 2012).

23. Pub. L. 112-99, 126 Stat. 266 (2012) (to be codified at 19 U.S.C. §§ 1671, 1677f-1). Section 2 of Public Law 112-99 provided explicit authority for Commerce to address, in cases processed after the date of enactment, potential double counting of domestic subsidies in scenarios where simultaneous antidumping duties are calculated using Commerce's NME methodology.

24. *Id.* § 1(a); see *GPX*, 678 F.3d at 1310.

25. *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011), *superseded by statute*, Pub. L. No. 112-99, 126 Stat. 265 (2012), *as recognized in GPX Int'l Tire Corp. v. United States*, 678 F.3d 1308, 1311 (Fed. Cir. 2012).

26. *GPX*, 678 F.3d at 1311.

27. *Id.* at 1312–13.

the new legislation is unconstitutional because (1) it attempts to prescribe a rule of decision for this case after our decision in *GPX* was rendered; and (2) it improperly creates a special rule applicable only to this case (or perhaps a few others) due to the different effective dates in the two provisions . . . [thereby] creat[ing] a situation in which both antidumping and countervailing duties may be imposed, without providing a mechanism to account for potential double counting.²⁸

The Federal Circuit rejected the first constitutional argument on the ground that the case was still pending on appeal (no mandate having issued) at the time of enactment, and the Federal Circuit directed that the second constitutional argument be addressed in the first instance by the CIT.²⁹

The double-counting claim was based on the contention that dumping margins calculated using the “NME” or “surrogate” method of establishing normal value may be higher as a result of domestic subsidies, and thus may wholly or partially offset those subsidies making it inappropriate to offset them a second time through countervailing duties.³⁰ There are different theories (none very persuasive) about why domestic subsidies might influence NME dumping margin calculations, with some suggesting that such subsidies might raise normal value and others suggesting that such subsidies might lower (or lead to a lowering of) export price. There are also different theories about how—and how actively—Commerce ought to investigate these hypothetical subsidy-dumping linkages, and what default rules or presumptions the agency should apply.³¹

In any event, this is an important issue for determinations issued after the enactment date of Public Law 112-99, in light of that law’s section 2. However, *GPX*’s bid for a court-ordered adjustment (along these lines) of Commerce’s 2008 duty calculations on pneumatic tires did not succeed.³² The Federal Circuit held that prior law contained no implicit norms requiring Commerce, when simultaneously calculating domestic subsidy margins and NME-methodology-based

28. *Id.* at 1312.

29. *Id.* at 1312–13. The CIT, in an opinion written by Judge Restani, subsequently upheld the new legislation, rejecting arguments that it violated the Constitution. *GPX Int’l Tire Corp. v. United States*, 893 F. Supp. 2d 1296, 1306–18 (Ct. Int’l Trade 2013).

30. *GPX Int’l Tire Corp. v. United States*, 645 F. Supp. 2d 1231, 1240 (Ct. Int’l Trade 2009), *aff’d*, 666 F.3d 732.

31. John R. Magnus, *Double-Remedies and DS 379*, INT’L TRADE COMMITTEE NEWSL. (ABA Section of Int’l Law), May 2012, at 4, 4–7, available at <http://www.tradewinsllc.net/publi/DS379%20ABA%205-11>.

32. *GPX*, 678 F.3d at 1312.

dumping margins,³³ to go through special exertions to avoid double counting.³⁴

B. Sioux Honey Ass'n v. Hartford Fire Insurance Co.

In *Sioux Honey Ass'n v. Hartford Fire Insurance Co.*,³⁵ the Federal Circuit dealt with the CIT's jurisdiction to entertain private party complaints about the U.S. government's under-collection of antidumping and countervailing duties, mainly in the context of "new shipper" transactions³⁶ carried out in the years when those transactions were still benefiting from the bonding privilege.³⁷ The plaintiffs, domestic producers of honey, garlic, mushrooms, and crawfish,³⁸ sought to rely on the Continued Dumping and Subsidy Offset Act of 2000³⁹ (CDSOA) to establish that the under-collection directly harmed them because the assessed duties would, if collected, have flowed through to them as CDSOA reimbursements.⁴⁰

Some of the claims had been filed against the U.S. government itself, and the plaintiffs alleged a mix of improper actions and failures to act by both Commerce and Customs.⁴¹ The CIT had dismissed those claims on various grounds, including lack of standing, lack of subject matter jurisdiction, and failure to state a claim on which relief

33. The term "NME" refers to Commerce's special nonmarket economy methodology for calculating dumping margins. The term is somewhat loaded in that, originally applying specifically to communist-bloc nations, its phonetic pronunciation speaks volumes about Cold War attitudes.

34. *Id.* at 1312 ("We conclude that the statute prior to the enactment of the new legislation did not impose a restriction on Commerce's imposition of countervailing duties on goods imported by NME countries to account for double counting." (footnote omitted)).

35. 672 F.3d 1041 (Fed. Cir.), *cert. denied*, 133 S. Ct. 126 (2012).

36. The term "new shipper" refers to an exporting firm that was not shipping goods to the United States at the time of the original investigation in an AD or CVD proceeding. *Id.* at 1047.

37. *Id.* at 1048. The bonding privilege enabled importers to post a bond, rather than tie up funds with actual cash deposits, when entering merchandise subject to an order. 19 U.S.C. § 1675(a)(2)(B)(iii) (2006).

38. *Sioux Honey*, 672 F.3d at 1048. Because the appeal collected similar claims arising from several different antidumping orders, plaintiffs here were a collection of firms comprising Sioux Honey Association; Adee Honey Farms; Monterey Mushrooms, Inc.; The Garlic Company; and Riceland Crawfish, Inc. *Id.* at 1041.

39. Pub. L. 106-387, §§ 1001-1003, 114 Stat. 1549, 1549A-72-74, (codified at 19 U.S.C. § 1675c (2000) (repealed 2006)). The CDSOA, also known as the Byrd Amendment, provided for the duties collected under antidumping orders to be "distributed . . . to the affected domestic producers for qualifying expenditures." *Id.* § 1003.

40. *Sioux Honey*, 672 F.3d at 1048.

41. *Id.* at 1048-49.

could be granted.⁴² The Federal Circuit generally upheld the CIT's ruling on these issues.⁴³

Other claims were directed against surety companies involved in the bonding transactions. This was an unusual set of claims to be heard by the CIT, whose caseload ordinarily is limited to claims against the government, but the CIT had determined that it possessed supplemental jurisdiction under 28 U.S.C. §§ 1367 and 1585⁴⁴ to entertain these claims. Ultimately, the Federal Circuit, after reviewing the same legislative history relied on by the CIT, reversed and held that jurisdiction to hear these claims did not exist.⁴⁵

C. PS Chez Sidney, L.L.C. v. United States International Trade Commission

*PS Chez Sidney, L.L.C. v. United States International Trade Commission*⁴⁶ was the latest in a series of appellate rulings emerging from efforts by domestic crawfish producer P.S. Chez Sidney to obtain distributions of collected antidumping duties through the CDSOA, whose benefits were in principle confined to domestic producers that “supported” the underlying petition for import relief.⁴⁷

There were two issues addressed. The first was whether the ITC erred in finding Chez Sidney CDSOA-ineligible, after it submitted full domestic-producer questionnaire responses with the “support” box checked at the preliminary stage and the “take no position” box checked at the final stage.⁴⁸ The ITC determined that Chez Sidney could not be considered as “supporting” the petition based on these facts and was therefore CDSOA-ineligible.⁴⁹ The CIT upheld the ITC's determination, and the statutory interpretation on which that determination was based, as reasonable.⁵⁰ The Federal Circuit, reviewing the ITC determination de novo, disagreed.⁵¹ It held that

42. *Id.* at 1049.

43. *Id.* at 1056–59.

44. 28 U.S.C. § 1367 (2006) (providing that the “district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy”); *id.* § 1585 (establishing that the CIT possesses the same powers as a federal district court).

45. *Sioux Honey*, 672 F.3d at 1051–54 (rejecting the CIT's reasoning and further holding that only an explicit grant of authority suffices for CIT jurisdiction).

46. 684 F.3d 1374 (Fed. Cir. 2012).

47. *Id.* at 1376.

48. *Id.* at 1377, 1379.

49. *Id.* at 1377–78.

50. *Id.* at 1378 (characterizing the eligibility question as a determination of fact on which the court would “not substitute its judgment for the ITC's”).

51. *Id.* at 1379, 1382.

the concept of “support” cannot be limited to what box is checked in a questionnaire response, and it directed that Chez Sidney be designated on remand as CDSOA-eligible.⁵²

The second issue was whether Customs abused its discretion in determining that it only needed to distribute money to Chez Sidney insofar as (1) undistributed money was available in the special clearing account for the Crawfish proceeding or (2) Customs could successfully recover some of the money already paid out to other CDSOA-eligible domestic producers.⁵³ The CIT had sided with Customs on this point, effectively holding that because Chez Sidney’s CDSOA-eligible status had been confirmed (following lengthy appeals) at a point when all distributable money had already been paid out, the company might simply be out of luck.⁵⁴ The Federal Circuit disagreed, holding that Chez Sidney would have to be allowed to collect some money somehow.⁵⁵

D. PSC VSMPO-Avisma Corp. v. United States

*PSC VSMPO-Avisma Corp. v. United States*⁵⁶ involved a challenge to Commerce’s dumping margin calculations in the second administrative review of the *Magnesium Metal from the Russian Federation*⁵⁷ antidumping order. Commerce, using constructed value to establish the normal value of the imported goods at issue, had calculated a margin of 15.77% for Avisma.⁵⁸ Per respondent’s successful appeals, the CIT instructed Commerce (1) to reopen the administrative record to accept a late-filed opinion from a cost accounting expert, and then (2) to revisit its constructed value analysis which had (unlawfully in the CIT’s view) treated chlorine and magnesium as co-products.⁵⁹ The result was a lower (8.51%)

52. *Id.* at 1382 (rejecting further the ITC’s reliance on the “last indicated expression of support” in the questionnaire, as the controlling evidence on the plaintiff’s support).

53. *Id.* at 1383.

54. *See id.* (characterizing the CIT decision as finding “[c]ustoms had not abused its discretion by following its published regulations”).

55. *See id.* at 1383–84 (“Chez Sidney . . . should be treated in the same manner as any other ADP eligible to receive . . . distributions. We therefore vacate that portion of the judgment establishing the mechanism by which Chez Sidney would receive its funds. On remand, the Court of International Trade should fashion a remedy that ensures Chez Sidney will receive the money to which it is entitled . . .”).

56. 688 F.3d 751 (Fed. Cir. 2012).

57. 70 Fed. Reg. 19,930 (Dep’t of Commerce Apr. 15, 2005) (notice of antidumping duty order).

58. *PSC VSMPO-Avisma Corp.*, 688 F.3d at 753.

59. *Id.* at 754, 756–59.

margin calculation, which the CIT upheld.⁶⁰ The petitioner then challenged the CIT's actions before the Federal Circuit.⁶¹

The Federal Circuit reversed on both issues, ordering that Commerce's original determination be reinstated and finding that the CIT acted improperly in requiring Commerce to accept the expert's affidavit and change its original cost calculation.⁶² In particular, the Federal Circuit held that it was error to force Commerce to make an exception to its deadlines for the submission of factual information,⁶³ and that Commerce's cost accounting approach did not violate any statutory directive and therefore should not have been disturbed.⁶⁴

E. King Supply Co. v. United States

In *King Supply Co. v. United States*,⁶⁵ the Federal Circuit upheld a Commerce Department finding that a particular type of pipe fitting was within the scope of the antidumping order on *Certain Carbon Steel Butt-Weld Pipe Fittings from China*.⁶⁶ In doing so, the Federal Circuit overturned a CIT decision reversing Commerce's scope determination.⁶⁷

Commerce is frequently called upon to clarify whether particular imported products fall within or outside the scope of antidumping proceedings.⁶⁸ Scope rulings are most often requested by importers seeking to confirm that their products can enter the United States without the need for antidumping duty deposits, but they can also be requested by domestic producers who observe, in the marketplace, imported products which they believe are wrongly bypassing an antidumping order.⁶⁹

Commerce's regulations provide for both expedited and (where necessary) more drawn-out scope inquiries. The agency begins by comparing the disputed product to the merchandise descriptions contained in the petition and in prior agency (Commerce and ITC)

60. *Id.* at 754.

61. *Id.* at 754–55.

62. *Id.* at 761, 765.

63. *Id.* at 761.

64. *Id.* at 765.

65. 674 F.3d 1343 (Fed. Cir. 2012).

66. 57 Fed. Reg. 29,702 (Dep't of Commerce July 6, 1992) (antidumping duty order).

67. *King Supply*, 674 F.3d at 1351.

68. See 19 C.F.R. § 351.225(a) (2012).

69. See, e.g., *King Supply*, 674 F.3d at 1347 (“King requested that Commerce issue a scope ruling that butt-weld pipe fittings imported by King from China are outside the scope of the [antidumping order].”).

determinations issued within the relevant antidumping proceeding.⁷⁰ Commerce can complete its analysis at this point, and issue an expedited ruling summarily finding the disputed product to be either in-scope or out-of-scope, if it determines based on these materials alone that there is no ambiguity.⁷¹ If Commerce does find ambiguity, and believes it needs to conduct a more in-depth analysis (perhaps with the aid of newly-gathered factual evidence), Commerce opens up a “full” scope inquiry and moves on to consider the so-called “(k)(2)” or “Diversified Products” factors.⁷² Like other types of agency-level antidumping determinations, Commerce’s scope rulings are subject to judicial review under the “substantial evidence” and “otherwise contrary to law” standards.⁷³

The *King Supply* dispute arose because of language in the antidumping order’s scope description, which read:

The product covered by this order is carbon steel butt-weld pipe fittings, having an inside diameter of less than 14 inches, imported in either finished or unfinished form. These formed or forged pipe fittings are used to join sections in piping systems where conditions require permanent, welded connections, as distinguished from fittings based on other fastening methods (*e.g.*, threaded, grooved, or bolted fittings).⁷⁴

At issue was whether the second sentence, describing how the subject fittings are normally used, amounted to an “end-use restriction” such that otherwise-qualifying fittings *not* used (or destined for use) in the mentioned application would be excluded.⁷⁵ The CIT, in reversing Commerce, had concluded that the second sentence did indeed amount to an end-use-based restriction on the order’s coverage.⁷⁶ Emphasizing that Commerce had neglected to include in this sentence a qualifying clause, the CIT had held that Commerce was obliged to find King Supply’s merchandise to be out-of-scope.⁷⁷

70. See 19 C.F.R. § 351.225(a) (describing the Department of Commerce’s “scope rulings”).

71. *Id.* § 351.225(d), (k)(1).

72. *Id.* § 351.225(e), (k)(2).

73. See *King Supply*, 674 F.3d at 1348 (“We must . . . uphold Commerce’s determination unless the *Scope Ruling* is ‘unsupported by substantial evidence on the record, or otherwise not in accordance with law.’” (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (2006))).

74. Certain Carbon Steel Butt-Weld Pipe Fittings from China, 57 Fed. Reg. 29,702 (Dep’t of Commerce July 6, 1992) (antidumping duty order).

75. *King Supply*, 674 F.3d at 1347.

76. *King Supply Co. LLC v. United States*, No. 09-00477, 2010 WL 3790082, at *2–3 (Ct. Int’l Trade Sept. 30, 2010), *rev’d*, 674 F.3d 1343.

77. *Id.* at *2–4.

The Federal Circuit, reviewing Commerce's determination *de novo*, saw things differently. It reasoned that end-use information of this type should not be construed as limiting the coverage of an AD order unless there is clear language leaving no reasonable doubt that certain products were intended to be excluded strictly on the basis of their end use.⁷⁸ The panel then stated that the CIT had placed "undue emphasis" on the end-use language at issue here—particularly in light of the deference owed to Commerce's own interpretation of the scope description⁷⁹—and had erred in substituting its own (perhaps also reasonable) analysis for Commerce's.⁸⁰ Ultimately, the panel held that Commerce reasonably interpreted the order's scope language to include King Supply's merchandise, and that Commerce's scope determination was indeed supported by substantial record evidence.⁸¹

F. Arcelormittal Stainless Belgium N.V. v. United States

In *Arcelormittal Stainless Belgium N.V. v. United States*,⁸² the Federal Circuit overturned a Commerce Department scope ruling that, the court held, was not supported by substantial evidence.⁸³

The operative language in the antidumping order reads as follows: "The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness . . ." ⁸⁴ A Belgian exporter sought a ruling on products with a nominal thickness above 4.75 mm but an actual (as delivered) thickness below 4.75 mm.⁸⁵ Commerce found the above-quoted scope language to be ambiguous—noting among other things that industry practice used both a nominal (as ordered) and actual (as delivered) measurement, depending upon the stage of the supply chain⁸⁶—and ruled the products under review to be in-scope despite their thinness.⁸⁷ The

78. See *King Supply*, 674 F.3d at 1348–49 (noting the difficulty in administering end-use restrictions and drawing a contrast with clear exclusionary language appearing in past orders).

79. See *id.* at 1350 (drawing from Federal Circuit cases, such as *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005), to illustrate the deference owed Commerce).

80. *Id.* at 1351.

81. *Id.*; see also 19 U.S.C. § 1516a(b)(1)(B)(i) (2006).

82. 694 F.3d 82 (Fed. Cir. 2012).

83. *Id.* at 84.

84. *Id.* at 86.

85. *Id.* at 83.

86. *Id.* at 85–86 (discussing the industry practice of maintaining both nominal and actual thickness measurements via a standardized tolerance system, within which deviations of actual from as ordered are acceptable).

87. *Id.* at 83–84.

CIT affirmed.⁸⁸ The Federal Circuit, reviewing Commerce's ruling de novo, focused on the fact that antidumping orders apply only to goods as they are imported, not as they are ordered, and that, thus, the scope could only be interpreted as applying to actual thickness as delivered.⁸⁹ This view was further supported by Commerce's previously rendered interpretation⁹⁰ of the same antidumping order as applying only to merchandise with an actual thickness of 4.75 mm.⁹¹ The Federal Circuit noted that while the bar is low for sustaining Commerce's finding, "it is not justifiable to identify an ambiguity where none exists."⁹² The Federal Circuit further cautioned that "Commerce's discretion to define and clarify the scope of an investigation is limited by concerns for transparency of administrative actions."⁹³ In other words, Commerce cannot cloak a substantive change to the scope of an order in the guise of interpretation.⁹⁴

G. Essar Steel Ltd. v. United States

In *Essar Steel Ltd. v. United States*,⁹⁵ the Federal Circuit dealt with cross-appeals arising out of Commerce's countervailing duty determination on hot-rolled carbon steel flat products from India.⁹⁶

Essar, an Indian exporter, had challenged on appeal Commerce's finding that Essar received countervailable subsidies under two separate programs of the government of India. In particular, Essar objected to (1) the benchmark prices Commerce used in determining whether Essar had obtained iron ore from the Indian government-owned National Mineral Development Corporation (NMDC) for less than adequate remuneration;⁹⁷ and (2) Commerce's finding that Special Economic Zone (SEZ) benefits accrued to all

88. *Id.* at 84.

89. *Id.* at 88.

90. Certain Cut-to-Length Carbon Steel Plate from South Africa, 62 Fed. Reg. 61,731 (Dep't of Commerce Nov. 19, 1997) (notice).

91. See *Arcelormittal Stainless*, 694 F.3d at 88–89 (laying out the facts of the prior scope ruling and Commerce's unequivocal statements regarding the clarity of the original scope).

92. *Id.* at 89 (internal quotation marks omitted).

93. *Id.* at 90.

94. See *id.* (citing *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1095 (Fed. Cir. 2002)); see also *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (limiting Commerce from changing the scope of an order or, "interpret[ing] an order in a manner contrary to its terms"); *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995) (discussing deference granted to Commerce's interpretation by the Federal Circuit).

95. 678 F.3d 1268 (Fed. Cir. 2012).

96. *Id.*

97. *Id.* at 1270.

Essar exports, rather than being tied to particular products.⁹⁸ The CIT had sided with Commerce on both points, and the Federal Circuit, reviewing *de novo*, likewise upheld Commerce's determinations.⁹⁹ In particular, the Federal Circuit found that Commerce had properly accounted for comparability factors when selecting benchmarks in its evaluation of the iron ore transactions.¹⁰⁰ The Federal Circuit further found Commerce's allocation of the SEZ benefits to all Essar exports to be supported by substantial evidence.¹⁰¹

The cross-appeals were brought by the United States and U.S. Steel Corp. as co-cross appellants. Commerce had applied adverse inferences in determining that Essar received countervailable subsidies under the Chhattisgarh Industrial Program (CIP).¹⁰² The agency cited, in this regard, less-than-satisfactory efforts by both Essar and the Indian government in providing requested information.¹⁰³ The CIT, while agreeing that the respondents had not cooperated to the best of their ability with Commerce's investigation, nevertheless remanded this determination, in part on the basis of factual information that had come to the CIT's attention but was not part of the administrative record underlying the challenged determination.¹⁰⁴ The CIT directed Commerce to reopen the record and consider this additional information.¹⁰⁵

The co-cross appellants asked the Federal Circuit to restore Commerce's original determination.¹⁰⁶ The Federal Circuit did so, and along the way clarified its views with regard to the use of adverse inferences by Commerce.¹⁰⁷ Under *Nippon Steel Corp. v. United States*,¹⁰⁸ Commerce assesses whether a respondent has maximized its efforts to provide "full and complete answers to all inquiries"—a

98. *Id.* at 1271.

99. *Id.* at 1270, 1272.

100. *Id.* at 1273–74.

101. *Id.* at 1274.

102. *Id.* at 1270–71.

103. *Id.* at 1271–72 (explaining Commerce's frustration with the Indian government's lack of cooperation with respect to the SEZ Act and describing Commerce's views that Essar failed to cooperate to the best of its ability). Where a respondent fails to cooperate to the best of its ability, Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b) (2006).

104. *Essar Steel Ltd.*, 678 F.3d at 1275.

105. *Id.*

106. *Id.* at 1274.

107. *See id.* at 1278–79 ("We have recognized Commerce's authority to apply adverse facts, even when a party provides relevant factual information if a party has not acted to the best of its ability to provide the information.")

108. 337 F.3d 1373 (Fed. Cir. 2003).

standard Essar failed here by not producing key documents in its possession.¹⁰⁹ The panel went on to explain that the discretion to apply adverse inferences is important because Commerce lacks subpoena power and needs some other method of incentivizing cooperation.¹¹⁰ Because the burden to create an accurate record lay with Essar,¹¹¹ Commerce's decision to use adverse inferences was supported by substantial evidence and the CIT should not have disturbed it or required a reopening of the record.¹¹² Judge Newman, dissenting in part but concurring in the result, took issue with the majority's opinion that the CIT acted outside its authority in ordering Commerce to reopen the record.¹¹³

II. SECTION 337

Section 337 of the Tariff Act of 1930¹¹⁴ is designed to provide an expedient remedy in cases where "unfair methods of competition" are utilized in U.S. import trade.¹¹⁵ Usage of 337 has been growing sharply, attributed largely to its speed and quality of remedy.¹¹⁶ The number of cases has increased over 530% from fiscal year 2000 to fiscal year 2011.¹¹⁷ The Federal Circuit reviews 337 appeals directly from the ITC, rather than after review at the CIT.¹¹⁸

A. *Ninestar Technology Co. v. International Trade Commission*

In *Ninestar Technology Co. v. International Trade Commission*,¹¹⁹ the Federal Circuit affirmed an ITC decision assessing civil penalties for

109. *Essar Steel Ltd.*, 678 F.3d at 1275–76 (quoting *Nippon Steel*, 337 F.3d at 1382).

110. *See id.* at 1276 (distinguishing between a mechanism for compelling cooperation and one that would be inappropriately punitive).

111. *Id.* at 1277 (citing *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993)).

112. *Id.* at 1278–79.

113. *Id.* at 1279–80 (Newman, J., dissenting) (citing the importance of creating an accurate record).

114. 19 U.S.C. § 1337 (2006).

115. *Id.* § 1337(a)(1)(A). Patent-based claims have dominated the section 337 docket in recent years. U.S. INT'L TRADE COMM'N, FACTS AND TRENDS REGARDING USITC SECTION 337 INVESTIGATIONS I (2012) [hereinafter ITC 337 FACT SHEET], available at www.usitc.gov/press_room/documents/featured_news/337facts.pdf.

116. The section 337 remedy provides for the issuance of a general exclusion order, entirely preventing importation of offending merchandise, or a limited exclusion order, preventing importations by named parties. 19 U.S.C. § 1337(d). These orders can be backed up by cease and desist orders. *Id.* § 1337(f). Furthermore, the timing of a section 337 action is tightly choreographed, yielding a final determination within seventeen months plus an additional sixty days for Presidential review of affirmative findings, with temporary relief available in as little as ninety days after institution. *Id.* § 1337(e)(2), (j)(2).

117. ITC 337 FACT SHEET, *supra* note 115.

118. 19 U.S.C. § 1337(c).

119. 667 F.3d 1373 (Fed. Cir. 2012).

violation of exclusion and cease and desist orders issued under section 337.¹²⁰ The ITC had issued an exclusion order pursuant to its finding that ink cartridges that Ninestar¹²¹ produced in China and imported into the United States infringed patents owned and exclusively licensed to Epson (including the separate entities Epson America, Inc., Epson Portland Inc., and Seiko Epson Corp.).¹²² When Ninestar continued to import and sell ink cartridges subject to the exclusion order, the complainant requested enforcement measures which eventually led to an Administrative Law Judge (ALJ) recommending, and the full Commission assessing, monetary penalties.¹²³

Ninestar asked the Federal Circuit to cancel the civil penalties on the ground that its conduct, while violating the ITC orders, would have been considered lawful under a particular line of patent law cases involving the territoriality and “first sale” principles.¹²⁴ The Federal Circuit brushed aside this argument.¹²⁵

Ninestar also offered a constitutional challenge, arguing that section 337 itself and the Commission’s actions in this case violated Ninestar’s constitutional right to “notice, clarity, and a jury trial,” as well as the principle of separation of powers.¹²⁶ The Federal Circuit agreed to address these claims, even though they had not been raised at the agency level, because they “relate[d] to the foundations of governmental process.”¹²⁷ But the claims failed.¹²⁸ The Federal Circuit held that section 337 proceedings serve the public interest in controlling unfair competition, that Congress acted constitutionally in creating the statutory rights section 337 embodies, and that the ITC violated no constitutional constraints in enforcing its orders in this case through monetary penalties.¹²⁹

120. *Id.* at 1376; *see also* 19 U.S.C. § 1337(f).

121. For ease of reference, “Ninestar China” is used here to refer to Ninestar Technology Co., Ltd., and “Ninestar” refers to that firm’s wholly owned U.S. subsidiaries, named appellants Ninestar Technology Company, Ltd., and Town Sky, Inc.

122. *Ninestar*, 667 F.3d at 1376 (citing *Certain Ink Cartridges and Components Thereof*, Inv. No. 337-TA-565, USITC Pub. 4195 (Oct. 19, 2007) (Final)).

123. *Id.* at 1377.

124. *Id.* at 1378.

125. *See id.* at 1378–79 (discussing *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617, 632 n.6 (2008) and *Fujifilm Corp. v. Benun*, 605 F.3d 1366, 1371 (Fed. Cir. 2010), and concluding that the precedent cited by Ninestar neither controlled this section 337 case nor even supported the proposition for which Ninestar had invoked it).

126. *Id.* at 1377.

127. *Id.* at 1382.

128. *Id.* at 1384.

129. *Id.* (quoting *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 460–61 (1977)).

B. General Electric Co. v. International Trade Commission

In an appeal of the ITC's decision that certain variable speed wind turbines¹³⁰ imported by Mitsubishi did not violate section 337, the Federal Circuit in *General Electric Co. v. International Trade Commission*¹³¹ had before it three separate patents: '039¹³², '221, and '985.¹³³ The court affirmed the Commission's ruling that the '221 patent was not being infringed.¹³⁴ However, the court remanded the Commission's determination, which had also favored the respondent Mitsubishi, in regard to the '985 patent.¹³⁵

With respect to the '221 patent, the Commission had focused on the claims addressing the method of circuitry recoupling after an emergency-induced current spike.¹³⁶ Specifically, the Commission found that the meaning of the term "predetermined value" in patent claim five could only be construed to refer to a specific predetermined value of current, rather than a pre-set period of time.¹³⁷ Looking back through recent Federal Circuit jurisprudence, the panel noted that construing "predetermined value" as monitoring current or voltage (as current proxy) hewed most closely to the patent's description of the invention.¹³⁸ Regarding infringement, the panel noted substantial evidence on the record supporting the Commission's finding that a system that measures the actual end moment of a given emergency event is not substantially the same as one that applies a set time period to all emergency events.¹³⁹

130. See *Gen. Elec. Co. v. Int'l Trade Comm'n*, 685 F.3d 1034, 1037–38 (Fed. Cir. 2012) (presenting a general explanation of electric power generating wind turbine technology). The patents in question are, in brief, for technology designed to moderate the effect of emergency events such as lightning strikes or short circuits on the turbines' overall work of converting irregular wind energy to widely consumable fixed-frequency alternating current (AC). *Id.* at 1037.

131. 685 F.3d 1034 (Fed. Cir. 2012). The decision considered here is as revised upon granting of a petition for panel rehearing for the limited purpose of withdrawing Part III of the original opinion.

132. *Id.* at 1037. The court did not reach the question of the '039 patent as it expired during the pendency of the proceeding on February 1, 2011. *Id.* at 1038.

133. *Id.* at 1036. We are adopting here the panel's shorthand for General Electric's U.S. Patents: No. 7,321,221 ('221), No. 5,083,039 ('039), and No. 6,921,985 ('985).

134. *Id.* at 1042.

135. *Id.* at 1046.

136. *Id.* at 1038–39.

137. See *id.* at 1040 (highlighting that the ALJ accepted General Electric's argument that a time constant could be included in the definition of "predetermined value").

138. *Id.* at 1041 (quoting *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005)).

139. *Id.* at 1042.

The '985 patent presented a question of whether, when properly construed, the petitioner's claim satisfied the domestic industry requirement of § 1337(a)(2)–(3).¹⁴⁰ The full Commission, in contradicting the ALJ's findings, held that the terms of the patent required specific location of shunting circuitry external to the inverter.¹⁴¹ The panel, however, cited *Linear Technology Corp. v. International Trade Commission*¹⁴² for the proposition that, absent claim language explicitly calling for it, terms should not be read to include specific structural requirements so long as the circuits perform their stated function.¹⁴³ Reversing the Commission's finding that the additional structural requirement in the '985 patent caused General Electric to fail the domestic industry requirement, the panel remanded the matter for proceedings consistent with the corrected claim construction.¹⁴⁴

Judge Newman's dissent addressed the question raised by the Commission's request for rehearing.¹⁴⁵ As framed by Judge Newman, the Commission sought to prevent the completion of this section 337 action by requesting removal of the infringement and validity claims relating to the '985 patent from judicial review.¹⁴⁶ In a lengthy discussion of the expeditious resolution imperative behind authorizing statutes of both section 337 actions and the Commission itself, Judge Newman pointed to general appellate practice and the stay of district court proceedings provided in 28 U.S.C. § 1659¹⁴⁷ as further factors all supporting denial of the ITC's request.¹⁴⁸ In closing, Judge Newman admonished the panel for performing a "disservice to the parties and the public," claiming that the Federal Circuit should have, at the least, resolved the case en banc.¹⁴⁹

140. *Id.* The domestic industry requirement is established in § 1337(a)(2), which provides that § 1337(a)(1) applies only if an industry in the United States exists or is in the process of being established that relates to the "articles protected by the patent, copyright, trademark, mask work, or design concerned," and § 1337(a)(3) gives guidelines for when a domestic industry shall be considered to exist. 19 U.S.C. § 1337(a)(2)–(3) (2006).

141. *Gen. Elec.*, 685 F.3d at 1042–45.

142. 566 F.3d 1049 (Fed. Cir. 2009).

143. *Gen. Elec.*, 685 F.3d at 1045–46.

144. *Id.* at 1046.

145. *Gen. Elec. Co. v. Int'l Trade Comm'n*, 692 F.3d 1219, 1219 (Fed. Cir. 2012) (Newman, J., dissenting from the panel action on rehearing) (arguing that the issues at hand had already been fully investigated, litigated, and decided in the ITC, and that the ITC's request for rehearing "negate[s] the finality of these final decisions").

146. *Id.* at 1219–20.

147. 28 U.S.C. § 1659 (2006).

148. *See Gen. Elec. Co.*, 692 F.3d at 1220–23 (Newman, J., dissenting from the panel action on rehearing) (asserting that speedy adjudication has been identified as necessary for protection of intellectual property rights).

149. *Id.* at 1223.

C. Interdigital Communications, LLC v. International Trade Commission

The Federal Circuit in *Interdigital Communications, LLC v. International Trade Commission*¹⁵⁰ reversed the Commission's determination as based on improperly construed claim terms and remanded to the Commission for further proceedings in light of the clarified terms.¹⁵¹ At issue were telephone handsets imported by Nokia that were found to infringe wireless cellular telephone technology patents dealing with both method and apparatus of call initiation.¹⁵² In construing the terms of the patents, the ALJ bifurcated the analysis such that the meaning of the separate terms "code" and "increased power level" applied during claim construction was different from the definitions used during evaluation of the infringement claims.¹⁵³

In Federal Circuit practice, claim terms are given their plain meaning as understood by persons skilled in the art unless the patentee provides a special definition for a given term during specification or prosecution.¹⁵⁴ The record reflected that the plain meaning of "code" to one skilled in the art of cellphone communications is a sequence of bits (if transmitted at the "data rate") or chips (if transmitted at the "chip rate").¹⁵⁵ The ALJ selected an approach that could only include certain codes transmitted at the latter "chip rate" in its definition of the specialized "spreading codes," even though the terms of the patent and expert witness testimony clearly stated that all codes transmitted at the chip rate are indicated by the term "spreading codes."¹⁵⁶ Thus, the ALJ worked with a definition other than that used by the patent itself and at least some of the claimants, leading the Federal Circuit to remand the matter for reconsideration with use of a consistent definition of spreading code.¹⁵⁷

150. 690 F.3d 1318 (Fed. Cir. 2012), *reh'g granted*, 707 F.3d 1295 (Fed. Cir. 2013), *petition for cert. filed sub nom. Nokia Inc. v. Int'l Trade Comm'n*, No. 12-1352, 2013 WL 1963893 (U.S. May 10, 2013).

151. *Id.* at 1330.

152. *Id.* at 1323. The patents shared the title "Method and Apparatus for Performing an Access Procedure" and apply to the "handshake"—or connection initiation—portion of a cellular telephone call. *Id.* at 1320.

153. *Id.* at 1323–24.

154. *Id.* at 1324 (citing *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13, 1316 (Fed. Cir. 2005)).

155. *Id.*

156. *Id.* at 1327.

157. *Id.* at 1327, 1330.

Similarly, the court concluded that the ALJ and the Commission incorrectly selected a definition of the patent term “increased power level” that was unnecessarily restrictive so as to render it incapable of including step-wise transmission power level increases.¹⁵⁸ The Federal Circuit corrected this language construction and remanded the second claim as well, brushing aside Nokia’s alternative argument that mere licensing activities within the United States cannot satisfy section 337’s “domestic industry” requirement.¹⁵⁹

Judge Newman’s dissent argued that the panel majority’s construction of the patent term “code” is both unsupported and different from what a person experienced in the field would have understood upon reading the patent specifications.¹⁶⁰

D. Amkor Technology, Inc. v. International Trade Commission

In *Amkor Technology, Inc. v. International Trade Commission*¹⁶¹ the Federal Circuit held that pursuant to 35 U.S.C. § 102(g)(2),¹⁶² the ITC applied an erroneous legal standard in finding Amkor’s patent invalid.¹⁶³ Amkor filed a 337 action on December 19, 2003 claiming that certain encapsulated integrated circuit devices imported by intervenor Carsem infringed Amkor’s U.S. patent.¹⁶⁴ Integral to Carsem’s defense were several documents relating to third party ASAT’s U.S. Patent No. 6,229,200 that the ITC was not able to obtain until July of 2009.¹⁶⁵ The Commission then rendered the determination in question by relying on the *Oka* rule¹⁶⁶ to invalidate Amkor’s patent on the grounds that the earliest possible priority date for the patent’s claim fell after the date of invention for the ASAT patent.¹⁶⁷

Section 102(g)(2) states that an applicant will not be granted a patent where the invention was made in this country prior to the application by some other inventor who did not abandon, suppress,

158. *Id.* at 1327–28.

159. *Id.* at 1329–30.

160. *Id.* at 1330 (Newman, J., dissenting).

161. 692 F.3d 1250 (Fed. Cir. 2012).

162. 35 U.S.C. § 102 (2006).

163. *Amkor Tech.*, 692 F.3d at 1251.

164. *Id.* at 1251–52 (referencing Amkor’s U.S. Patent No. 6,433,277).

165. *Id.* at 1253–54 (laying out the lengthy procedural history).

166. *Oka v. Youssefeyeh*, 849 F.2d 581, 584 (Fed. Cir. 1988) (establishing the last possible conception date as the standard where a party can only provide a range of possible conception dates).

167. *Amkor Tech.*, 692 F.3d at 1254 (citing the ITC’s opinion at Commission Op., Inv. No. 337-TA-501, at 12 (July 27, 2010)).

or conceal it.¹⁶⁸ Section 102(g)(1) further lays out specific additional requirements in cases of interference¹⁶⁹ by reference to additional sections of the code.¹⁷⁰ The Federal Circuit pointed out that the *Oka* rule applies only to interference cases arising under § 102(g)(1) and not to validity disputes arising under § 102(g)(2), as in this case.¹⁷¹ The correct legal standard here, the court stated, was that an issued patent's presumption of validity under 35 U.S.C. § 282 can only be overcome by clear and convincing evidence—a bar Carsem fell short of by merely establishing that ASAT “*might have*” conceived the devices first.¹⁷²

Upon consideration of Carsem's alternative argument that Amkor's patent is invalid as anticipated and obvious, the Federal Circuit opined that the modification Amkor sought to patent was not obvious.¹⁷³

III. CUSTOMS

Customs, including its predecessor incarnation, the U.S. Customs Service,¹⁷⁴ is by far the oldest trade agency in the U.S. government.¹⁷⁵ On July 31, 1789, the U.S. Customs Service was formed under the fifth act of the first Congress.¹⁷⁶ Until the establishment of the Internal Revenue Service (IRS) via the Underwood Tariff Act of 1913,¹⁷⁷ Customs was the primary source of U.S. federal government

168. 35 U.S.C. § 102(g)(2) (2006), *amended by* Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 3(b)(1), (n), 125 Stat. 284, 285, 293 (2011).

169. *Id.* § 135(a) (explaining an interference as “[w]hensoever an application is made for a patent which, in the opinion of the Director, would interfere with any pending application, or with any unexpired patent, an interference may be declared”).

170. *Id.* § 102(g)(1).

171. *Amkor Tech.*, 692 F.3d at 1258. In order to get to the question of validity, the Federal Circuit considered its ruling that the date of patent conception is the date the invention is first reported to the inventor's U.S. agent in *Scott v. Koyama*, 281 F.3d 1243 (Fed. Cir. 2002), controlling even though *Scott* arose out of a prior version of § 102(g) that did not distinguish interference claims from prior invention claims. It cited *Lorillard v. Pons*, 434 U.S. 575, 581 (1978), to reason that Congress can be presumed to have had notice and intent to incorporate existing interpretations when adopting a new law that includes sections of a prior law. *Amkor Tech.*, 692 F.3d at 1255.

172. *Amkor Tech.*, 692 F.3d at 1258.

173. *Id.* at 1258–61 (evaluating the technical details of the claim).

174. *See* *Bull v. United States*, 479 F.3d 1365, 1368 n.1 (Fed. Cir. 2007) (discussing transition from U.S. Customs Service within Treasury Department to Bureau of Customs and Border Protection within Department of Homeland Security).

175. *See generally* 1789 Collection Act, Act of July 31, 1789, ch. 5, 1 Stat. 29, § 38 (establishing the government's regulation of collecting duties imposed on ships, vessels, and goods coming in to the United States).

176. *Id.*

177. Pub. L. No. 63-16, 38 Stat. 114 (codified as amended in scattered sections of 26 U.S.C.) (reinstating federal income tax and establishing a system to collect).

revenue.¹⁷⁸ Formerly under the auspices of the Treasury Department, in 2003 Customs and several other agencies were brought within the newly established Department of Homeland Security (DHS).¹⁷⁹

Customs' primary trade function is to administer the tariff code at the border. It has authority to inspect all ingoing and outgoing shipments, deals with the relevant filings and paperwork required by law, levies the appropriate duties, and generally controls the flow of goods through all U.S. ports of entry.¹⁸⁰ Although Customs' most frequent trade activity—tariff classification rulings under the Harmonized Tariff Schedule of the United States (HTSUS)¹⁸¹—is scarcely represented in the Federal Circuit's 2012 docket, its other activities relating to duty assessment and payment kept the court busy nonetheless. The Federal Circuit also decided one customs-related case that was treated first not by Customs but by the CIT.¹⁸²

A. Aromont USA, Inc. v. United States

In *Aromont USA, Inc. v. United States*,¹⁸³ Aromont challenged a Customs decision classifying certain imported flavorings in HTSUS subheading 2104 rather than in subheading 2106 where the duty rate was lower.¹⁸⁴ The CIT had sided with Aromont, overruling Customs on the question of classification, and the United States appealed to the Federal Circuit.¹⁸⁵ Reviewing the case de novo,¹⁸⁶ the panel focused on defining the principal use of Aromont's goods according to the so-called *Carborundum* factors.¹⁸⁷

178. *History of the US Tax System*, ALMANAC OF POLICY ISSUES (Aug., 2003), http://www.policyalmanac.org/economic/archive/tax_history.shtml.

179. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. §§ 101-557 (2006)). Some twenty-two discreet agencies and departments were rolled into DHS at its inception.

180. Customs provisions are grouped and codified in Title 19 U.S.C.

181. U.S. INT'L TRADE COMM'N, USITC PUB. 4299, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (2012).

182. *Norman G. Jensen, Inc. v. United States*, 687 F.3d 1325 (Fed. Cir. 2012).

183. 671 F.3d 1310 (Fed. Cir. 2012).

184. *Id.* at 1311. Customs concluded that Aromont's imported flavorings fell under HTSUS subheading 2104.10.00 (2104) covering, "[s]oups and broths and preparations therefor." *Id.* (internal quotation marks omitted). Aromont filed a protest stating that the flavorings should have been classified under subheading 2106.90.99 (2106) for "[f]ood preparations not elsewhere specified or included," and appealed Customs' denial of the protest to the CIT. *Id.* (internal quotation marks omitted).

185. *Id.*

186. See *id.* at 1312 (citing *Intercont'l Marble Corp. v. United States*, 381 F.3d 1169, 1173 (Fed. Cir. 2004), to establish that decisions on motion of summary judgment should be reviewed de novo).

187. *Id.* at 1312-13. *Carborundum* factors include actual use; physical characteristics; cost; expectations of the ultimate purchasers; economic practicality of the use; channels of trade; environment of the sale; manner of advertising and display;

In Customs practice, provisions that focus on the use of a good, rather than its name (in this case the “preparations therefor” language contained in 2104), are governed by HTSUS Additional U.S. Rules of Interpretation 1(a) (ARI 1(a)).¹⁸⁸ The principal use is that “which exceeds any other *single* use.”¹⁸⁹ Aromont’s argument focused in part on the “actual” use of the disputed goods, a factor the U.S. government sought to dismiss as irrelevant.¹⁹⁰ The Federal Circuit pointed out that actual use is a relevant, though not controlling, factor in interpreting a principal use provision.¹⁹¹

Upon considering all factors, the panel found that Aromont’s strong evidentiary case with respect to actual use, physical characteristics, and cost overcame the government’s effort to show that other factors required a different result.¹⁹² Thus, the panel affirmed the CIT’s summary judgment holding that Aromont’s goods were properly classified under Heading 2106 based on their principal use.¹⁹³

B. Hitachi Home Electronics (America), Inc. v. United States

In *Hitachi Home Electronics (America), Inc. v. United States*,¹⁹⁴ the Federal Circuit declined to reconsider en banc a case involving Customs deadlines.¹⁹⁵ The case is noteworthy for a dissent in which Judge Reyna set forth his view of why Customs is required by 19 U.S.C. § 1515(a)¹⁹⁶ to resolve protests within two years. Judge Reyna argued that a reading of the statute permitting extensions beyond the two-year deadline is inconsistent with existing business realities¹⁹⁷ and, indeed, Congress’s intent in drafting § 1515.¹⁹⁸ The dissent closes by pointing out that § 1515’s language requires Customs to allow or deny protests, thereby indicating a consequence of Customs’ inaction, and that

recognition in the trade; etc. See *United States v. Carborundum Co.*, 536 F.2d 373, 377 (C.C.P.A. 1976) (laying out the factors courts consider for principal use).

188. *Aromont*, 671 F.3d at 1312.

189. *Id.* (quoting *Lenox Collections v. United States*, 20 C.I.T. 194, 196 (1996)).

190. *Id.* at 1313.

191. *Id.*

192. *Id.* at 1316. The Court’s analysis showed that neither side provided persuasive evidence with respect to expectations of purchasers, channels of trade, environment of sale, or recognition in trade factors. *Id.* at 1315–16.

193. *Id.* at 1316.

194. 676 F.3d 1041 (Fed. Cir. 2012) (per curiam).

195. *Id.* at 1042.

196. 19 U.S.C. § 1515(a) (2006).

197. See *Hitachi*, 676 F.3d at 1042 (Reyna, J., dissenting) (citing Customs and International Trade Bar Association’s (CITBA’s) brief).

198. See *id.* (referring to both House and Senate legislative history to show that Congress intended a clear deadline).

should Customs find its docket unmanageable within the stated deadline, it should petition Congress for a statutory fix.¹⁹⁹

C. Ford Motor Co. v. United States

In *Ford Motor Co. v. United States*,²⁰⁰ the Federal Circuit affirmed the CIT's finding that Ford failed to submit proof of Harbor Maintenance Tax²⁰¹ (HMT) payments sufficient to satisfy applicable regulations.²⁰² Congress had enacted the Water Resources Development Act of 1986²⁰³ imposing an ad valorem tax on all exports, imports, and domestic shipments passing through U.S. ports.²⁰⁴ As part of a complex payment system, Customs set up payment accounts at the First Chicago Bank, which, in turn, transmitted payment records nightly to Customs' Automated Commercial System (ACS) database, which Customs did not monitor for accuracy.²⁰⁵ In implementing the refunds necessitated by the Supreme Court's 1998 holding that the export portion of the HMT is unconstitutional,²⁰⁶ Customs discovered significant errors and inconsistencies in the payment database.²⁰⁷ While resort to paper records could correct some of these errors, such records were not available for payments prior to July 1, 1990.²⁰⁸ Customs then established different regulations for pre-1990 claims requiring additional supporting documentation to be submitted.²⁰⁹

Ford's claims included both pre- and post-1990 payments and, therefore, were controlled by two different evidentiary regimes.²¹⁰ In support of its pre-1990 claim Ford submitted a 1998 Freedom of Information Act (FOIA) Report from Customs listing each quarterly HMT payment made between 1987 and 1992, along with an affidavit that it was claiming only export shipment-related refunds and two

199. *Id.* at 1043–44.

200. 676 F.3d 1054 (Fed. Cir. 2012).

201. 26 U.S.C. § 4461 (imposing a tax on any port use), *declared unconstitutional* by *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998).

202. *Ford*, 676 F.3d at 1055.

203. Pub. L. No. 99-662, § 501, 100 Stat. 4082, 4133–37 (codified as amended at 33 U.S.C. § 2201 (2006) and in scattered sections of 26 U.S.C.).

204. *Ford*, 676 F.3d at 1056.

205. *Id.*

206. *U.S. Shoe Corp.*, 523 U.S. at 363.

207. *See Ford*, 676 F.3d at 1056–57 (detailing issues of mismanagement and poor administration).

208. *Id.*

209. *Id.* at 1057; *see also* 19 C.F.R. § 24.24(e)(4)(iv)(C) (2012).

210. 19 C.F.R. § 24.24(e)(4)(iv)(C) requires supporting documentation for pre-1990 refunds only, with the exception that post-1990 claims only require supporting documents where the claimant seeks to prove corrections of payments listed in the Report/Certification.

employee declarations attesting to the accuracy of Ford's HMT payment records.²¹¹ The CIT found this insufficient.²¹² In upholding the CIT's decision, the Federal Circuit majority pointed out that the FOIA Report was based exclusively on the ACS database—the very same unreliable source that gave rise to the bifurcated refund process—and that those database errors are known to have arisen from bank employee errors as well as exporter error.²¹³ Ford's employee declarations were insufficient to eliminate the full spectrum of possible database errors and were, thus, unable to demonstrate refund entitlement.²¹⁴

Ford's post-1990 claims failed for similar reasons. Customs, having retained all paper records from the post-1990 era, had no record of the twenty Export Vessel Movement Summary Sheets (EVMSSs) Ford produced from its files.²¹⁵ Even taking the most liberal interpretation of the regulations allowing mere submission to suffice, rather than requiring Customs' actual acceptance, the panel was not able to hold in Ford's favor because it produced no further evidence that the EVMSSs had ever actually been submitted to Customs.²¹⁶

Because the evidence that Ford presented did not raise a genuine issue of material fact in either the pre- or post-1990 claim, the majority affirmed CIT's holding in Customs' favor on summary judgment.²¹⁷ Judge O'Malley, however, dissented from the majority on the basis that the government failed to carry its burden of demonstrating absence of any genuine material fact²¹⁸ and that the majority erred in weighing the evidence, rather than merely determining whether there was anything to weigh at all.²¹⁹

211. *Ford*, 676 F.3d at 1057.

212. *Id.* at 1058.

213. *Id.* at 1059.

214. *Id.* at 1059–60.

215. *Id.* at 1060.

216. *See id.* at 1060–61 (offering rather generously that even a declaration averring that the EVMSSs were indeed submitted would have tipped the scales in Ford's favor).

217. *Id.* at 1060–61.

218. *Id.* at 1061 (O'Malley, J., dissenting) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)) (noting the burden of demonstrating the absence of a genuine issue of material fact is on the party defending a favorable summary judgment).

219. *Id.* at 1063 (holding “all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial” (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986))).

D. Shell Oil Co. v. United States

In another HMT-related claim, the panel in *Shell Oil Co. v. United States*²²⁰ dealt with HMT²²¹ and Environmental Tax²²² duty drawback²²³ claims for imported petroleum products.²²⁴ Section 1313(a) of 19 U.S.C.²²⁵ provides for a ninety-nine percent refund of import duties paid for goods that are later exported or destroyed before being used.²²⁶ The statute further provides that merchandise that incorporates goods (imported or domestic) of the same kind and quality as imported duty-paid goods within a three-year window is eligible for a drawback as substitute merchandise in the same amount as would have been possible for the imported merchandise itself.²²⁷ Eligible drawbacks left unclaimed after three years are deemed forfeited.²²⁸ In clarifying the scope of the drawback eligibility, Congress in 1999 created a special limited six-month exception window for the clearing of otherwise expired claims.²²⁹ The scope was again revised in 2004 to overturn the Federal Circuit's decision in *Texport Oil Co. v. United States*,²³⁰ applying to claims filed on or after the date of enactment, as well as to any prior-filed drawback claim for which liquidation was still not final.²³¹

Between 1995 and 1996, Shell filed duty drawback claims for petroleum derivatives for petroleum imports entered between 1993 and 1994 under the substitute good provisions.²³² Customs refunded

220. 688 F.3d 1376 (2012).

221. See *supra* note 201 and accompanying text (explaining the Harbor Maintenance Tax).

222. 26 U.S.C. § 4611(a) (2006). The Environmental Tax is imposed on crude oil and petroleum products entered into the United States for consumption, use, processing, or warehousing. *Id.*

223. See 19 C.F.R. § 191.2(i) (2012) (defining a drawback as the refund of all or part of a customs duty, fee, or internal revenue levied tax imposed under federal law on an import by virtue of its imported status).

224. *Shell Oil*, 688 F.3d at 1378.

225. 19 U.S.C. § 1313(a) (2006).

226. *Id.*

227. *Id.* § 1313(b). For example, if a firm pays a \$100 import duty on a ton of steel and two years later the same importing firm seeks to export three tons of newly manufactured steel gears made entirely of domestically sourced steel, that firm is still eligible to receive a \$99 drawback for the gears as substitute merchandise for the prior steel import.

228. See *id.* § 1313(r)(1) (explaining that extensions will only be granted where it can be established that Customs was responsible for the delay).

229. Miscellaneous Trade and Technical Corrections Act of 1999, Pub. L. No. 106-36, § 2420(e), 113 Stat. 127, 179. The three-year statutory deadline was suspended for claims filed during that time window from June 25, 1999 to December 25, 1999.

230. 185 F.3d 1291, 1293 (Fed. Cir. 1999) (interpreting the drawback statute to preclude drawback for duties unless exclusively linked to imports).

231. Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108-429, § 1557(b), 118 Stat. 2434, 2579.

232. *Shell Oil Co. v. United States*, 688 F.3d 1376, 1378, 1380–81 (2012).

ninety-nine percent of the import duties, but Shell failed to include HMT or Environmental Tax in an express request for refund or add the amounts paid in its net claim figure and was therefore not refunded these taxes.²³³ Shell's 1997 protest failed at Customs on *Texport* grounds, leading to Shell filing a complaint at the CIT in 1998.²³⁴ The CIT held for Customs on cross-motions for summary judgment in 2011, finding that neither the 1999 nor 2004 amendments to the drawback statute excused the lateness of Shell's claim.²³⁵

In upholding Customs' decision as the CIT had done,²³⁶ the Federal Circuit held that the burden of establishing eligibility for duty drawback lies with the claimant—a burden Shell failed to carry.²³⁷ The panel pointed out that Shell failed to file a claim within the 1999 window for clearing stale claims, in spite of the statute's explicit creation of an opening and closing date for the six-month window.²³⁸ In response to Shell's claims that the pre-1998 regulations applicable to the claims in question did not require a correct accounting of the total refund requested for a complete claim, the panel noted that Shell's drawback requests were filed under special regulations providing for accelerated payment—regulations that require the claimant to provide a full and complete accounting of the expected refund.²³⁹ In effect, the responsibility for computing the maximum total refund lay with the importer, not Customs.²⁴⁰ The panel disposed of Shell's argument to preserve its claims under the 2004 amendment's effective date provision because the already liquidated entries did not include a protective claim for HMT and Environment Tax refunds.²⁴¹

233. *Id.* at 1380–81.

234. *Id.* at 1381.

235. *Id.*

236. *Id.* at 1381–82.

237. *Id.* at 1382–83 (citing *Aectra Refining & Mktg., Inc. v. United States*, 565 F.3d 1364, 1373 (Fed. Cir. 2009)) (noting that placing the burden on Customs of establishing the maximum possible refund amount for a given drawback claim would create an untenable administrative burden).

238. *See Shell Oil Co. v. United States*, 781 F. Supp. 2d 1313, 1331 (Ct. Int'l Trade 2011) (requiring that “a drawback claim [be] filed within 6 months after the date of the enactment of those amendments” (alteration in original) (internal quotation marks omitted)), *aff'd*, 688 F.3d 1376.

239. *Shell Oil*, 688 F.3d at 1384; *see also* 19 C.F.R. § 191.72(b) (1995) (requiring a complete drawback request for accelerated payment to include “a computation of the amount due”).

240. *Shell Oil*, 688 F.3d at 1384.

241. Again referencing the Federal Circuit's decision in *Aectra*, the panel explained that the 2004 amendments were never meant to completely waive the normal three-year time limit, but, rather to apply to entries not completely liquidated

E. Ford Motor Co. v. United States

In *Ford Motor Co. v. United States*,²⁴² Ford was challenging Customs' handling of nine reconciliation entries filed to correct an over-deposit of duties on Jaguar vehicles imported by Ford in 2005–2006.²⁴³ Customs had waited long past the applicable deadline without acting on these entries and then—after Ford commenced a court appeal seeking a declaratory judgment that duty refunds were owed—had abruptly liquidated most of the disputed entries.²⁴⁴

The CIT accepted the U.S. government's argument that liquidation of the entries, while belated, had eliminated the subject matter jurisdiction needed for a court to address Ford's complaint which invoked the CIT's residual 19 U.S.C. § 1581(i)²⁴⁵ authority.²⁴⁶ The Federal Circuit reversed and held that subject matter jurisdiction did exist.²⁴⁷ The court invoked basic "hornbook law" to the effect that subject matter jurisdiction depends on facts existing at the time a claim is filed.²⁴⁸ The court observed that post-complaint conduct by the government as defendant ought to affect jurisdiction only when Congress has made clear its intent to allow such a result,²⁴⁹ and the court held that liquidating the disputed entries here at the (excessive) deposit rate "may have opened up a new avenue for judicial review under 19 U.S.C. § 1581(a), but . . . cannot defeat subject matter jurisdiction under § 1581(i)."²⁵⁰

The Federal Circuit also revived certain claims that had been dismissed on "case or controversy" grounds after the CIT concluded (wrongly, in the Federal Circuit's view) that Ford had abandoned them.²⁵¹ Finally, as part of the remand order, the Federal Circuit vacated the CIT's discretionary dismissal of claims over which it had acknowledged having subject matter jurisdiction so that the CIT

that already included in their original claim a request for taxes and fees that may have been otherwise denied on *Texport* grounds. *See id.* at 1385.

242. 688 F.3d 1319 (Fed. Cir. 2012).

243. *Id.* at 1321.

244. *Id.* at 1322.

245. 19 U.S.C. § 1581(i) (2006).

246. *Ford Motor Co. v. United States*, 716 F. Supp. 2d. 1302, 1310–11 (Ct. Int'l Trade 2010), *rev'd in part and vacated in part*, 688 F.3d 1319.

247. *Ford*, 688 F.3d at 1321.

248. *Id.* at 1324.

249. *Id.* at 1326.

250. *Id.* at 1327. The panel found unpersuasive the government's argument that ascribing significance to Customs' post-complaint actions here would not defeat jurisdiction, but simply modify its basis from 28 U.S.C. § 1581(i) to § 1581(a). *Id.* at 1324–25.

251. *Id.* at 1329–30.

might revisit those as well, if it so chooses, in light of the corrected jurisdictional analysis.²⁵²

F. *Norman G. Jensen, Inc. v. United States*

The appeal in *Norman G. Jensen, Inc. v. United States*²⁵³ was begun by a customs broker seeking mandamus to extract an overdue ruling from Customs on a large batch of protests (308 protests involving 1529 separate entries of Canadian lumber).²⁵⁴ Jensen invoked the CIT's residual jurisdiction under 19 U.S.C. § 1581(i), but the CIT dismissed for lack of jurisdiction on the ground that a remedy was available under the enumerated grants of jurisdiction in § 1581(a)–(h), making resort to § 1581(i) inappropriate.²⁵⁵

The Federal Circuit agreed with the CIT that, in order to avoid swallowing the specific grants of jurisdiction provided in § 1581(a)–(h), usage of the “catch all” jurisdiction in § 1581(i) had to be tightly circumscribed and would not be appropriate in this case.²⁵⁶ In addressing certain specific arguments advanced by Jensen as to why an action based on § 1581(i) should be allowed to continue, the Federal Circuit revisited (and declined to distinguish) its 2011 decision in *Hitachi Home Electronics (America), Inc. v. United States*.²⁵⁷

CONCLUSION

The Federal Circuit's 2012 term was rich in international trade issues. Though not very numerous, the cases presented gave the court the opportunity to see nearly the full spectrum of subject matter and procedural possibilities of its international trade jurisdiction—including seeing one of its decisions promptly overturned by Congress.

252. *Id.* at 1330.

253. 687 F.3d 1325 (Fed. Cir. 2012).

254. *See id.* at 1326.

255. *See id.* at 1329–30 (noting that Jensen could have pursued an accelerated protest under § 1581(b) and then challenged any denial of the protest under § 1581(a)).

256. *Id.*

257. 661 F.3d 1343 (Fed. Cir. 2011), *cert. denied*, 133 S. Ct. 757 (2012).